

WANING JUDICIAL ACCOUNTABILITY- ANTITHETICAL TO THE IDEA OF DEMOCRACY

- Sharadindu Shekhar*

Abstract: *Indian polity is under acute tension. Faith of the people in the fairness, uprightness, and competence of governmental institutions stand seriously eroded. They turn to the judiciary as the last bulwark of hope. But of late, even here things are getting proliferating and disturbing and one is unfortunately no more in a position to say that all is fine within the judiciary. The independence and impartiality of the judiciary is one of the hallmarks of the democratic system of the government. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favour. In this article, the analysis of the need of fading spirit of judicial accountability is done in the light of various factors and suggestions have been advanced in order to ensure the same.*

The three divisions of the Indian government- Legislature, Executive and Judiciary discharge crucial functions of regulation through formation of rules, application of the rules and rule adjudication respectively. The main driving force behind this concept is based on the simple saying that 'power corrupts man and absolute power corrupts absolutely'. There is another principle working in tandem with the separation or the balance of power i.e., checks and balances. This particular theory holds that no organ should be given unchecked powers. The power of one organ should be checked and restrained by the other two, in order to maintain and secure balance. Democratic governance works on checks and balances. There are hundreds of elected representatives including the Prime Minister invested with authority, power, and immunity. Naturally, in such a broad spectrum of redistributed power there is a need to enforce accountability from above so that the interests of the sovereign i.e., people is safeguarded. Accountability is the prerequisite condition for a healthy democracy. Realizing this, the framers of the Indian constitution invested the judiciary with the role of the "enforcer of accountability". They made the judiciary the guardian of our constitution and handed it over the role of the watchdog with the prime motive to enforce accountability among public servants.

Why do we need accountability from judiciary? This is very aptly stated by this quote- "A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system."¹ A campaign initiated by the people's accord on Judicial

* Sharadindu Shekhar is a student at School of Law, Bennett University.

¹ Anil Divan, 'Judicial Integrity', p.1, in http://www.judicialreforms.org/files/Hindu_judicial_integrity_lessons_from_the_past.pdf, accessed on 25th of March, 2020

Accountability and Reforms had mentioned, “The judicial system of the country far from being an instrument for protecting the rights of the weak and oppressed has become an instrument of harassment of the common people of the country.... The system remains dysfunctional for the weak and the poor... (and has been) displaying their elitist bias.”² In this regard, Mona Shukla has jotted down three promotions done by judicial accountability: Firstly, it promotes the rule of law by deterring conducts that might compromised judicial independence integrity and impartiality. Secondly, it promotes public confidence in judges and judiciary. Thirdly, it promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.³

In such a scenario, Indian judiciary, though being an integral part of the system, was given the role to guard the system against encroachment. What intensified the situation was the structure that was devised for the judiciary. While executive action and even legislation could conveniently be declared void by the courts, the directions of the courts, sometimes issued even without notice to the affected parties, were beyond question, and had to be obeyed before the threat of the contempt. The landmark judgment of *Kesavananda Bharti v State of Kerala*⁴ in the year 1973, the Supreme Court acquires the power to strike down even constitutional amendments which were held by the court to violate the basic structure of the Constitution. Even more centripetal was an intelligent interpretation of the provision regarding appointment of judges of the government and by this the court took over the power of appointment of judges. The evident example was the attempt to introduce the role of legislature and executive in the process of appointment of judges through the National Judicial Appointments Commission (NJAC) being struck down by the judiciary as void.⁵ This raises a question, while comparing the situation prevailing in that of the United States and the United Kingdom respectively, that the British judges do not see the presence of Lord Chancellor as a threat to judicial independence and also the American judges do not see the role of Senate as a threat to their independence, then why is it that only the Indian judiciary feels it a threat to have the say of legislature and executive as an impediment in their affairs. Now, appointment of the judges of the Supreme Court and High Courts are carried out by a collegium of senior judges of the Apex Court. There is no laid-out system to be followed in the appointment and no transparency whatsoever. And to cap all these, the procedure to dismiss the judges of the High

² 18 Mona Shukla, ‘Judicial Accountability: an aspect of judicial independence’ in Judicial Accountability, Regal Publications, New Delhi, 2010, p. 4

³ Supra At 2, p.4

⁴ *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973) 4 SCC 225)

⁵ *Supreme Court Advocates-on-Record - Association & Anr. v/s Union of India* (WRIT PETITION (CIVIL) NO. 13 OF 2015)" (PDF). Supreme Court of India. 16 October 2015. Retrieved 24 March 2020.

Court and Supreme Court has been rendered by the Constitution too elaborate to be ever followed. The procedure of impeachment which ultimately requires the nod of 2/3 majority of both the houses of the Parliament (and before that a complex layout for determining charges) is such that after 1947, it has taken place only once successfully, though we have hundreds of charges lying against the judges.

The end result is that Indian judiciary enjoys virtually authoritative and unbridled competence unsurpassed by any court in the world. One instance of the Constituent Assembly debates on the issue of judicial independence and appointment of judges, Hon'ble Member T.T. Krishnamachari made a notable intervention. Krishnamachari mentioned that while a complete separation of power between the judiciary and the executive may be good to envisage on paper, it may not work in actual practice. He said, "To put the Constitution of the country in a straight-jacket by giving undue power to the judiciary at a time when we know that in the matter of recruitment to the judiciary, we are not able to get 'A' Class men at all, is unwise."⁶ He feared that a judiciary with enormous power and no means of control by the legislature would, perhaps, create a Frankenstein which would nullify the intentions of the framers of the Constitution. The result we see today that our judiciary has transparency worth the name in its function. Probably, our constitution makers visualized judges to be super humans away from every mortal frailty. But they are not, in fact. They are also like us, very much prone to every sort of 'inducements'. The present lack of accountability which facilitates transparency has been best put forward by Pt. Jawaharlal Nehru in a diatribe, "judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them." Hundreds of allegations, proven or alleged, point to the fact that the judges have also succumbed to temptations more often than not. Such charges of misconduct or improbity are often reinforced by abysmal lack of transparency in their functioning. If the perception of the judges behaving like ordinary mortals gets established in the psyche of the general mass, it will prove chaotic because today amidst every public institution getting diseased by the virus of corruption, a common man looks to the judiciary as the only salvager.

That is why, bringing about accountability is necessary not only to restore judiciary to its pristine health but also to prevent the entire system from collapsing.

For this, the norm of absolute immunity on the part of the judges should be replaced with a limited immunity so that the judges should discharge their duties without fear of civil suit. However, this immunity should be non-functional in the event of criminal and corruption charges. Next, there

⁶ Constituent Assembly Debates VII, p. 583-84.

should be an independent body to investigate charges against the judges. The investigation process has to be transparent and sedulous. If charges are upheld, the accused judges should be removed. Then, the judiciary must frame an elaborate code of judicial conduct which they did in the form of adopting a charter called the 'Restatement of Values of Judicial Life'⁷ in May 1997. It serves as a guide for an autonomous, non-partisan and fair judiciary. The charter is "a complete code of the canons of judicial ethics" and precisely advocates and acknowledges important values to be adhered and cherished by the Honourable Judges. By virtue of the Charter, the manner and functioning of members of the higher judiciary must re-establish people's belief in the neutrality and fairness of judiciary. Consequently, any act of the judge of Supreme Court or a High Court which subverts the plausibility of this perception must be avoided and breaches of this code must be investigated and sanctioned by a judicial body.

The judiciary is the bastion of democratic spirit. We cannot afford to weaken them, as have happened with other institutions of public life. But we cannot afford too, the guardian behaving as a compartmentalized oligarchy functioning above all and defending its ill acts in the name of defending Constitution.

⁷ Prashant Bhushan, "judicial accountability", Economic and Political Weekly, vol. XLIV No.37, 12th September, 2009, p.10 in <http://www.judicialreforms.org/files/EPW%20judicial%20accountability%20asset%20disclosure%20and%20beyo nd.pdf>, accessed on 24th March, 2020.