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THE NEED FOR ACCOUNTABILITY BESIDES JUDICIAL INDEPENDENCE

Authored By- Prachi Mishra

ABSTRACT

The present article highlights the need for the judiciary to be answerable and accountable for its decisions and acts. Both the other organs are accountable directly or indirectly and are also under the check of the judiciary as well. But the judiciary itself does not have any restrain or duty as such in the name of its own accountability. The paper also highlights the difference between judicial independence and judicial accountability and how and why these two need to be balanced with each other.

IJLRA **The Concept of Judicial Accountability** **FOR LEGAL RESEARCH & ANALYSIS**

It's common to come across the accountability of the government of India towards the citizens as it is a generally used and well known feature of a democratic country like us. But we rarely find any mention of the accountability of the judiciary which happens to be the third and the most important organ of the government itself. Why is it that judiciary is always associated with protecting the rights of the citizens and not being answerable and accountable to them for what it actually does! Judiciary acts as our Constitution's guardian. Being given the responsibility of protection of what is most essential and fundamental for a country, judiciary owes it to the Constitution itself that it stands accountable for its acts. It is equally important for the judiciary to be answerable to the people as other organs of the government. Judiciary is resided with the faith of the people or we can say that the citizens have entrusted them with the task of protecting them when their rights are violated.

"Ironically the Higher Judiciary in India has powers of control over every organ under the

Constitution but there exists no effective method of disciplining its own members.”¹ For the judges to be impartial it is necessary that we have an independent judiciary but too much of independence might as well endanger such impartiality. Accountability is the sine qua non of democracy.² When judiciary watches over the other two organs then who would be watching over judiciary? In order to be accountable, it has to be responsible and per se answerable for its decisions by giving appropriate reasons. Judicial accountability promotes two things most of all, i.e.,

- Rule of law; and
- The confidence of the public in the judicial organ.

In order to limit the other organs, it's necessary that the judicial organ also does things remaining in its own limits or else this might lead to situations like favouritism, corruption and biasness in it as well which is actually prevalent in many forms already. The legislature as well as the executive, both are accountable to people directly or indirectly but there is nothing in law to make the third organ accountable to anyone let alone the people of India. It's good that the higher judiciary has been provided with some special constitutional protections so that it can perform its task and no other organs can come up as an obstacle in the justice delivery system. But not always can it be right and such exceptional powers and protections are subject to misuse. There can be made an appeal, revision or even review of orders of a court and that is all that we have in the name of their accountability but what about other misconducts or serious errands made by the judges while performing their duties, no procedure has been laid down as such.

Judicial Independence And Judicial Accountability

Both independence of judiciary and its accountability must go hand in hand. But the judiciary seems to have contradicted these two to such an extent that when accountability is demanded, judicial independence is always given as a defence. The principles of judicial independence and accountability are sometimes regarded as fundamentally opposed to one another, and constantly in tension.³ Both these concepts and their objectives are not taken in their actual sense and that is why

¹ ‘The accountability of the judiciary’, Available at: <https://www.lawteacher.net/free-law-essays/constitutional-law/the-accountability-of-the-judiciary-constitutional-law-essay.php> (visited on October 19, 2019)

² ‘Judicial Accountability’, Available at: <http://www.lawyersclubindia.com/articles/Judicial-Accountability-8961.asp> (visited on October 23, 2019)

³ A.P. Shah, ‘A manifesto for judicial accountability in India’, The Wire, Available at: <https://thewire.in/law/cji->

they seem to be so opposite. the means of accountability adopted can determine the extent of independence granted to the judiciary.⁴ In the name of judicial independence, sometimes it has been seen to be taken as an immunity from any sort of liability on the part of the judges and that they can do things their own way without having to answer for it. Certain express provisions can be seen where judges have been provided with some excessive immunities and powers which are very prone to misuse every now and then.

○ **Right To Information Exemption**

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 the critics.⁵ Both the other organs come under the purview of the Right to Information Act, 2005 and they have to provide the required information about the work they perform as and when required. But the third organ, i.e., judiciary stands out and is not subject to this Act. In the name of independence of the judiciary judges have always stayed themselves out of any questioning regarding their actions. But every citizen's right to know as to what is going on inside the government includes the judicial organ as well. But it has always been protecting itself from it while transparency does not seem to likely to become a hindrance in the way of its independence especially when the Supreme court itself has created the right to information and has always supported it. Then why is the judiciary itself reluctant to be a part of it.

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○ **Contempt Of Court**

Judges have been provided with a power to punish for its contempt but it has been observed that at most of the occasions this power is being misused by the courts to protect themselves from criticism and even in matters where personal grudges are involved. Unfair contempt case includes that of Arundhati Roy when she criticized against an order of the court and she was held guilty of contempt for that and was also given a day imprisonment for that along with fine.⁶

⁴ ranjan-gogoi-supreme-court-judiciary (visited on October 19, 2019)

⁵ Supra note3

⁵ Supra note1

⁶ Infra note7

○ **Process For Removal Of A Judge**

A judge of the supreme court or a high court can only be removed from his office if misbehaviour or incapacity is proved against him. Therefore, if there is any other errant act done by a judge or gross negligent mistakes have been done by him which might be harmful for the interest of others, then also there is no provision to take up such matter. 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.⁷ Before taking up the matter for recommendation to the house, a committee is set up which carries on investigations to see whether the matter needs to be taken further and if it turns out that impeachment process must be initiated against such person, then committee recommends to the parliament and then it is discussed in both the houses of the parliament and a resolution in this regard needs to be passed by both the houses by a 2/3 majority and then only the resolution is given to the president for him to order removal. This procedure is provided under Art. 124(4)⁸ of the Constitution of India.

Such committees have been set up a no. of times but have hardly led to any removal. Judges found guilty includes famous matters of Soumitra Sen and Nirmal Yadav. The Committee formed here includes judges and generally no judge would want to charge his colleague of any such an incapacity. So there should be a neutral independent body established for such an investigation.

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● **Case Of Veeraswamy**

The additional immunity with which the judges have cloaked themselves was in the Justice R. Veeraswamy case, in which it was declared that judges of SC or HC cannot be subjected to investigation in any criminal offence of corruption, or a FIR be registered against them without the prior permission of the CJI and again it's not likely that the CJI will allow such permission, as it can bring shame to the entire Judiciary.⁹

⁷ Isha Tirkey, ' JUDICIAL ACCOUNTABILITY IN INDIA UNDERSTANDING AND EXPLORING THE FAILURES AND SOLUTIONS TO ACCOUNTABILITY', available at: https://ccs.in/internship_papers/2011/247_judicial-accountability-in-india_isha-tirkey.pdf (visited on October 26, 2019)

⁸ 124(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-third of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

⁹ Supra note7

How Much Of Judicial Activism Do We Need?

In order to protect the citizens' rights, judiciary comes out with judicial activism where they take up cases by themselves and this has proved to have provided justice to so many. But one should know where the line of limits should lie and going beyond that might lead to consequences not intended at the first place. In many cases, the Supreme Court has entered into the sphere of State activities while making interpretation of legislative enactments and administrative action of the State so as to serve the larger interest of society.¹⁰ Interfering with the jurisdiction and sphere of the other two organs of the government was not the intention when judicial activism came to our country but now it seems to have changed its direction and is harming the 'Separation of Power' which is ensured to us by the Constitution. Too much of judicial activism is not good for the kind of government we have in India because apart from checks and balances no organ can and should intervene in the pursuits of the other but this seems to be increasing so much recently.

• Public Interest Litigation

What a great concept a PIL is and its introduction in India has served interests of so many especially matters where those who need justice are not able to access it as individuals and so a collective petition on all of their behalves can be filed. But this is being criticized these days because people tend to misuse it for their private interests in the name of public interest and also that the judiciary is over stepping its boundaries by taking up matters which are actually under the legislature or the executive to be dealt with. Judiciary is making laws, its deciding purely administrative matters and also taking up policy making which is not the work of this organ of the government.

It seems like some form of self-governance is being practised by the judiciary where it considers that it can take control of the other organs while itself it's not subject to any checks and balance however minimum they are. A bench comprising Justice AK Mathur and Justice Markandey Katju said, "If the judiciary does not exercise restraint and over-stretches its limit there is bound to be reaction from politicians and others. The politicians will then step in and curtail the powers or even independence of the judiciary. The judiciary should, therefore, confine itself to its proper sphere (Divisional Manager Aravali Golf Course vs Chander Haas)¹¹, realising that in a democracy many

¹⁰Hrudaya Ballav Das, ' Too much judicial activism not good for democracy', The Pioneer, available at: <https://www.dailypioneer.com/2014/state-editions/too-much-judicial-activism-not-good-for-democracy.html> (visited on October 19, 2019)

¹¹ 2007(14) SCALE1, (2008)1SCC683

matters and controversies are best resolved in a non-judicial settings.”¹² Both these Justices deserve all the admiration for advising caution and restraint to ensure that “judicial activism does not become judicial adventurism”. It is wrong to suggest that they opposed judicial activism.¹³ J. Katju has himself said that – among all the organs of the State, only judiciary can define limits for all and it needs to exercise such power with utmost humility as well as self-restraint.¹⁴

The Matter Of CJI Ranjan Gogoi

Recently, a former employee of the Supreme Court made allegations against the Chief Justice of India, J. Gogoi that he had sexually harassed her. She happened to be a permanent employee of the Supreme Court and got removed for some insubstantial reasons like complaining about her seating arrangement and taking a casual half day leave from work. And then she came out to make such allegations against the CJI. A special hearing was held even when no petition was moved regarding this. It was taken to be a “Matter of Great Public Importance Touching Upon the Independence of the Judiciary”. The Chief Justice himself was one of the judges who sat to decide the matter but he eventually abstained from signing the order. Statements were issued saying that the complaint was false. It would have been appropriate that some external committee should have been set up to examine the matter but instead a committee of judges only was set up and even CJI was himself one of the members of such committee. Could a fair decision be expected from such a committee? Apparently not. The victim was not allowed to be represented by a lawyer, she was not explained the process of the inquiry being held, not even given the copy of her own evidence. Eventually, she chose to withdraw her complaint by herself. Here, it is not being argued that the CJI could have been responsible for such offence but what is being argued is that the procedure followed to find out whether he was or was not involved, is tainted. A person cannot be a judge in his own cause and the way this matter was handled seems to be questionable. The judiciary is misusing the immunity from any kind of check or control by any other organ out there and this might lead to unwanted and grave consequences if not looked into now!

¹² Sanjay K. Singh, ‘SC asks courts to curb judicial activism’, The Economic Times, Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/sc-asks-courts-to-curb-judicial-activism/articleshow/2612748.cms> (visited on October 24, 2019)

¹³ V R Krishna Iyer, ‘Has judicial activism become excessive?’, The Economic Times, Available at: <https://economictimes.indiatimes.com/has-judicial-activism-become-excessive/articleshow/2630034.cms> (visited on October 21, 2019)

¹⁴ J. Markandey Katju, ‘Can Judges Legislate? The Supreme Court Sets the Record Straight.’, The Wire, Available at: <https://thewire.in/law/can-judges-legislate-the-supreme-court-sets-the-record-straight> (visited on October 23, 2019)

Following The Judicial Standards And Accountability

The Judicial Standards and Accountability Bill was presented in 2010 but it could not be made into a law since there were so many underlying flaws in the bill. In the said bill, there was provision to get the code of conduct for judges framed by the parliament. The bill did not turn out to be satisfactory so it lapsed. A new law is required to be made on Judicial standards and accountability but excessive control should not lie in the hands of the executive and legislature when it comes to such a law. Some amount of such power and control is always good to be given to the other organ in order to keep check and balance but not excessive. As per the existing law, if there is any misconduct on the part of any judge then removal is the way to go but there are a number of other misbehaviour as well in which a judge might get involved and they might not be grave enough to start impeachment proceedings against them but surely some amount of action is required to be taken against them. Some measures including warning or suspension can also become a part of such law so that judges start to hesitate before getting into any of these misbehaviours on their part, like setting up of an all-time disciplinary committee to deal with such complaints made against judges. This committee can ensure that on minute allegations against a judge he/she could be given any direction, warning or may even get suspension keeping in mind the seriousness of the act or if the allegations made are grave enough then it could request for setting up judicial inquiry committee to take on for further investigation into the matter and then the rest of the procedure follows.

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What Does The Constitution Have To Say?

In our Constitution we have got Article 235 which we can say marks the accountability of judiciary to a certain extent. The said Article lays down that the concerned High Courts are having a certain amount of control over the district court and all other subordinate courts. Therefore, if we can say that the Constitution also lays down that there should be some judicial accountability in any form, then its only Article 235 which can be taken to mean that lower judiciary is accountable to the higher judiciary for some matters. But the accountability of the higher judiciary nowhere finds any mention in the Constitution.

The Debate On Independence Of Judiciary

The famous three Judges cases and NJAC case mark are based upon the debate that has been going on regarding the independence of judiciary. Whenever we talk about the independence of judiciary in India, these cases find mention everywhere. The first judges case was of S.P. Gupta vs UOI¹⁵, in this case it was held that the ‘consultation’ with the Chief Justice used in Article 124(2) and 217(1) of the Constitution with regard to the appointment and transfer of high court judges would be a matter of consideration but it won’t mark the final decision and the power of final decision would lie solely in the hands of the government. The word ‘consultation’ was given a literal meaning here by the court and was limited to a mere formality.

While in the second judges case, Supreme Court Advocates on Record Association vs UOI¹⁶, the court held that the decision of the Chief Justice would be given primacy and importance because he is the best one to know the interest of judiciary and the standards required accordingly to appoint a judge. Until this case, the government used to fill vacancies in the High Courts and Supreme Courts. The court held that ‘consultation’ does not mean ‘concurrence’. Thus on the question of primacy the court concludes that the role of Chief Justice of India in the matter of appointment of the Judges of the Supreme Court is unique, singular and primal, but participatory vis-a-vis the executive on a level of togetherness and mutuality, and neither he nor the executive can push through an appointment in derogation of the wishes of the other.¹⁷

In the third judges case, In re special reference¹⁸, the court held that the Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or a Judge of a High Court in consultation with the four senior most Judges of the Supreme Court. Insofar as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior most Judges of the Supreme Court.

Over the course of the three cases, the court evolved the principle of judicial independence to mean that no other branch of the state - including the legislature and the executive - would have any say in the appointment of judges. An then after these cases, in 2014 a bill came named as National Judicial Appointment Commission Bill which later on became an Act. This was made to establish a body for the transfer and appointment of judges. NJAC was criticized for being against the

¹⁵ AIR 1982 SC 149

¹⁶ (1993) 4 SCC 441

¹⁷ Prashant Gupta, ‘Supreme Court Advocates on Record Association Vs. Union of India – Case Analysis’, ipleaders, Available at: <https://blog.ipleaders.in/supreme-court-advocates-on-record-association-vs-union-of-india/> (visited on November 2, 2019)

¹⁸ 1 of 1998 AIR 1999 SC

independence of judiciary because of too much executive participation and the judiciary took it to be an interference in their independence. The Commission was established through the 99th Amendment Act, 2014 but it was struck down in 2015 with the case of Supreme Court Advocates on Record Association vs UOI¹⁹ and was held to be unconstitutional and then the old collegium system for appointment of judges in higher judiciary remained.

CONCLUSION

In the name of separation of power, the power has been separated finely but when it comes to checks and balances, only the legislature and executive seems to have been under such control by the other organs to see the misuse of powers while the judiciary is under no one's check and accountable to none. This is leading to too many 'judicial legislations' which is actually the work of legislature and other consequences which are needed to be looked at timely. Just because judicial accountability finds no as such mention in the Constitution, it does not mean that it gives it a right to soar so freely as to be uncontrollable. Adequate responsibility needs to be put on the shoulders of the judiciary so as to feel answerable towards those for the protection of whose rights it was made in the first place, the people!