



INDEPENDENCE AND ACCOUNTABILITY OF JUDICIARY

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Abstract

This research paper is an attempt to analyse the efficacy of the judicial system in the country and the need for a system of accountability, by drawing on the experiences of other countries which have a system in place for curtailing instances of corruption in judiciary. This becomes all the more necessary when one takes into account the historic press conference held by the four senior most judges of the apex court who expressed reservations as to the allotment of cases and constitution of rosters by the Chief Justice of India. Also, how a system of accountability could expedite efficient justice delivery and ensure that justice is actually delivered forms a point of focus in this research paper as we need to remember the fact that Judges are not “demigods”, incapable of flaws or inconsistencies but mere mortals subject to “judicial meanderings and tentativeness”¹.

Given the fact that there is no system in place for ensuring judicial accountability in India, the necessity of holding judges accountable for their decisions rendered is an essential corollary to the concept of independence of Judiciary as envisaged by the framers of our constitution. In a democracy no institution can enjoy

unbridled power without any scope of accountability. Hence, an analysis of the rejected NJAC proposal has also been made in this research project, whether this proposal could have helped in ushering in a system of judicial accountability in the world’s largest democracy.

Independence of Judiciary

Every democratic country adopts various means to ensure freedom of the judiciary and thereby to ensure individual freedom. For instance, U.S.A. has adopted system of separation of powers to ensure independence of the judiciary. But in constitutional systems based on the concept of Parliamentary sovereignty, the adoption of separation of powers is ruled out. This is the case in England. This is also partly the case in India, for in India, the doctrines of Parliamentary and constitutional sovereignty are blended together.²

Independence of judiciary in India

Constitution of India provides for various provisions whereby independence of judiciary is ensured. Firstly, the judges of the Supreme Court and the High Courts have to take an oath before entering office that they will faithfully perform their duties without “fear, favour, affection, ill-will, and defend the constitution of India and the laws”. Recognition of the doctrine of constitutional sovereignty is quite implicit in this oath.

¹ 5th edition IP MASSEY, ADMINISTRATIVE LAW 4-5

² Vijay jaiswal, *Independence of Judiciary in Indian Constitution*, IMPORTANT INDIA (Mar. 15 2018, 10:59 AM), <https://www.importantindia.com/2146/independence-of-judiciary-in-indian-constitution/>.



Secondly, the process of appointment of judges also assures the independence of judiciary in India. The judges of the Supreme Court and the High Courts are appointed by the President³. It is an obligation of the president to make appointments of the Justices of the apex court as well as the High courts. Necessary qualifications have also been provided for appointment and the same should be adhered to while effecting appointments and they should not be vitiated by political considerations.

Security of tenure is guaranteed by the constitution as the judges of the Supreme Court and the High Court's serve "during good behaviour" and not during the pleasure of the President, analogous to other high Government officials meaning thereby that arbitrary removals cannot be effected by the President. They may be removed from office only through impeachment. A Judge can be removed on the ground of proved misbehaviour or incapacity on a report by both Houses of Parliament supported by a special majority.

Fourthly, salaries and allowances of the Apex court and the High courts are drawn from the consolidated funds of India and that the same cannot be reduced except in the event of an emergency⁴

Fifthly, By forbidding the discussion of activities of the Judges, by the executive or the legislature in the parliament, except in case of removal of them.⁵

Sixth, the retirement age is 65 years for Supreme Court judges and 62 years for High court judges. Such long tenures enable the

judges to function impartially and independently.

Seventh, by laying down that after retirement, a judge of the Supreme Court shall not plead or act in any court or before any authority within the territory of India.⁶

All of the aforesaid provisions ensure the independence of judiciary, which is now a part of the "basic structure"⁷ of the constitution that is an inviolable provision of the constitution which cannot be altered by any amendment to the constitution.

Why Independence of Judiciary is necessary?

It is quite essential for a vibrant democracy that Judiciary functions independently to ensure the faith and reliance of the common citizen towards the state of law and order in the society. Decisions rendered by courts of law should not be vitiated by any undue influence, which may arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

Equally vital is the fact that judges should base their decisions solely on the evidence presented by the parties to the case, in accordance with the rule of law as the same is a pre-requisite for the judges to discharge their constitutional responsibility of providing fair and impartial justice.

Disputes between Citizens and the state have increased exponentially along with the responsibility of judges to provide remedies

³ INDIA CONST. art 124 cl.4.

⁴ INDIA CONST. art 146 cl.3.

⁵ INDIA CONST. art 121.

⁶ INDIA CONST. art 124 cl.7.

⁷ Kesavananda Bharti Sripadagalvaru Vs. State of Kerala(1973) 4 SCC 225.



against unlawful acts of government. All of this has resulted in a need for judicial independence so as to protect the citizens from the excesses of the government.

Therefore, the existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full consonance with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities in the defence of human rights and dispense the role of active protectors of human rights.

International resolutions

The protection of judicial independence has been the focus of international resolutions, the most prominent of which are:

The ‘**United Nations Basic Principles on the Independence of the Judiciary and the role of lawyers**’⁸. These were endorsed by the UN General Assembly in 1985 and 1990.

The ‘**Bangalore Principles of Judicial Conduct**’⁹ were endorsed in 2003 and set out a code of judicial conduct which are intended to complement the UN’s Basic

Principles on the Independence of the Judiciary and the role of lawyers. The first of its principles states that Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Other bodies have endorsed judicial independence. For instance, in 1995, the group of Asian – Pacific Chief Justices adopted a common set of standards for the promotion and protection of their judicial institutions, which included judicial independence. These are known as the **Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region**,¹⁰

In 1998, a similar statement of principle (“**the Latimer House Principles**”) ¹¹ were also agreed by representatives from over 20 Commonwealth countries at a conference held at Latimer House, Buckinghamshire,

UK. An international conference was also held by the Seventh United Nations Congress on the **Prevention of Crime and the Treatment of Offenders**, held at Milan from 26 August to 6 September 1985, which was further endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.¹²

⁸ (Mar. 16 2018, 5:57 AM) <https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/>

⁹ (Mar. 17 2018, 1:00 PM) <https://www.yargitay.gov.tr/sayfa/uluslararasi-belgeler/documents/bangaloreetigi.pdf>.

¹⁰ (Mar.17 2018 1:10 PM) https://www.hurights.or.jp/archives/other_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html.

¹¹ (Mar.17 2018 1:20 PM) <http://www.cpahq.org/cpahq/cpadocs/Latimer%20House%20Principles.pdf>.

¹² (Mar.18 2018 7:52 PM) <https://www.un.org/.../Basic%20Principles%20on%20the%20Independence%20of%20>



Discussions were conducted to ensure a balance between judicial independence and ensuring accountability of the Judiciary.

Principle of Judicial Accountability

A natural corollary of Judicial Independence is “Judicial Accountability”, which can be defined as the costs that a judge expects to incur in case his/her behavior and/or his/her decisions deviate too much from a generally recognized standard, in this case referring to the “letter of the law”¹³.

Judicial independence was not intended to be a shield from public scrutiny. Judicial independence is not only a necessary condition for the impartiality of judges, it can also endanger it. Higher judiciary in our country is the only institution that is virtually not accountable and at the same time enjoys exceptional constitutional protection and formidable weaponry such as “contempt of court” to silence its critics. Although provisions for appeal, reversion and review have been provided for in the constitution for decisions violating rule of law, but there is no mechanism for accountability for serious judicial misconduct and disciplining errant judges.

Why is Judicial Accountability necessary?

“Power corrupts, and absolute power corrupts absolutely.” – John Emerich Edward Dalberg Acton

The aforementioned quote is quite relevant given the deplorable condition of the Indian

judiciary, where the sanctity of the highest authority in the country for judicial decision making- the honourable Supreme court has taken a huge blow after the historic press conference held by the four senior most justices of the Supreme court, expressing reservations against the allotment of cases and formation of rosters by the Chief Justice. The judiciary has always held a high regard in the eyes of the common citizen- a system of authority respected by one and all and deemed as a defender against the arbitrary actions of Government and citizens alike. When such an important responsibility has been placed on the judicial system and by extension, the Judges, then a system for ensuring the accountability of judges becomes imperative for ensuring effective justice delivery.

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. It must be accountable either to the source of its origin, to the institution and more importantly to the people. When there is a system in place for ensuring the accountability of Legislature and Executive, then why should the Judiciary remain unaccountable? Ultimately, every institution should be held accountable to the people in every democratic polity like ours. Several countries in their constitutions have already provided for ensuring accountability of judiciary so as 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 favour, affection of ill-

¹³ (Mar. 17 2018)
<http://www.firstpost.com/india/judicial-accountability-who-will-judge-the-judges-in-india-1405511.html>



will and to uphold the constitution and laws of the country. Thus, here arises a tension between Judicial Independence and Judicial Accountability and a need to reconcile these two afflicting concepts.

Systems for ensuring Judicial Accountability in Other countries

From an international perspective, measures for ensuring judicial accountability have already been incorporated by various countries through passing legislations, orders, or making relevant amendments in their constitutions itself. An analysis of the same is given below:-

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. An amendment in the Judges act, 1971 led to the creation of the Canadian Judicial Council with a mandate to “promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in the superior courts of Canada”¹⁴. Further, Under section 63(2) of the Judges Act, any member of the public (including a provincial attorney general or the federal Minister of Justice) may make a complaint about a federally appointed judge by writing to the Canadian Judicial Council¹⁵.

United States of America

Judicial accountability in the United States of America is ensured by Code of Conduct

for United States Judges- a set of ethical principles and guidelines adopted by the Judicial Conference of the United States. This Code provides guidance for judges on issues of judicial integrity and independence, on permissible extra-judicial activities and the avoidance of impropriety or even the appearance of impropriety. The Judicial Councils in each circuit are generally responsible for enforcing the Code. Sanctions for breach include private or public censure, temporarily suspending a judge’s caseload, and requesting voluntary retirement.¹⁶

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 occur on proved charges of misbehaviour and misconduct, effected by the Governor General on an address from both houses of parliament in the same sitting on either of the two grounds listed above. A more formal mechanism for considering complaints was established to address the Judicial Commission of New South Wales. The New South Wales statute requires the Commission to dismiss complaints in a number of specified circumstances: including where there is a right of appeal, where the complaint is frivolous or trivial, or where further consideration is unnecessary or unjustifiable.

Apart from the aforementioned countries, efforts to establish a system of judicial accountability in developing countries has

¹⁴ (Mar.17 2018 12:28 PM) http://www.cjc-ccm.gc.ca/english/index_en.asp.

¹⁵ Judges act, 1971

¹⁶ (Mar.17 2018 1:49 PM) http://www.deontologie-judiciaire.umontreal.ca/en/textes%20int/documents/Judicial_Accountability_SOUTH_AFRICA.pdf



been on the rise. The most recent example being a consultation meeting in Tunis on the topic of judicial accountability, seeking to hold judges accountable for violations of human rights, judicial corruption or other instances of misconduct.

Judicial accountability in India

Many eminent jurists and reports from international and National institutions have stressed on the need for having a system of Judicial accountability in India. A number of bills have been passed and legislations promulgated to ensure judicial accountability in India. These include the Judges (Inquiry) Act, 1968, Judicial Standards and Accountability Bill, 2010 and the most recent being the National Judicial Appointment Commission Bill, 2014 which was rejected by a majority of 4:1 by the apex court, terming the 99th Amendment and NJAC Act unconstitutional.

National Judicial Appointments Commission

“An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto”¹⁷.

National Judicial Appointments Commission (NJAC) was a proposed body which would have been responsible for the

appointment and transfer of judges to the higher judiciary in India. The Commission was established by amending the Constitution of India through the ninety-ninth constitution amendment vide the Constitution (Ninety-Ninth Amendment) Act, 2014 passed by the Lok Sabha on 13 August 2014 and by the Rajya Sabha on 14 August 2014.¹⁸

The NJAC was deemed as a replacement of the collegium system for the appointment of judges as invoked by the Supreme Court via judicial fiat. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission. Ratified by 16 state legislatures, the proposal for NJAC was subsequently assented to by the President of India Pranab Mukherjee on 31 December 2014. The NJAC Act and the Constitutional Amendment Act came into force from 13 April 2015. However, this legislation did not go well with the legal fraternity with a plethora of petitions being filed against the purported legislation. Finally, on 16 October 2015, the Constitution Bench of Supreme Court by 4:1 Majority upheld the collegium system and struck down the NJAC as unconstitutional.¹⁹

Composition

¹⁸The Constitution (Ninety-ninth Amendment) Bill, 2014" (PDF). Govt. of India.

¹⁹Supreme Court Advocates-on-Record -Association Vs. Union of India(WRIT PETITION (CIVIL) NO. 13 OF 2015

¹⁷ The Official Gazette of India[No. 48] NEW DELHI, WEDNESDAY, DECEMBER 31, 2014/ PAUSA 10, 1936 (SAKA)



As per the amended provisions of the constitution, the Commission would have consisted of the following six persons:

Chief Justice of India (Chairperson, ex officio)

Two other senior judges of the Supreme Court next to the Chief Justice of India - ex officio

The Union Minister of Law and Justice, ex-officio

Two eminent persons

These (two) eminent persons would have been nominated by a committee consisting of the

Chief Justice of India, Prime Minister of India, and²⁰ Leader of Opposition in the Lok Sabha (or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in Lok Sabha), provided that of the two eminent persons, one person would be from the Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.

Functions

As per the amended constitution²¹, the functions of the Commission would have included the following:

- Recommending persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts.

- Recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court.
- Ensuring that the persons recommended satisfied the merit, ability and other related criteria as mandated under the act.

Efficacy of the NJAC act in ensuring Judicial Accountability

The debate centring around NJAC has drawn the response of a large number of people with the discourse ranging from senior lawyer Ram Jethmalani calling it an "evil absurdity" to attorney general Mukul Rohatgi pointing to judges who habitually turned up late in court as a reason to ditch the existing collegium system to select judges.²²

In the midst of these discourses, one cannot discount the fact that ensuring Judicial Accountability is a prerogative of the all the stakeholders in the society so as to ensure efficient justice delivery as Justice must not only be done but it should be seen as done.

Contrary to popular opinion that NJAC "would compromise the independence of the judiciary and give primacy to the executive"²³ in the appointment of judges, in my opinion, the system of NJAC wasn't altogether flawed and could have contributed towards ensuring Judicial accountability and integrity.

²² (Mar. 19 2018 9:40 PM) <http://www.livemint.com/Politics/rcsu24yGQ0frdanyQ9fVVL/All-you-need-to-know-about-NJAC.html>

²³ (Mar. 19 2018 9:41 PM) <http://www.livemint.com/Politics/F54M8MGUsvxkiYkKvaJoXL/The-arguments-that-led-to-Supreme-Courts-NJAC-verdict.html>

²⁰ Ibid.

²¹ CONST.OF IND. Art.(124A)



Arguments against the validity of the NJAC act were raised by various legal stalwarts including **Ram Jethmalani, Harish Salve, Fali Nariman, T.R. Andhyarujina, Anil B. Divan, K.K. Venugopal and Arvind P. Datar.**

Their arguments against NJAC can be summarised in the following points:

Whether NJAC would endanger the independence of the judiciary as guaranteed under the existing collegium system?

Whether the appointment of two eminent persons from a non-judicial background would topple the pillar of independence of the judiciary?

Whether the power of voting to non-judicial members of NJAC would amount to bad appointments?

As has been pointed out in the aforesaid paragraphs about the need for having an independent and accountable judiciary, perhaps we need a system whereby judicial accountability is ensured. What the framers of our constitution envisaged was a system of “Checks and Balances” wherein no organ of the government would have an untrammelled and arbitrary scope of power, their functioning checked by the simultaneous operation of the other two organs.

It was rightly pointed out by Attorney General Mukul Rohatgi that “In addition to the independence of the judiciary and separation of powers, public confidence stemming from democratic nature of our country also has to be kept in mind while making appointments.” Time and again apprehensions have been raised against the erstwhile “collegium system”, which has been in operation for the past 20 years,

operating as a mode of ensuring appointments to the Highest echelons of Judiciary.

This system hasn’t always ensured full accountability as the decisions for making appointments is vested in a body of senior most judges of the honourable apex court and their decisions pertaining to appointments cannot be questioned. This becomes all the more relevant when one takes into account the opinion of Justice Jasti Chelameshwar, who has been a staunch critic of the collegium system and was the only dissenting judge who upheld the validity of the NJAC act .

The most strongly attacked proposition of the NJAC act was the presence of “two eminent persons” in the panel as the same would dilute an otherwise purely judicial aspect of functioning. Scepticism regarding suitability of two non-judicial persons as members of the selection committee was expressed by the bench during the course of arguments.

This can be aptly summarized by the arguments raised by Mukul Rohatgi, “One way to look at it is that such a person may not possess legal acumen, but is bound to have a deeper understanding of life beyond the courtroom. We have to look beyond and cannot be oblivious to the world outside. It would not be wise to continue on a path completely insulated from the world.”²⁴

Hence, it was rightly argued that NJAC envisaged adopting a broad platform and looking beyond the perspective of the courtroom to serve the public, who were the

²⁴ (Mar. 19 2018 9:41 PM) <http://www.livemint.com/Politics/F54M8MGUsvxkiYkKvaJoXL/The-arguments-that-led-to-Supreme-Courts-NJAC-verdict.html>



ultimate seekers of justice. Moreover it is the common man who is affected by the course of functioning undertaken by the Judiciary, as the Judiciary is the only forum which acts as “a sentinel on the qui vive” to protect citizens against the excesses of the state.

Conclusion

Although the system of NJAC may have been wholly rejected, but efforts to evolve a system of ensuring Judicial Accountability should not be dropped. It is an undisputed fact that the judiciary has an important role to play in a functioning of a democracy and ensuring access to justice.

Judicial Independence and Judicial accountability are conflicting but not mutually exclusive concepts and in the present day scenario, both of these aspects form an important part of the justice delivery system. Any organ of the state cannot exercise its power arbitrarily, devoid of any checks imposed on their power and the same is true for the judiciary as well. 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 and therefore its accountability is questionable. The main task of judiciary is to provide fair trial and speedy justice and the organ that protects the society.

Representation of the members of the society should be ensured in the process of appointment of Justices to the High Courts and the Apex court, a suggestion put forth

by the Law commission of India in its 80th²⁵ and 121st²⁶ reports, as high courts and the Supreme Court apart from entertaining Civil and Criminal cases also adjudicate cases which have a direct bearing on the fundamental rights of the common man and in this sense, ensuring accountability of judiciary is particularly important.

There is no doubt as to the importance of the independence of judiciary but we need to realize the fact that ensuring the independence of judiciary is not merely an end in itself rather the means to an end. The end is to secure efficient, expeditious and impartial delivery of justice. And the main intention being the fact that people get justice irrespective of their status.

The aforesaid is pertinent to instill and maintain confidence in the general public as the Judiciary is one system which has always enjoyed the confidence of the masses until recently, when a press conference held by the four senior most judges of the apex court raised questions as to the credibility of the Highest court of Justice.

Therefore, any new step towards revamping the Judicial System should aim at balancing in the best possible manner judicial independence and judicial accountability.

²⁵ (Mar 22 2018 5:13 PM) <http://lawcommissionofindia.nic.in/51-100/Report80.pdf>
²⁶ (Mar 22 2018 5:13 PM) <http://lawcommissionofindia.nic.in/101-169/Report120.pdf>