



JUDICIAL ACCOUNTABILITY AND JUDICIAL INDEPENDENCE IN INDIA: AN ANALYSIS

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Introduction

The judiciary is one of the pillars upon which the majestic edifice of Democracy and Rule of Law is built. The judiciary is responsible for ensuring that all governmental organs operate within the limits of power allowed to them by the Constitution and legislation, ensuring that the Rule of Law is effective and meaningful.¹ An independent judiciary is thus required in a constitutional democracy like India. It assures not just the Rule of Law and the execution of human rights, but also the development and stability of a society. According to Justice H.R Khanna, the independence of the judiciary is an essential corollary of the judiciary's functions. According to him, the judiciary's mission has evolved from "settling conflicts between private persons" to "the arbiter of problems between the state and its citizens." The independence of judges has become an essential attribute of democratic society since those who decide such issues should not be vulnerable to the pressure of citizens and the state.²

The judiciary's independence comprises independence from other state institutions, such as the Government and legislature, and independence of individual judges to determine a case without being affected by

anything else. A judge must carry out his duties in the proper spirit of the law and keep his scales level when interpreting laws and administering justice. It highlights one of the fundamental goals of an independent judiciary: securing the nomination of personnel with the necessary qualifications.

However, in India judicial institutions have a long history of yielding to political commitment and ensuring a non-political court has always been a problematic issue. Because our founding fathers recognized this, they established a collaborative procedure for appointing Supreme Court and High Court judges that included both the executive and the judiciary. However, judicial appointment issues developed quickly.

Background

One of the most contentious issues before the Draft committee was appointing Supreme Court and High Court judges. Under the Government of India Act, 1919, and the subsequent Government of India Act, 1935, the crown held sole jurisdiction, with no particular provision for contacting the Chief Justice in the process.³

The Sapru Committee in 1945 recommended in its Constitutional Proposal that "The head of the state should appoint justices of Supreme Court and High Courts in consultation with Chief Justice of Supreme Court and High Court Judges, in consultation additionally with the High Court Chief

¹ Gagrani, Harsh, Appointment or Disappointment: Historical Backdrop and Present Problems in the Appointment of Judges of Indian Judiciary (2009). NLIU Law Review

² Khanna H.R., Judiciary in India and Judicial Practice, Ajoy Law House/ S.C Sarkar and Sons Pvt. Ltd., Calcutta, 1985, p.16

³ *Supra*, Note 1.



Justice and head of the unit concerned.⁴ Even the Union Constitution's Ad Hoc Committee declared in early 1947 that it did not believe it was "expedient to leave the power of selecting the judges to the unconstrained discretion of the President" and suggested two alternatives. One of the procedures allowed the President to nominate someone for appointment to the Supreme Court with the Justice's approval. The nominee will be confirmed by a panel of seven to eleven members made up of Chief Justices of High Courts, Members of Parliament, and the Union Law Officer. The other approach required three people from the panel, as mentioned earlier, to make recommendations, one of whom had to be nominated by the President in consultation with the Chief Justice of India.⁵ For the appointment of the Chief Justice of India, the identical procedure was to be followed, except that the Chief Justice would not be consulted.⁶

Sri B.N. Rau, the Constitutional Advisor in the memorandum of Union Constitution, submitted a few days later, suggested that the president should appoint the Judges with the approval of at least two-third of the Council of Stat, in which the Chief Justice of India was an ex-officio member.⁷ Even the Union Constitution Committee differed from the recommendation of the Ad Hoc Committee and proposed that the "the President shall appoint a Judge of Supreme Court after consulting the Chief Justice and such other judges of the Supreme Court as also such

judges if the High Court as may be necessary for the purpose.⁸

Judicial Independence

Although judicial independence is not a new concept, its definition remains ambiguous. One of the cornerstones in the effective functioning of democracy is an independent judiciary. It not only safeguards people's rights and interest, but it also defends the rule of law, thereby safeguarding fundamental rights. Cyrus Das believes that the rule of law and the realization of human rights are prerequisites for forming a robustly independent judiciary throughout the Commonwealth.⁹

The concept of an independent judiciary can be traced all the way back to ancient England; the court's independence is a gift from the Indian Constitution, which has been engrafted in the Constitution. The legislature, executive, and judiciary are the three branches of the Indian government. They conduct three critical functions: creating rules, applying rules, and adjudicating rules, in that order. The primary premise underpinning such a division of tasks is the "Separation of Powers" which ensures accountability and restraint of the Government and so protects our rights and liberties. 'Power corrupts man, and absolute power corrupts totally' is the central message here. Judicial independence is not for protecting a judge from investigation and censure for reasonable charge. No judge can

⁴ Austin G., *The Indian Constitution: Cornerstone of a Nation*. Oxford Clarendon Press, 1966, p.176.

⁵ *Supra* Note 1.

⁶ Shiva Rao, B., *The Framing of India's Constitution: A Study*, IIP, New Delhi, p.590.

⁷ Rau, B.N., *India's Constitution in the Making*, 1960.

⁸ *Supra* Note 5, p.600.

⁹ Dr. Cyrus Das in his opening address in a workshop on *Independent Judiciary* Universal Publishers at p.7



be immune from the demands of justice for indulging in any misdeeds.¹⁰

When it granted the Court one of the most fundamental characteristics of federalism, namely its independence from other state institutions, the Constitution upheld the basic principles of federalism. The members of the Constitutional Assembly were not only visionaries, but also talented and dedicated builders. Given the risk of conflicts of interest appearing among various groups in a free evolving society, they prepared a document that indicated an acute understanding that it was necessary to embed the concept of the rule of law into the Indian polity.¹¹ Thus, the judiciary in India enjoys a very significant position since it has been made the guardian and the custodian of the Constitution.¹²

Following the lifting of the emergency in 1977, which was a blow to the judiciary's independence, and against the backdrop of executive interference in judicial appointments, the Supreme Court was asked to protect the judiciary's independence from undesirable appointments and arbitrary transfers by the executive. This was done in three cases: - First, Second and Third Judges Case.

First Judge Case

In the First Judges Case,¹³ The Supreme Court was asked to decide on the system's controversies for appointing judges. In the decision, different judges stated their

opinions on numerous subjects, including the transfer and appointment of judges.

The Court accorded executive action priority when it came to appointing judges. In the case of the appointment of High Court Judges, the Court concluded that each of the constitutional officials, namely the Chief Justice of the High Court involved, the governor of the State, the Chief Justice of India and President must have "full and effective consultation." In such a consultation, however, if there is a difference of opinion among these authorities, the President's opinion will take precedence and so prevail over other opinions. Furthermore, the majority ruled that the President's decision cannot be challenged in Court, either based on mala fide intentions or unrelated reasons.¹⁴ As a result of the Judge's decision, the President effectively gained veto power over the selections.

In the case of Subhash Sharma v. Union of India,¹⁵ A three-judge bench observed about the word 'consultation' in Article 124(2) that "The Constitutional phraseology would require to be read and expounded in the context of constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence."¹⁶ The Bench referred this question to a larger bench.

Second Judges Case

Following the Subhash Sharma case, a nine judge Supreme Court bench looked into

¹⁰ Dr. Cyrus Das and Chandra K "Judges and Judicial Accountability", Universal Publishers, New Delhi, p.90

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https://highcourtchd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/goodgovernance.pdf, (Accessed on September 15th, 2021 at 19:46)

¹² Union of India v. Sankalchand Himatlal Sheth AIR 1997 SC 2328

¹³ S.P Gupta v. Union of India, AIR 1982 SC149.

¹⁴ *Supra* Note 1.

¹⁵ AIR 1991 SC 631.

¹⁶ *Ibid* at 640.



appointing judges in the landmark case of *S.C Advocates on Record Association v. Union of India*,¹⁷ commonly known as the Second Judge Case. The issue originated from a public interest writ petition filed in the Supreme Court by the Lawyers Association, which raised various serious concerns about Supreme Court and High Court Judges J.S Verma J. and four other judges wrote the majority opinion. The Court, referring to the ‘consultative’ process envisaged in Art 124(2), emphasized that the executive does not enjoy ‘primacy’ or absolute discretion in the appointment of Supreme Court judges.¹⁸ The Court also stated that that it was not desirable to give the Chief Justice unlimited power over appointment and that the executive should serve as a check whenever necessary. Further defining “the primacy of Chief Justice of India’s opinion” the Court stated that it is “the collective opinion developed after considering the views of several other judges who are traditionally connected with this duty” not just his individual opinion.¹⁹ The Court limited political influence on the Government and individual discretion on the part of all constitutional functionaries participating in appointing Supreme Court judges with this decision.

Third Judges Case

In an advisory opinion on a referral made by the President²⁰ under Article 143, generally known as the First Judge Case, the Supreme Court clarified various points resulting from the verdict as mentioned earlier in 1999. A nine judge panel regarding judicial appointment, the Bench unanimously decided that the Chief Justice of India must

consult “a collegium of four senior most justices of the Supreme Court,” thereby broadening the scope of consultation. This collegium included the Chief Justice of India and two of the Supreme Court’s most senior judges before delivering this opinion. The Court specifically stated that an opinion formed by the Chief Justice of India in any other manner has no primacy in the appointments to the Supreme Court, and the Government is not obliged to act thereon.²¹

Furthermore, the Court stated that if a majority of a collegium is opposed to a particular person’s appointment, that person will not be nominated. The Court even went so far as to state that if two of the justices who make up the collegium express strong opinion against the selection of a particular person for a good reason, the Chief Justice will not pursue the appointment.²²

The process of appointing judges to the High Court should be started by the Chief Justice of the High Court in question, who should do so after hearing from at least two of the High Court’s most senior judges. Before issuing an option, the Supreme Court judges’ collegium must examine the recommendations of the Chief Justice of the High Court and speak with other High Court judges and the Supreme Court justices who may be familiar with the High Court. In a disagreement between the President of India and the chief Justice of India, the latter’s opinion will take precedence.

By issuing this ruling, the Court reduced the scope of arbitrariness, even on the part of the judiciary, by increasing the size of the

¹⁷ AIR 1994 SC 268.

¹⁸ Ibid at 429.

¹⁹ Ibid at 434.

²⁰ In *Re: Presidential Reference* AIR 1999 SC 1.

²¹ Ibid at 16.

²² *Supra* Note 1.



collegium from two to four senior most judges other than the Chief Justice of India and requiring proper considerations of each of the collegium's judges' opinions.

National Judicial Appointment Commission

In the First Judges Case, Bhagwati J. recommended forming a judicial committee, similar to the Australian Judicial Commission, to nominate candidates for judicial appointments. The Law Commission later proposed establishing a National Judicial Commission in its 121st report, published in 1987. The Law Commission had feared executive arbitrariness since the First Judges Case because it held overriding powers in the selection and appointment of judges and hence wished to remove some authorities from the executive's grasp. Though the Law Commission did not finalize its composition, it suggested the following: Chief Justice of India (Chairman), three Supreme Court senior most judges, retiring Chief Justice of India, three Chief Justices of the High Court in order of seniority, Minister of Law and Justice, Government of India, Attorney General of India, and an outstanding law academic.²³

In 1990, the then Law Minister accepted the Law Commission's recommendations and proposed the 67th Constitutional (Amendment) Bill, including significant modifications. The Bill, however, failed due to dissolution of Lok Sabha. On December 18, 1998, Senior Congress member V.N Gadgil submitted a Bill in the Rajya Sabha that aimed to alter Articles 124 and 217 and form National Judicial Council (NJC). The purpose of this bill was to diminish judicial power in the nomination of judges by

proposing the Prime Minister as Chairman of the NJC. However, like the last bill, this one was simply a paper tiger, and lapsed with the dissolution of Rajya Sabha. The 98th Constitutional (Amendment) Bill, 2003 reintroduced the proposal to implement NJC, but the bill never saw the light of the day and was never passed. The primary rationale of the bill proposing the establishment of the NJC was taken over by the two Supreme Court Judges in the Second and Third Judges Case. The collegium of judges now had the adequate power to nominate Supreme Court and High Court judges, and executive influence was limited.

Judicial Accountability

Accountability refers to a position where a person accepts responsibilities for their acts and performances by either providing justifications or avoiding penalties. Accountability only exists when a person has a specific obligation to someone. It is a term that describes a relationship between two people. One of the essential characteristics of accountability is that the individual is held accountable for some type of performance that he has performed or is expected to perform, usually work or responsibilities that he is entitled to do. The relationship here is about some performance standard; whether it is in nature of performance or a benchmark he needs to meet. It is essential to note that individuals in an accountability relationship must produce or produce or receive information with these characteristics in mind. The judiciary is a clear example of unaccountability, as it is excluded from the Right to Information Act of 2002, obscuring transparency.

This act was a significant legislative change intended to increase transparency and

²³ *Supra* Note 1.



accountability, but the higher judiciary ignored it in *Manohar s/o Manik Rao Anchule v. State of Maharashtra and Anr.*²⁴ The Supreme Court stated that transparency is undeniably crucial, if not essential, to democracy and that if an authority is held accountable, the likelihood of errors is reduced. The bold and independent judiciary has also been entrusted with protecting the country's Rule of Law, for which the judiciary must be transparent and constitutionally sound. When establishing morality and actions standard for others, the judiciary should also ensure that they follow them themselves.

For example, the Indian Judiciary has the right to hold someone in contempt of the Court if they say or do something that harms the judiciary's reputation. In defamation proceedings,²⁵ the courts adopt the criterion set down in *New York v. Sullivan*.²⁶ The United States Supreme Court established this criterion in a judgement that declared that even a thoughtless statement made against a public figure is not defamatory unless made with "actual malice" and utter disregard for truth. However, the New York Times criterion does not apply to speech that implicates Indian Court judges. This standard applied to everyone else, but the weapon of contempt of court is deployed without hesitation when a judge is involved. One of the most severe threats to the judiciary's independence is erosion of the judiciary's credibility in the minds of right thinking people. Furthermore, as Lord Lanning stated, it is sad when the right thinking people believe the judiciary is biased.

²⁴ AIR 2013 SC 681.

²⁵ *Rajagopal v. State of Tamil Nadu* AIR 1995 SC264.

²⁶ *New York Times Co. v. Sullivan* 376 U.S 254 (1964).

Judicial Appointment vs. Judicial Independence

The appointment of judges is yet another contentious issue in which the judiciary has long resisted transparency. RTI requests for disclosure were also tuned down on the grounds of secrecy. The Chief Justice of India and four other judges nominate Supreme Court judges, then appointed by the president based on their recommendations. The President will appoint Supreme Court judges in consultation with the Chief Justice of India and such other Supreme Court justices as he deems necessary.²⁷ However, the Constitution does not specify whose opinion will win in the event of a disagreement, nor does it specify that exact criterion for appointing judges. When we talk about undermined judicial independence, we must remember that this refers to the judiciary's independence not just from the political and governmental forces but also from their vices and jurisprudence. In the Constitutional Assembly Debates, Dr. B.R Ambedkar observed, "Everyone agrees that for democracy to survive, the judiciary must be kept independent and competent in itself." The question is how these two objects can be kept safe.²⁸ The judicial system, without a doubt, must be autonomous since it is the foundational doctrine, but it must also be competent in its own right. Injustice or arbitrary judgements are not excused by judicial independence. Only accountability and transparency will ensure competency and efficacy in this system.

²⁷ Article 124(2) Constitution of India.

²⁸ Constitutional Assembly Debates, Dr. Ambedkar Speech.



Allocation of Cases v Judicial Transparency

The Chief Justice of India has sole control over case allocation. When the Chief Justice feels like it, he assembles benches and transfers cases. There is no established system, method or criteria when assigning some instances to specific judicial authorities. On January 12, 2018, a revolt against India's then Chief Justice, Deepak Mishra made headlines. Justice Chalameshwar, Ranjan Gogoi, Madan B Lokur and Kurian Joseph have written to the Judge, expressing their dissatisfaction with the case allocation and requesting an explanation.²⁹ There was little transparency, and the judge assigned cases according to his preferences. This led to anxiety among the judges, and there was a lack of transparency. The entire system cannot be described as corrupt; nonetheless, several people will work tirelessly and faithfully to their nature. They protect the rule of law and administer justice fairly and impartially. Despite their lack of control over case assignments, they uniformly adhere to a similar school of thought or philosophy while writing their decisions. We frequently notice on a bench that, even if the judges reach the same conclusion, their reasons for doing so are vastly different. Knowing and predicting who would provide what kind of justice, the Chief Justice might use this information to his advantage and allot cases accordingly. We cannot call it outright corruption, but there is a vacuum here since no judge knows where or how he will be transferred or which cases he will be assigned. Such circumstances arise

as a result of lack of transparency and accountability.

Need for Judicial Accountability

The judicial system deals with the administration of justice through the courts. The human persons who preside over the courts are known as judges. They are not just outward symbols of courts, but they are also flesh and blood representations. The image of the courts and the trustworthiness of the legal system are determined by how judges do their tasks. Judges have been held in great regard in India since the beginning of time. However, due to several harmful incidents, people gradually lose faith in the judiciary and take law into their own hands. It is a complete disgrace.

As a result, it is necessary to hold the judiciary accountable, as degeneration of values in the judiciary is unaffordable compared to any other branch of government, as the judiciary is tasked with protecting our Constitution. The concept of judicial accountability and answerability is not new. Several countries' constitutions include provision for judicial accountability. It is to limit the consolidation of power in the hands of a single state organ, particularly in nations like India, where judicial activism is blamed for interfering with and invading the domain of the other organ. However, judicial independence is required for every judge whose oath of office requires him to operate without fear or favour, affection or malice and follow the country's Constitution and laws.

²⁹<https://scroll.in/article/876314/explainer-all-you-need-to-know-about-the-impeachment-motion-against-cji-dipak-misra> (Accessed on September 23, 2021, at 20:09).



Conclusion

In India, judges should practice more self-control and self-policing. As the most powerful Court in India and globally, the judges must create and adhere to a Judicial Code of Conduct. They apply the notion of self-control and hold themselves accountable to the public since citizens' trust is critical to the proper functioning of this vital branch. Judicial accountability is desired or demanded since it is the most powerful branch in delivering justice as the first human right to the people. The concept of judicial accountability entails a great deal of responsibility, and the Court must be accountable to the public. An impartial committee should make decisions on matters like a judge behaving badly or not having a good work ethic. The committee can issue written warnings, temporary suspensions, or even fine the judges to discipline them, with impeachment as the final option. There should be a website where offended individuals can complain against any misbehaving judge or asking for sexual favours. The website should be open to the public and ruled over by the Chief Justice and president. Such measures will not jeopardize judicial independence but rather increase system transparency and accountability. Annual reports from the judiciary office can be made public documents so that the citizens can analyse the judicial system and offer constructive criticism on judicial policies, ruling and judges' behaviour. With a more transparent method for nomination, nepotism and favouritism can be avoided, and the judicial system's efficiency can be improved. As a result, the route to judicial responsibility remains long and complicated. However, effective accountability for such a powerful and crucial organ as India's Court is critical for a country's Rule of Law and democracy to

survive. We can soon have an efficient and responsible judicial system where the Rule of Law reigns if we make a more transparent judiciary.

