THE JUDICIAL ACCOUNTABILITY BILL: A WATCHDOG FOR A WATCHDOG?

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I. INTRODUCTION

"*The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, is essential to the full and non-discriminatory realization of rights and indispensable to the processes of democracy and sustainable development."*[1] Judiciary is an indispensable organ of State. Judges enjoy many privileges, which are essential for their independent conduct, and thus an effective justice delivery mechanism. Interference by any other branch is perilous to autonomous exercise of power by the judiciary. Does this mean in any way that the power of the judiciary and the judges is absolute?

Every institution is governed by a set of principles. The Judiciary is constitutionally entrusted with the fair and just resolution of disputes, is pledged to preserve the rule of law and to protect the rights and liberties guaranteed by the Constitution and the laws of the land, and hence it is vested with a wide jurisdiction. It is entrusted with the duty of providing equal access to a fair and effective system of justice for all without excess cost, inconvenience, or delay, with sensitivity to an increasingly diverse society where new issues arise every day and to

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[1]Vienna Declaration on Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 27.

quality service that continuously improves and meets or exceeds public expectations, and that ensures that all are treated with dignity, and respect. The very foundation of Judiciary is the liberty, dignity and freedom of individuals, besides a set of values[2] that are purported to be adopted and followed with holy reverence by everyone associated with the system, particularly those in the higher reaches.

As per the dictionary, the word accountability means "responsibility to someone for some activity". Accountability disallows the growth of corruption, nepotism and arbitrariness. It would not be an exaggeration to say that accountability fosters good governance, whose main ingredients can be identified as openness, fairness, reasonableness,[3] rationality and participation coupled with an effective means of grievance redressal mechanism for the constituents. These components themselves emphasize the need for accountability.

II. CASE FOR ACCOUNTABILITY

Every institution is responsible to its constituents, for whom it was created. The State is responsible to its citizens, the Parliament to the electorate and the Executive to the Parliament. The question that now arises is whether the judiciary is a public institution. Essentially, the judiciary is an instrumentality of State. This is sufficient to say that judges are public servants. This question arose in the case of *K.*

[2] The term 'values' refers to the values formulated as Restatement of Values of Judicial Life considered in the Full Court Meeting of the Supreme Court on 7th May, 1997 and adopted in the Chief Justices' Conference in December 1999 for due observance by all judges of the country.

[3] This was first suggested by Lord Greene, MR as an 'umbrella concept' covering the major heads of judicial review in the case Associated Provincial Picture Houses Limited v. Wednesbury Corporation, (1947) 2 All ER 680. This was read into Article 14 of the Indian Constitution by the Supreme Court of India in a plethora of cases; Maneka Gandhi v. Union of India, AIR 1978 SC 597, para 7, pp. 283-284, D. S. Nakara v. Union of India, (1983) 1 SCC 305, para 11, p. 315.

Veeraswami v. *Union of India*,[4] where the majority decision held that judges fall within the definition of 'public servant' under Section 2 of the Prevention of Corruption Act, 1947. However, what is of significant interest is the view held by K. Veeraswami, former Chief Justice of the Madras High Court, with regard to this case:

"The minority view of Verma, J. that they are 'but constitutional functionaries holding the office of a judge, not public servants' is the only correct one. The judge functions as a judge. He is the court, a third branch of the State itself. And such a court is not and cannot, by any stretch of imagination, be a servant or public servant. The majority view requires review and reconsideration in public interest as it concerns all the judges of the Supreme Court and High Courts, the superior Judiciary of the country."[5]

This view seems amazing as well as amusing. It is directly aimed at absolving the higher Judiciary of any kind of accountability. Court is a public institution and a judge is an officer of that organ of the State. Thereby he is a public servant and is accountable to the public. A judge is not 'the court'; he is only a significant instrumentality of the court. The judiciary has left its power of interpretation free from any limitations. This judgment is one such example, where it attributed to itself a status unimaginable in a democracy.

Constitutional morality and judicial values are both inextricably entangled to deliver justice to the sovereign mandate. Morality envisaged in the Constitution is meaningful when it is judiciously protected for the welfare of the people. The judiciary being the custodian of the Indian Constitution is entrusted with an obligation to incorporate judicial values in its undertakings to ensure the

[4](1991) 3 SCC 655, para 35, p. 697.
[5]K. VEERASWAMI, WHITHER LAW AND JUSTICE 23 (Eastern Law House, New Delhi) (2001).

achievement of constitutional goals.[6] In the course of this paper, the authors shall identify four significant issues regarding accountability and make out a strong point for the need to create an effective institutional mechanism to tackle the same, inter alia mentioning other suggestions.

III. APPOINTMENTS – WHITHER COLLEGIUM

It is a known fact that the appointments to the higher judiciary are made on the basis of a system called collegium, according to which, for the purposes of Articles 124 (2) and 217 (1) of the Constitution of India, the opinion of the Chief Justice of India who in turn consults four senior-most judges of the Supreme Court 'has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India.'[7] However, if two of the four judges consulted disagree on some name, it cannot be recommended to the President.[8] Prior to this, in the case of *S.P. Gupta* v. *Union of India*,[9] a judgment also called a 'self inflicted wound' by a Senior Advocate of the Supreme Court, T.R. Andhyarujina,[10] the Supreme Court held that the government should have the last word with regard to the said appointments and that the opinion of the Chief Justice of India was not binding. Independence of the judiciary is threatened when the Executive has the final say. This is evident when we read this entry

[6]Minu Elizabeth *Scaria, Constitutional Morality and Judicial Values, 2008*, available at http://www.legalserviceindia.com/article/l186-Constitutional-Morality-And-Judicial-Values.html (last visited August 24, 2011).
[7] Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441, para 451, p. 693.
[8]Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739, para 22, p. 765.
[9]1981 Supp SCC 87, para 31, pp. 231-232.
[10]CONSTITUTIONAL PERSPECTIVES: ESSAYS IN HONOUR AND MEMORY OF H.M. SEERVAI 14 (VenkatIyer, ed.) (2001).

about the appointment of new judges to the Punjab and Haryana High Court made by B.N. Tandon, a civil servant, in his diary:[11]

"One name was under consideration last year also but in the end, the Chief Justice declined to entertain the proposal on the grounds that his integrity was suspect. But the position has changed now even though neither the state government nor the high court has proposed his name…Surely, some political pressure is being exerted. Some years ago, this gentleman was in politics and was a minister as well. Gokhale said he could not go against the Chief Justice until the PM's election petition had been disposed of. It will come in appeal regardless of who wins. Whatever the Chief Justice says should be done. We may need his help…"

The political masters and their judicial counterparts seem to be engaged in ensuring mutual benefit for each other. This would defeat democracy as a whole and therefore, the question of giving the power of appointment solely to the Executive does not arise at all. At the same time, we cannot have democratically elected judges, owing to the formality of the institution and the fact that a majority of the people still lacks proper information because of reasons like illiteracy.

But the Roman adage based on the principles of natural justice which says that 'whatever touches us all should be decided by all' is defeated when the judiciary assumes the responsibility of appointments. There is absolutely no voice for the public, who are ignorant of what goes on between the judges. This has to be seen in contrast to the systems followed in the United Kingdom and the United States of America. While in the former the Lord Chancellor is helped in selection by an Appointment Committee which may consist of representatives from the Bar, the Bench and the Law Society, there is a Senate Judicial Sub-Committee in the latter through which people

[11]B.N. TANDON, PMO DIARY I: PRELUDE TO THE EMERGENCY 375-376 (Konark Publishers Pvt. Ltd., New Delhi) (2002).

voice their concern to their elected representatives. The present system followed in our country is nothing short of being totally secretive and in contrast to the transparency battles being waged by civil society. It is submitted that neither the civil society nor the executive nor the judiciary *alone* will constitute an effective institutional mechanism for appointment. There is a need to set up a system which encompasses views from different quarters of society. Presence of elected representatives along with nominees of civil society with proven record of sincerity and dedication to duty will make the appointments through the system efficient and transparent to a great extent.

IV. TENURE OF THE CHIEF JUSTICE OF INDIA

Another important issue is the tenure of the Chief Justice of India. The age of retirement of a Supreme Court judge is sixty-five years and that of a judge of a High Court is sixty-two years. The Chief Justice of India shoulders tremendous responsibility. Besides having to deal with appointments, he sets the tone for the administration of justice in the country. The Chief Justice of India is vested with wide administrative powers. This is exemplified by the action of Dr. K.G. Balakrishnan, who, through a letter to the Prime Minister recommended that the impeachment proceeding against Justice SoumitraSen be initiated by the Parliament, moving away from the procedure mentioned under Article 124 (4).[12]

The following table, which is an analysis of the tenure of the thirty seven retired Chief Justices of India[13], presents a grim picture. It is

[12]Editorial, *Impeaching Justice Sen*, THE HINDU, November 12, 2010.
[13]Supreme Court of India, *Retired Hon'ble The Chief Justices of India, 2011*, available at www.supremecourtofindia.nic.in/judges/rcji.htm (last visited May 31, 2011).

noteworthy that there were only two judges whose tenure was more than four years.

Tenure of the CJI	Number of Judges
Upto one year	16
One-two years	9
Two-three years	6
Three-four years	4
More than four years	2

In view of the short time available to the Chief Justice of India, it is submitted that he cannot be expected to bring in the changes that are capable of making the system effective. Cleansing and conditioning a system is a Herculean task, which consumes time and other resources tremendously. Compare this situation with that of the Executive. Every elected Government has a fixed tenure provided by the Constitution. It then frames policies accordingly and sets the targets to be achieved within the available time span. The intricacy of the myriad issues in various sectors that it has to look after necessitates that it has ample time at its disposal to address the concerns and take progressive steps. Suppose the Government is subject to change every now and then. There would also be a frequent change in the policies and programmes, thereby obstructing the accomplishment of any of the policies. A fixed tenure aids in planning and ensures that the targets sought to be achieved are met. However, despite thrusting immense responsibility on the Chief Justice of India to foster discipline in the judicial system, the Constitution does not provide for any fixed tenure for the post. This indicates a flaw in the present system. The Chief Justice is not a Pied Piper for the vices and knotty

issues in the system that he will drive them away to doom, howsoever short his tenure may be. Therefore, the present system which lays emphasis upon the role of the Chief Justice of India in disciplining the system cannot be said to be effective.

V. IMPEACHMENT – A PROCEDURE TOTALLY INEFFECTIVE

Nani A. Palkhivala has said: *"If you lose faith in politicians, you can change them. If you lose faith in judges you still have to live with them."*[14] Our Constitution provides for an elaborate process to remove a judge from office under Article 124 (4). The intention of the framers was to ensure that the Executive does not intimidate the judiciary. Further, independence of the judiciary is of paramount concern for a nation where rule of law is upheld. However, is this process of impeachment effective in the light of the fact that it is time-consuming and susceptible to political pressures? In this scenario, can there be an in-house mechanism to set the house in order?

In the case of *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee*[15] the Supreme Court addressed the question that when a judge cannot be removed by impeachment for conduct which generates dissatisfaction amongst the general public, who would stamp out the rot. While Bhattacharjee resigned following an uproar, the Supreme Court emphasized the need to evolve a method of self-regulation by the judiciary in such cases of alleged misconduct.[16] Responsibility was placed upon the Chief Justice of India. There have been many documents circulated and identified, for instance, the Restatement of Values of Judicial Life and the Bangalore Principles of Judicial

[14]M.V. KAMARTH, NANI A. PALKHIWALA – A LIFE 343 (Hay House India, New Delhi) (2007).
[15](1995) 5 SCC 457, para 35.
[16]V. Venkatesan, *Judging the Judges*, 14 FRONTLINE 142, 142 (1997).

Conduct, 2002.[17] It is however, to be kept in mind that these documents do not have any statutory backing. A judge against whom allegations have been made should definitely get a chance to represent himself. But should this necessarily precipitate into a lengthy and rarely ending process?

More often than not, the case is put to rest by transferring the allegedly errant judge under Article 222 of the Constitution. R. Venkataraman, former President of India, wrote in his memoirs: "In the case of Justice S.K. Desai, *the knotty problem of the competence of the Chief Justice to order an inquiry or other measures against the judges of the High Court was circumvented by transferring the judge to another High Court."*[18]

VI. TRANSFER – IS IT THE PILL FOR ALL ILLS?

The provision for transfer of judges was proposed by the Constituent Assembly's Drafting Committee only at the final revision stage in November, 1949.[19] The policy of general transfers of judges which was introduced in 1975 was grossly misused during the regime of Indira Gandhi when several politically motivated and punitive transfers were made. This was despite the then law minister's assurance to the Parliament that no transfers would be effected without the prior consent of the judges concerned.[20]

[17]See *Supra* n. 2.
[18]R. VENKATARAMAN, MY PRESIDENTIAL YEARS 393 (HarperCollins Publishers India) (1994).
[19]MADHAV GODBOLE, THE JUDICIARY AND GOVERNANCE IN INDIA 534 (Rupa& Co., New Delhi) (2009).
[20]GODBOLE, *Supra* note 19, at 535.

Justice Rajinder Sachar expressed his views[21] with regards to the issue at hand and termed it unfortunate that transfer was generally being used as a tool to counter the problem of misbehaviour by judges. Of late, this policy is being used in case of serious complaints against judges. Another policy adopted is to ask the judge concerned to retire. For instance, Chief Justice Gajendragadkar used both of these, but in his autobiography[22] he was apologetic for doing so even though the complaints against the judges were widely accepted to be true. The irony at that time was that the judge was transferred to his own home state and when the other judge was asked to retire for understating his age, he was already older than the retirement age![23]

The moot question now is whether transfer or retirement can undo the incorrect act of the judge. Should he not be held accountable and his misdeed exposed before the public? Why is it that there is so much secrecy and opaqueness? It is interesting to note the judgment of the Supreme Court in the case *Indira Jaising* v. *Registrar General, Supreme Court of India and Another*[24] wherein the issue of making the reports of investigation committees public was debated. While dismissing the petition, the court observed that the report made by the committee is confidential and discreet, and only for the purpose of the Chief Justice's information. The Court went on to say since the judges of the superior courts hold very high positions; they cannot be subjected to disciplinary proceedings, which exist in the case of all

[21] "The policy of non-consensual transfers would weaken the Judiciary. I, however, found my position getting weaker by admitted misbehaviour of some of the judges, especially in the matter of their relatives practicing in the same court…Unfortunately, instead of promptly facing this problem of misbehaviour of individual judges, a general policy of transferring one-third of all judges from their parent High Courts to other High Courts was followed for the last so many years…": Some Aspects of Judiciary by RAJINDER SACHAR, THE CITIZEN AND JUDICIAL REFORMS UNDER INDIAN POLITY 70 (Subhash C. Kashyap, ed.) (2003).

[22] JUSTICE P.B. GAJENDRAGADKAR, TO THE BEST OF MY MEMORY 165-170 (Bharatiya Vidya Bhawan, Bombay) (1967).

[23] GODBOLE, *Supra* note 19, at 563.

[24] (2003) 5 SCC 494, para 3, pp. 496-497.

other employees. If this is the case, how can the very same judiciary direct that action be taken against Cabinet Ministers? They hold very high positions too, then why these double standards?

It is hereby submitted that transfer of an errant judge cannot be the pill for all ills. Any misdeed should not go unpunished and transfer is no punishment. It is indeed an opportunity to continue with the misdeeds albeit at a different place. The Supreme Court itself observed in *Supreme Court Advocates-on-Record Association and Another*v. *Union of India*,[25] that transfer in accordance with Article 222 of the Constitution cannot be treated as punitive.[26]

VII. THE ROAD AHEAD

Krishna Iyer, J said, *"The Judiciary being a fiduciary, its power, as a democratic instrument, must be tested, tuned and transformed to redeem its tryst with the people to deliver justice, law being the means and the Constitution setting the operational parameters. Management of judicial power, like management of any other business must suffer reforms…"*[27] This observation clearly points to the requirement of reforms in the judicial system. Judiciary is a repository of the faith of the people, a faith that it will redress their problems and help in enforcement of their rights. In the wake of rising allegations of

[25](1993) 4 SCC 441, para 472, p. 700.

[26]"The power of transfer can be exercised only in 'public interest' i.e. for promoting better administration of justice throughout the country. After adoption of the transfer policy, and with the clear provision for transfer in Article 222, any transfer in accordance with the recommendation of the Chief Justice of India cannot be treated as punitive or an erosion in the independence of judiciary. Such Judges as may be transferred hereafter will have been, for the most part, initially appointed after the transfer policy was adopted and judicially upheld by this Court. There will be no reason for any of them to even think that his transfer is punitive, when it is made in accordance with the recommendation of the Chief Justice of India." (Para 62).

[27]V.R. KRISHNA IYER, A JUDGE'S EXTRA JUDICIAL MISCELLANY 30 (B.R. Publishing Corporation, Delhi) (2001).

corruption and dishonesty, it is necessary that judiciary as an institution 'redeems' the trust of the people. The time has now come to clean the mess. The constantly rising number of allegations of misconduct, son-stroke and uncle-judge syndrome cannot be brushed aside simply by saying that the office of a judge is sacrosanct. Whether the office of the judge is sacred or not is not the pertinent point. The conduct of the judge when it evokes public resentment and shakes the faith of the people must be investigated and if proven, serious action must be taken. All this needs to be done in a time-bound manner.

Firstly, the much debated National Judicial Commission with the powers of investigation and removal should be created. This body should be representative in character, providing ample space to the Bench, Bar, political class and the general public. The Commission may have the Chief Justice of India as its Chairperson, with the Attorney General of India, a representative each of the Government and the Opposition, two senior advocates of the Supreme Court and two eminent citizens nominated by the President after consultation with the ruling and the Opposition parties as the other members. When the body deals with complaints against the judges of High Courts, it may additionally consist of the Chief Justice of that High Court and two advocates representing the State Bar as members. This Commission should be a wide body bestowed with the power of appointment of judges, which can be centralized like the civil services. This would mean doing away with the collegium system, which is a welcome step. Because the Commission will be varied and representative of different interests in its composition, it can be expected to be impartial and unprejudiced. The Commission should also have the power to remove a judge from office for conduct which amounts to bad behaviour but not impeachable behaviour. For behaviour to be 'impeachable', it should fall within the meaning of the word 'misbehaviour' used in Article 124 (4) of the Constitution.

The distinction between the two kinds of behaviour can be understood from the following observation of the Hon'ble Supreme Court:

"Every act or conduct or even error of judgment or negligent acts by higher judiciary per se does not amount to misbehaviour. Wilful abuse of judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude would be misbehaviour. Misconduct implies actuation of some degree of mensrea by the doer. Judicial finding of guilt of grave crime is misconduct. Persistent failure to perform the judicial duties of the judge or wilful abuse of the office ***doles malus*** *would be misbehaviour. Misbehaviour would extend to conduct of the Judge in or beyond the execution of judicial office."*[28]

It should have the power to take a decision and direct removal of the judges as used to be done under the Government of India Act.[29] Also, the procedure of promotion being given on the basis of number of years of service should be amended. Promotions should be based on the track record concerning disposal of cases. A wing of the National Judicial Commission may act as an evaluator of performance. Thus, the powers of appointment, evaluation of performance, independent investigation of allegations and removal should be vested in the proposed Commission. Above all, it is important that the Commission is itself bound by limitations of time imposed by the statute creating it.

Secondly, it is hereby proposed that the age of retirement of the judges of the Supreme Court of India be raised to sixty-eight years and that of the judges of the High Courts to sixty-five years. The tenure of the Chief Justice of India and the Chief Justices of the High

[28]Per K. Ramaswamy, J in Krishna Swami v. Union of India and Another, (1992) 4 SCC 605, para 71, p. 651, cited in C. Ravichandran Iyer v. Justice A. M. Bhattacharjee and Others, (1995) 5 SCC 457.

[29]*Why Has the Judiciary Failed?* by SHANTI BHUSHAN, THE CITIZEN AND JUDICIAL REFORMS UNDER INDIAN POLITY 35, 42 (Dr. Subhash C. Kashyap, ed.) (2002).

Courts needs to be fixed, just as the government which is subject to change every five years. Only those judges who have the required number of years of service left should be considered for elevation. A fixed tenure is definitely advantageous to make progressive changes and also for the purpose of evaluation.

Thirdly, there should be periodic training and testing of the competency of the judges. This may be fulfilled through the existent National Judicial Academies.

Fourthly, an element of transparency needs to be brought in by making public the reports of investigation against allegedly errant judges. Also, an audit of the number of pending cases needs to be conducted from time-to-time. The findings of the audit should be definitely presented in the Parliament and the respective State Legislatures and the judge placed highest in hierarchy within the particular jurisdiction should be required to give reasons for the pendency, through the Law Ministry.

Lastly, the budgetary allocation for judiciary and the salaries of judges needs to be increased. It is completely accepted that the Government cannot compete with market forces. Nevertheless, it can at least bring the salaries near to the existing market prices in order to attract talent from the national law schools and other institutions of repute. Here, it would be pertinent to note that the proposed National Judicial Commission should not be viewed as a threat to the independence of the judiciary or be seen as a mere watchdog of the judiciary. It should be conceived as a means of democratization of judiciary by combining the existing in-house procedure of the judiciary with the aspirations of the people in this information era. It shall only streamline the system and make it more accountable and acceptable to the people.

VIII. CONCLUSION

As the Constitution was promulgated, the judiciary – despite failings well known and confirmed so studiously by the Law Commission – was the most respected of the three branches of government.[30] The public has faith and confidence in the judiciary and they approach the judiciary for just and fair decisions.[31] It is important that this respect is renewed and increased in magnitude. Undoubtedly, independence of the judiciary should be safely protected; but this cannot be used as a shield against public scrutiny, our nation being a democracy and accountability being intricately woven into its fabric.

Judges are not different from other public officials. They only interpret the law; they are not 'the law'. It is to be always remembered that law is stable but it cannot afford to stand still. Someone may be high or higher, but the law is the highest. By its very characteristic, law being dynamic demands that it adapts itself to changes in society. How can the judiciary be immune to the alterations and modifications in society? How can it claim itself to be holy and infallible, above the systems purporting to be set up to ensure accountability, that too in the wake of allegations of corruption becoming stronger?

The phrase *'Satyameva Jayate'* captures the essence of the visions and ideals of the judicial system in India.[32] Judiciary is one organ which, by punishing the guilty, infuses faith in the citizens regarding the supremacy of law and the omnipotence of justice. The judicial system in India has sought to be a defender of the rights of the people. This institution continues to be one of the most revered and the most adulated of all the organs of the State, more so in the wake of it being

[30]GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION 141-142 (Oxford University Press, New Delhi) (1999).
[31]A. K. Behera v. Union of India and Anr., (2010) 11 SCC 322, para 43.
[32]Mansi Trivedi, *Supreme Court is the Final Pedestal for Justice*, 2009, available at http://www.legalserviceindia.com/article/l386-Supreme-Court-is-the-final-Pedestal-for-justice.html (last visited August 25, 2011).

vocal with regard to issues affecting the common man, for instance, the issue of black money. It is for this reason that there is concern among the people about lack of transparency in judicial appointments. Also, there is a sense of increasing discomfort because of the lack of a credible mechanism to deal with serious complaints against the higher echelons of the judiciary. In the backdrop of all allegations of erosion of the judiciary and its values, it is important that steps that reinforce the public confidence and stop the judiciary from becoming an arrogant institution are taken.

Accountability is the hallmark of democracy and thus, a *Judicial Dictatorship* is not better than any other kind. We want a judiciary which is accountable to the people, sensitive to their issues and responsible to its cause, rather than an institution which merely adds to the existing chaos and further complicates the situation. An anti-corruption wave has firmly gripped the entire nation and the judiciary cannot escape from it by taking refuge in a few principles like its superiority and independence.