

## JUDICIAL REVIEW AND ACCOUNTABILITY: SUSTAINABILITY COURT OVERSIGHT

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### ABSTRACT

The proper administration of justice system being an intrinsic value of rule of law and constitutional governance fundamentally lies with judicial accountability. Though the Indian constitutional jurisprudence is considerably developed in line with international judicial standards, still Indian legal system lacks adequate standard relating to judicial accountability and Code of Ethics and judicial review. The inadequacy and inefficiency of the system are evident from the very few cases reported against judges despite prevalence of suspicion of corrupt and unethical practices among the judges. This tendency of non-reporting of the cases is reasonably high and relatively complex on account of apparently proved unworkable and unfeasible constitutional mechanism against judges in India.

In this context, the first part of the paper conceptualises judicial accountability considering different dimensions and core elements of judicial accountability. The second part of this article presents theoretical aspects of the interrelationship between judicial accountability and judicial independence highlighting their similarities and disparities. Focusing on current constitutional as well as the statutory status of judicial accountability and with the help of descriptive as well as analytical methodology later part of the paper explores the Indian legal system on judicial accountability followed by the critical analysis of the same. Over the past few decades, the Indian judiciary has remarkably contributed for the development of the constitutional governance and rule of law. The researchers also argues that the Indian legal system shall be further streamlined in line with the best practices of the other countries.

**Key words:** *Justice, Good Governance, Indian Judiciary Transparency, Accountability.*

### INTRODUCTION

It is well known fact that judiciary is one of the most important organs of the government. It plays an important role in justice delivery system and in the governance of the country. Indian judiciary has been praised for playing an active role for promoting good governance in India but Indian judiciary itself is facing many challenges for true realization of good governance by

public at large. There is lack of transparency in the appointment of judges and administrative functioning of judicial system in India.

Framer of the Constitution and our founding father has vested enormous power in the judiciary for the protection of the civil liberties and Constitution itself but they have not provided very effective mechanism for the accountability of judiciary. Justice is one of the Constitutional mandates and most important human right of citizen. There is a spreading rash of judicial delinquency in many forms. Trust and fiduciary are the main component of power which has been vested in public authority. Accountability and trusteeship go together and constant monitoring and social audit is most important factor in this regard. Executive branch is accountable to the parliament and ultimately, the Parliament has been made accountable to the people. Theoretically, under the Constitutional scheme, judiciary too has been made accountable to the Parliament. Judiciary is one of the most important pillars of democracy; therefore, it must be subject to the democratic discipline. Any branch of the government which is not subject to discipline of democratic principles may become uncontrolled and unaccountable. To save the prestige, trust and confidence which have been posed by the public in judiciary it is necessary that the working of the judiciary must be transparent and accountable. Founding father of the Constitution had thought that settled norms and peer pressure would act as adequate checks upon the judiciary but it has not happened. It is rightly observed by the Supreme Court that a single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system. A scholar has listed three main benefits of the judicial accountability as follows-

- It promotes the rule of law.
- It promotes public confidence in judges
- It promotes institutional responsibility.

The process of accountability can be promoted and facilitated through the judicial accountability. To achieve judicial accountability, it is necessary that judicial system must be made accountable to the law.

## **OBJECTIVES**

- To examine the feasibility of existing constitutional as well as the legal regime in achieving the inherent objectives of judicial accountability.
- To explores the legislative deficiencies in addressing the core issues and challenges in addressing judicial accountability in India.
- To propose possible recommendations so as to uproot the factors hindering the concept of judicial accountability in India.

## **RESEARCH METHODOLOGY**

The methodology adopted for the present research paper is purely doctrinal in nature. The theoretical, analytical and comparative methodology is adopted for the purpose of analysis of the data. Various legal materials such as various Constitution reports as well as legislations have been reviewed. International instruments have been considered. The research work is also based on reports of Law Commission of India and the Parliamentary Standing Committee.

Scholarly literatures have also been extensively utilised to strengthen the theoretical and conceptual aspects of the paper.

### **HYPOTHESIS**

- The Indian legal system lacks adequate standard relating to judicial accountability, Code of Ethics and judicial review.
- There is lack of transparency in the appointment of judges and administrative functioning of judicial system in India.

### **MEANING AND CONCEPT OF JUDICIAL ACCOUNTABILITY**

Accountability means being “responsible for your decisions or actions and expected to explain them, when you are asked”. In Webster’s dictionary, accountability is defined as the quality or state of being accountable, liable, or responsible. Generally speaking, accountability implies the necessity to justify or explain ones past conduct, behaviour or action. Thus, the word “accountability” means responsibility with respect to the powers, functions and duties which are assigned to a person. Judicial accountability makes the judges accountable by holding them legally or politically responsible for their behaviour. In simple words accountability means to take responsibility for one’s own action, behaviour or decision and to be responsible to an external body. It is concerned with the qualitative work, quality of justice, conduct and behaviour of judges. It emphasizes upon the complete integrity of judges which is very basic trait of justice delivery system. Unimpeachable integrity, impartiality, fairness is utmost necessity for efficient functioning of judiciary. In NJAC Case it was observed by Justice J. Chelameswar that deep learning in law, incisive and alert mind to quickly grasp the controversy, energy and commitment to resolve the problem are critical elements which make a Judge efficient and enable him to decide cases quickly. However, every Judge who has all the above-mentioned qualities need not automatically be a Judge who can generate confidence in the litigants unless the litigant believes that the Judge is absolutely fair and impartial. Judiciary is the watchdog of the Constitution and its fundamental values. It is also said to be the lifeblood of constitutionalism in democratic societies. People have expectations that their cases should be decided quickly by judges. It will generate confidence among people. Now, the question is that which is the formula and what are the qualities which can make a judge to decide cases quickly thereby generate confidence in the masses and litigants. Transparency is a vital factor in constitutional governance. It is well established fact that constitutionalism demands rationality in every sphere of State action. It may be the process of appointment or the process of justice delivery system.

Keeping in mind the concept of judicial accountability and independence it can be divided into three categories. One is political accountability, second is decisional account-ability and third is behavioural accountability. Selection and appointment of judges, their tenure is part of the political accountability. Decisional accountability is concerned with the manner in which the judges are accountable for their judgments and ruling. Concept of judicial review, appeals, academic criticism of judicial actions is a part of decisional accountability. Legislatures do not provide adequate funding for proper functioning of the courts. Definitely, it adversely affects the decision-making process of the court. Behavioural accountability involves the conduct of judges. Transparency is an aspect of rationality. In process of appointment, transparency is

required. The process of appointment by Collegium system in our country is absolutely opaque and inaccessible to public.

In the reference of judicial proceeding the Supreme Court has observed that "Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial conducted by the court in open and which is open to public scrutiny and watch works naturally as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice.

### **CONCEPT OF JUDICIAL REVIEW:**

Judicial Review is the power of the Courts to determine the constitutionality of Legislative act in a case instituted by aggrieved person. It is the power of the Court to declare a legislative Act void on the grounds of unconstitutionality.

*Judicial Review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court's opinion transgresses the Constitution.*

The constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds goods. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision" of the law of parliament.

Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. Being the guardian of Fundamental Rights and the arbiter of constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures.

In the framework of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and delimits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review. The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as **Article 13, 32, 131-136, 143, 226, 145, 246, and 372.**

**Article 372 (1)** establishes the judicial review of the pre-constitutional legislation similarly. **Article 13** specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void. Even our Supreme Court has observed, even without the specific provisions in **Article 13**. The court would have the power to declare any enactment which transgresses a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under **Articles 32 and 226**. **Articles 251 and 254** say that in case of in consistent if between union and state laws, the state law shall be void.

The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the Constitution **Article 13(2)** even goes to the extent of saying that "The state shall not make any law which takes away or abridges the rights conferred by this Part (Part III containing Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." The courts in India are thus under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision.

Underlining this aspect of the matter, the Supreme Court stated in *State of Madras v. Row*, that the Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts "face up to such important and none too easy task" not out of any desire "to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution<sup>1</sup>." The Court observed further: "While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

The doctrines of supremacy of the constitution and judicial review has been expounded very lucidly but forcefully by BHAGWATI, J., as follows in *Rajasthan v., Union of India*<sup>2</sup>:

"It is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is supreme lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government be it the executive or the legislature or the judiciary, derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of Such power laid down by the constitution. This Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are "the limits and whether any action of that branch transgresses such limits". Therefore, the courts in India cannot be accused of usurping the function of constitutional adjudication; it is a function which has been imposed on them by the Constitution itself, 'It is a delicate task; the courts may even find it embarrassing at times to discharge it, but they cannot shirk their constitutional responsibility.

Justifying judicial review, RAMASWAMI, L, has observed in *S.S. Bola v, B.D. Sharma*<sup>3</sup>.

"The founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and Fundamental freedoms and to help to create a healthy nationalism, The function of judicial review is a part of the constitutional interpretation it. self, It adjusts the constitution to meet new conditions and needs of the time."

In a number of cases, the Supreme Court has emphasized upon the importance of judicial review in India.

<sup>1</sup> AIR 1952 SC 196, 199 : 1952 SCR 597; Ch. XXIV

<sup>2</sup> AIR 1977 SC 1361: (1977) 3 SCC 592.

<sup>3</sup> AIR 1997 SC 3127, 3170

KHANNA, J., emphasized in *Kesavananda*:

"As long as some Fundamental Rights exist and area part of the Constitution, the power of judicial review has also to be exercised "with a view to see that 'the guarantees afforded by these Rights are not contravened.....Judicial review has thus become an integral part of our Constitutional system...

In *Minerva Mills* CHANDRACHUD, C.J.' speaking on behalf of the majority, observed;

“It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the Fundamental Rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled.”

In his minority judgement in *Minerva* BHAGWATI, J., observed:

"It is for the judiciary to uphold the constitutional values and to enforce the constitutional values and to enforce the constitutional limitations, that is the essence of the rule of law, which inter alia requires that 'the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law.' The power of judicial review as an integral part of our 'constitutional system...the power of judicial review...is unquestionably....part of the basic structure of the Constitution.

Under our Constitution, judicial review can conveniently be classified under three heads:<sup>4</sup>

1. **Judicial review of Constitutional amendments:** This has been the subject-matter of consideration in various cases by the Supreme Court; of them worth mentioning are: Shankari Prasad case<sup>5</sup>, Sajjan Singh case<sup>6</sup>, Golak Nath case<sup>7</sup>, Kesavananda Bharati case<sup>8</sup>, Minerva Mills case<sup>9</sup>, Sanjeev Coke case<sup>10</sup> and Indira Gandhi case<sup>11</sup>. The test of validity of Constitutional amendments is conforming to the basic features of the Constitution.
2. **Judicial review of legislation of Parliament, State Legislatures as well as subordinate legislation:** Judicial review in this category is in respect of legislative competence and violation of fundamental rights or any other Constitutional or legislative limitations;
3. **Judicial review of administrative action of the Union of India as well as the State Governments and authorities falling within the meaning of State.**

## CURRENT MECHANISM OF JUDICIAL ACCOUNTABILITY OM INDIA

The Constitution of India 1950 makes more clear provisions relating to the maintenance of judicial accountability. These constitutional provisions authorise both the houses of parliament to initiate removal process supported by the majority of the total members of the house on the ground of proved misbehaviour or incapacity followed by an order of the president. This is the corresponding provision of the Government of India Act-1935 which authorised his majesty to remove judges on the grounds of misbehaviour or infirmity of mind or body. Constituent power

<sup>4</sup>Justice Syed Shah Mohammed Quadri, *Judicial Review of Administrative Action*, (2001) 6 SCC (Jour) 1

<sup>5</sup> Shankari Prasad Singh Deov. *Union of India*, AIR 1951 SC 458.

<sup>6</sup> Sajjan Singh v. *State of Rajasthan*, AIR 1965 SC 845

<sup>7</sup> GolakNath v. *State of Punjab*, AIR 1967 SC 1643

<sup>8</sup> Kesavananda Bharati v. *Union of India*, AIR 1973 SC 1461

<sup>9</sup> Minerva Mills v. *Union of India*, AIR 1980 SC 1789

<sup>10</sup> Sanjeev Coke Mfg. Co.v. *Bharat Coking Coal Ltd.*, (1983) 1 SCC 147

<sup>11</sup> Indira Nehru Gandhi v. *Raj Narain*, 1975 Supp SCC 1

has authorised the parliament, not only for the initiation of the removal process but also for the enactment of the law to regulate the procedure for the presentation of an address by the president of India and investigation of the cases relating to misbehaviour and incapacity. Accordingly, the Judges Enquiry Act, 1968 was enacted by the Parliament of India to articulate and rationalise judicial accountability of the country. This Act vocalises the procedural justice for the judges who are subjected to impeachment process and visualises the practicality of the accountability mechanism. The scheme of the Act mandates that impeachment motion should be supported by 100 Members of Parliament in case of Lok Sabha and 50 Members of Parliament in case of Rajya Sabha. It is pertinent to note that the constitutional scheme gives power only to the parliamentarian due to democratic value attached to this constitutional institution. This power is designed to operationalise checks and balances theory. The Act has indicated that the removal process should be hard in order to promote the arbitrary removal of the judges from their office. This idea of accountability scheme symbolises the following words. “There is a legitimate reason that the removal of a judge is cumbersome and difficult. Judges should be immune from removal at the will of the electorate or anyone else simply because of a disagreement over a judge's philosophy or a particular ruling in a particular case<sup>12</sup>” According to the Act, once the motion is accepted, the speaker or chairman as the case may be ought to constitute an investigation committee to look in to the allegation of the parliamentarians made against judges. From the provisions of the Judges Enquiry Act, 1968, after the investigation it is evident that the findings of the investigating committee constituted by the parliament as the case by communicating to the speaker or the chairman as the case may be and same is to be placed before each house of the Parliament.

## CHALLENGES IN HOLDING JUDICIARY ACCOUNTABLE

### 1. Impeachment being the sole procedure

According to the Indian Constitution, the only way through which the members of the higher judiciary that is the Chief Justices and Judges of Supreme Court and High Courts are accountable or can be removed is through impeachment. Under **Article 124(4)**, the process of impeachment is carried out only on the grounds of proven misbehaviour or incapacity.

No one being judge has been impeached till date. However, it will be a misjudgement if one thinks that the judiciary is free from corruption. The loophole is the entire process of impeachment itself. It is undoubtedly lengthy and cumbersome.

To begin an impeachment, one needs signatures to pass the resolutions. However, that becomes quite an impossible task since many MPs have their own pending individual or party cases in these judges court, so they are not willing to risk themselves. Conclusive documentary evidences are also required before they put their signatures to the motion<sup>13</sup>.

#### 1. The Veeraswamy case<sup>14</sup>

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

<sup>12</sup> (Haines, 2010, p.923).

<sup>13</sup> Background paper for the Seminar on Judicial Accountability, ‘Securing Judicial Accountability’ p.1, in <http://www.judicialreforms.org/files/securingjudicialaccountability.pdf>

<sup>14</sup> K. Veeraswami vs Union Of India And Others 1991 SCR (3)

the prior permission of the CJI<sup>15</sup>.<sup>10</sup> Again it's not likely that the CJI will allow such permission, as it can bring shame to the entire Judiciary.

## 2. The Ramaswamy case<sup>16</sup>

The impeachment issued by the apex court failed badly due to the lack of majority vote from the Houses of the Parliament. Justice Ramaswamy was charged with misusing the court's fund but was not impeached for the refusal of one of the parties to cast a vote.

## SUGGESTIONS

There is a need for a more nuanced and balanced procedure where we also demand some degree of accountability of assessing the product that comes out of the court, the amount of judicial time that has been devoted to cases and the number of adjournments which are granted.

Seeking accountability is not so much a simplistic issue that can be solved by just bringing the judges to book as it is of a wider dialogue within society of what is it that ails the system and how to find answers within the system while still protecting the its independence. Developing principle within the judiciary to find the issues which is being face is needed to maintain faith of the people in the superiority of the court.

One solution could be setting up a permanent committee of very eminent retired judges who can look into an enquiry and then make recommendations to the Chief justice. An independent enquiry like such would also give answers to the rumours that float around in media.

## CONCLUSION

Quoting Dr. Ambedkar's last speech in the Constituent Assembly is relevant here:

"I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics." One thing which is very general but worth quoting is the concept of judgement. The judiciary pronounces judgements. Judgements include the Court's reasoning and rationale behind the verdict it has propounded. This explanation, too, stands for a form of accountability and review. And in the end, it is pertinent to note that the Constituent Assembly agreed that the judiciary's independence is important but not its insulation. Accountability, if not already existent in its entirety, must come into play and in full force. In the words of Chief Justice Burger of the American Supreme Court, a sense of confidence in the Courts is essential to maintain the fabric of ordered society for free people. It can be conclusively said that this sense of confidence, is impossible without some degree of accountability.

Also, To create confidence and faith of the public it is necessary to adopt the principal of transparency and fairness in the functioning of any democratic institution. Judiciary has forced

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<sup>15</sup> Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in Judicial Accountability, Regal Publications, New Delhi, 2010, p. 8

<sup>16</sup> Sarojini Ramaswami vs Union Of India & Ors on 27 August, 1992

too many other organs of State and institutions to be transparent in its functioning. But eyebrows have been raised by different stakeholders and thinkers about the lack of transparency in the functioning of Indian judiciary itself. The judiciary should have not given this opportunity to others. It is necessary for the judiciary to adopt the transparency in its functioning. The ultimate object of judicial accountability is to maintain public confidence in the judiciary because a legal system works only if the decisions given by the court are being widely acceptable by public. Public will accept the decisions of the court if they are convinced that judiciary is fair, impartial and independent. It means that justice not only should be done but it also must appear to be done. There-fore judges not only should avoid not only any type of impropriety but it should be ap-pear that they do not indulge any type of impropriety. One of the major criticisms against higher judiciary is about the lack of transparency in the appointment and trans-fer of judges. In this regard, judiciary has failed in maintaining the standard of account-ability. Principal of good governance demands transparency in the all sphere of functioning of judiciary. Not only appointment of judges, all over functioning of the judiciary should be transparent and fair. It will increase the faith and confidence of the public in judiciary. It is equally important that while taking the major of judicial accountability the judicial independence should not be compromised.

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