

Procedural and Substantive dimensions of Judicial Accountability

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In a democracy, accountability must be comprehensively shared and coordinated by public office bearers including bureaucrats, politicians and judges. They all should remain accountable to the people. In India when the representative institutions and public agencies are alleged to have been failing in fulfilling their core duties assigned to them, Judiciary has come forward to open its doors to the masses. Image of the court and credibility of judiciary in this process gets determined by the manner in which judges discharge their duty. Judicial accountability of judges is therefore vital for Democracy. Several Constitutions in the world have already provided for ensuring the accountability of judiciary. Experiences regarding the performance of higher judiciary in India for the last seven decades are very interesting and of mixed one. There are number of judges who remained capable, unbiased, credible and impartial but allegedly there is also a flip side to this. In the name of independence of judiciary, no judges are immune from criticism for his non judicial behavior. Judges have the immunity for acts in discharging of their judicial duty only.

Procedural accountability

The Constitution of India offers an elaborate framework with enabling provisions for procedural accountability of judiciary. Working of the Constitution over seven decades in India has shown a tussle between the primacy of accountability and independence of judiciary, in particular higher judiciary.

The issue of judicial independence is closely related to the legitimacy of the decisions which judiciary takes, and also upon a public perception about it whether it is independent and non-political or not. Non-political means judges are not associated in any way to any political party. When Allahabad High Court found that Mrs. Indira Gandhi had used government machinery and corrupt practices to win the election, her election result was declared invalid.¹ Undoubtedly it was a political decision but it was taken on the basis of evidence. So judges need not be political but should be independent, fearless and impartial. Independent means free from any pressure, influence, social, political or economic. Fearless means judges should not be afraid of any consequences of the decision made by them.²

There have been tussle for primacy in the appointment of judges between executive and judiciary from the very beginning. Before independence, the appointment procedure was governed by 1935 Act, Section 220(2) which provided that a judge of the High Court would be appointed by the Governor General after recommendation of the governor of the province with prior consultation with the chief justice of the High Court.

The matter of appointment of Judges was extensively discussed in the constituent Assembly. A special committee

consisted of noted advocates like S. Varadachariar, Alladi Krishna Swami Ayyar, B.L. Mittar, K.M. Munshi, and B.N. Rau was given the responsibility to give report on the powers and position of the Supreme Court.³ Committee was not in favor to give the discretionary power of appointment of judges to the executive, it rather suggested two alternative methods. One was that the President would make a nomination after consulting CJI subject to confirmation by minimum seven out of eleven persons. They all were High Court Chief Justices, members of Central legislature and law affairs of the central government.

The other method recommended by the committee was that a panel would suggest three names for every single vacancy and the President would finalize the name in consultation with CJI. But in the appointment of CJI, same methods would be adopted except CJI will not be consulted.

Since 1950, judges were appointed by the government in consultation with the Chief Justice of India. Next twenty years, there was nearly the same view between the Chief Justice of India and the government. For the first time, the question arose whether the word 'consultation' referred to in the Article 124(2) and 217(1) with the Chief Justice of India meant 'concurrence' where the recommendation of the judiciary is binding on the government. In the year 1981, S.P. Gupta case, court decided by a majority that the recommendations made by CJI were not binding on the government.⁴ Now the government was free to disobey the recommendation made by the judiciary.

In Second Judges Case 1993, once again the appointment issue was taken to the Supreme Court and the Judgment in the S.P. Gupta case was overruled. The bench of nine judges opined that a collegiate opinion of a collective of judges is binding on the government and finally established the primacy of judiciary in the matter of appointment of judges for constitutional courts over executive.⁵ However, majority suggestion in the First judge case had also focused on consultation with collegiums for recommendation to the President regarding the appointment of judges of Supreme Court and High Courts. Several legal luminaries have expressed their opinion over the issues involved in Second judges Case. The Attorney General Millon K. Banarjee had argued in the Second Judges Case that the word 'Consultation was altogether different from Concurrence'.⁶ Regarding the High Court judge's appointment, it is very problematic to give priority or primacy to any of them or whose recommendation should be acknowledged, whether they are Chief Justice of

³Granville Austin, *The Indian Constitution Cornerstone of a Nation*: OUP, New Delhi 1999, p 211.

⁴*S.P. Gupta v. Union of India*, AIR 1982 SC 149: (1981) Supp. SCC 87.

⁵Supreme Court Advocates-on-RECORDS v Union of India, (1993) 4 SCC 441: AIR 1994 SC 268.

⁶Supreme Court Advocates-on-Records v. Union of India, (1993) 4 SCC 441,498.

¹ *Indira Gandhi v. Raj Narayan* AIR 1975 SC 2299.

² S P SATHE, *Judicial activism in India: Transgressing Borders and Enforcing Limits*, OUP, IInd Edition, New Delhi, 2002, p294.

concerned High Court, Governor of the concerned state or Chief Justice of Supreme Court of India. Justice R.S. Pathak is of the opinion that giving primary to Chief Justice of Supreme Court over the Chief Justice of concerned High Court or Governor of the state is clearly against the provision of 217(1). Sr. Advocate in the Supreme Court K. Parasaran says that security of tenure is very important for judges in Highest Judiciary and for Independence of Judiciary also. But while interpreting art 217, principle of hierarchy should not be applied because when President is advised by two chief justices, one of the High Court and the other is of the Supreme Court, then for the President, matter of appointment of High court judges is functional not hierarchical. He argues that the Supreme Court has not been given Supervisory jurisdiction over the High Court's as in the case of High Courts over the subordinate Judiciary in the state.

Senior Advocate Shanti Bhushan, on the issue of appointment of judges and judicial accountability commented that the President is bound by the advice of the council of ministers in exercise of executive functions only. But in the appointment of judges, President is bound by the advice of the CJI because he/she may be the best person to decide the suitable candidate for judgeship.⁷ Although persons with active political carrier have proven to be an unbiased and good quality judges like Krishna Iyer, P.B. Sawant, K.S. Hedge etc. But definitely in a common people's perception, Judges of the Higher Judiciary is above politics and they are considered to be of clean image.

Political and legal fraternity was surprised with the selection procedure of the judges after the decision in the Second judges case. It was considered less a judicial decision and more a legislation for the appointment procedure to the higher judiciary which is binding on the government.

In 1998, Third Judges case, collegium's number was raised to five, known as 'third judges' case. After this judgment, the word 'Consultation' began to be understood as 'concurrence' under Art 124, 217 and 222, however, the court had interpreted the meaning of consultation as 'primacy', rest with the Chief justice of India'. In exceptional cases, as per Second judge case, government could refuse to accept the recommendation citing strong and valid reason. But it is upon the CJI and other judges of the Supreme Court who had been consulted earlier on the matter to either accept or reject. After rejection, the government was bound to accept the recommendation.

The 99th Constitutional Amendment Act with NJAC brought the major changes in the procedure of appointment by replacing the collegiums with six members.⁸ NJAC consisted along with the CJI, two senior most judges of the Supreme Court, Union Law minister and two eminent persons. Both the eminent person was to be chosen by a selection committee of three members. They are CJI, Prime minister, and leader of the opposition in the Lok Sabha. The term of the eminent person would be of three years while other members of NJAC

would be ex-officio. For government, the eminent person may not necessarily be from legal background which was very uncomfortable situation for the majority of judges of the Supreme Court.

Second Controversial issue was principle of 'Special majority' introduced in the section 6(6) of the NJAC Act, which any two members of the NJAC could reject a recommendation made by others. Through this way to give favor to political class, any judge could have been superseded.

Third flaws in the Act were that section 5(1) of NJAC recommends for appointment of the senior most judge as CJI, If considers fit but no definition of fitness is mentioned in the Act.

Fourth issue was that inclusion & law minister in the NJAC means frequent interaction and internal meetings which is not healthy for the independence of judiciary because government is normally the biggest litigant before High Courts and Supreme Court.

The NJAC Act and the ninety ninth Constitutional amendments Act were reviewed in the 'Fourth Judges Case', 2015. The majority of judges observed that independence of judiciary is the core issue and the appointment process of judges at the higher judiciary must be safeguarded from the interference of the executive. So there seems to be a serious trust deficit between judiciary and the government. Justice Kehar quoted BJP leader L.K. Advani's remarks that an 'Emergency like situation could happen in India'.⁹ In justice Kehar's word 'It would be utmost importance, therefore, to shield judicial appointments from any political executive interference to preserve the Independence of the Judiciary from the regimes of the spoils system'. Justice Madan B. Lokur described the 'intention of the government to make appointments without CJI's view as tyrannical'. In the matter of appointment, transfer, promotion and supersession where how the decisions of the Supreme Court was manipulated to favor the particular political regime and three junior judges were superseded in the Supreme Court by passing the trend, rule and customs.

How manipulation works can be understood in the case of Justice P.D. Dinakaran. Actually serious and substantive charges of corruption were against Karnataka Chief Justice P.D. Dinakaran when the collegiums of Supreme Court were considering him for the appointment of judge for the apex court of the country. However, the charges of allegations were not finally decided. So unless a credible system of selection process is not developed, many more Dinakaran will continue to come and erode the integrity, sanctity and people's faith in the judicial system of India.

In Gopal Subramanian case also, the way media was managed and issues were given hype, finally candidate withdrew his consent. This show the way to the next party in government to do its best to keep out judges, who it feels, may be inconvenient. So there is a need for truly independent and transparent appointment process should prevail and judiciary and government, both, should take the idea forward.

Substantive accountability

The Supreme Court has accepted the doctrine of separation of power as one of the basic features of the

⁷ *Sudhanshu Ranjan*, Justice Judocracy And Democracy in India Boundaries and Breaches, Routledge, First paperback Edition 2016, p 184.

⁸ Justice(Retd) B N Sri Krishna, in a chapter 'judicial independence' in book 'The Oxford Handbook of THE INDIAN CONSTITUTION' Edited by Sujit Choudhary, Madhav Khosla and Pratap Bhanu Mehta, South Asia Edition, OUP New Delhi 2016.p 356.

⁹ V VENKATESAN, in 'Judicial Assertion' Print Edition: November 13, 2015, Frontline, p 9.

Constitution. Tussle for primacy between the three organs of the government continues and each organ tries to dominate over the others, depending on the situation. Earlier we saw the case of the government of Bihar where the executive had made the legislature non functional in D.C. Wadhwa case by promulgating the ordinances. In emergency period also, how Indira Gandhi government played illegally with the executive power. In such condition, an independent, impartial and robust judiciary is the need of the hour.

Actually Judicial interpretation is the source of conflict between the executive and the judiciary. Sad part of the story is also true that on many front, executive or government is either not responsive or dysfunctional. In the first ever impeachment motion against a Supreme Court judge; the Parliament did not discharge its quasi-judicial function. Often bureaucrats are dependent on court's decision so that they are not held accountable for their decision they take. Had judiciary not pressurized and taken firm position on corruption issue, the leaders like Lalu Prasad and A. Raja would never have gone to jail; P.J. Thomas would not have left the post of CVC. So every organ of the government should honestly discharge its duty. But will judges do it after tasting power? In the words of Upendra Baxi, Activism has brought extraordinary power to the Indian appellate judiciary as well as an agendum of acute anxieties. These arise because justices are loath to lose their new found power.¹⁰

Higher courts have been assigned two roles, judicial interpretation as in Britain and Judicial review as in US. There is an opinion in the legislature that time and again in the name of interpretation, Judiciary is acquiring more and more powers in its hand. Executive and legislature considers it as interference in their domain whereas judiciary is of the opinion that it is discharging its Constitutional duty as impartial arbitrators. Stepping into the area of legislature sometimes inadvertent but not always, actually, the demarcated line is not clear and all the three organs are putting allegations of entering into others domain.

At many occasions, like on 3 Dec. 2007, Lok Sabha witnessed a heated debate and members across the party lines were critical of the judiciary for its alleged interference in the functioning of the legislature and the executive.¹¹ In 1996, a demand of special session was raised by some MPs to discuss the jurisdiction area of different organs including the issue of judicial activism.¹² On 8th April 2007, Prime Minister Dr. Manmohan Singh at inaugurating the conference of Chief Ministers and Chief Justices of High Courts on 'Administration of Justice on Fast Track' in New Delhi Said: 'The dividing line between judicial activism and judicial overreach is a thin one. However, substituting with a takeover of the functions of another organ may, at times, become a case of overreach.'

These are delicate issues which need to be addressed cautiously. All the Organs including the judiciary must ensure that the dividing lines between them are not breached. This makes for a harmonious functioning.¹³ On the same dais, Chief Justice of India, K.G. Balakrishnan put their views regarding the relation between the executive and the judiciary and rather defended judiciary. The PM's statement against the judiciary

was an expression of resentment of the government. Similar type of remarks was made in an open court by Supreme Court Judge A.K. Ganguli that 'No government wants a strong Judiciary'.¹⁴ Constitution makers have tried their best to draw a line for each organ which must not be breached by anyone and balance of power could be maintained.

Judicial encroachment: In the name of independence of judiciary and rule of law, there are some decisions of the Supreme Court clearly seems to be breaching the marked line assigned to the other organ. Supreme Court laid down the guidelines and norms for adoption of Indian child by foreigners,¹⁵ made the procedures for giving permission for passive euthanasia¹⁶, in famous Vishakha and others Vs. State of Rajasthan,¹⁷ gave instruction to stop sexual harassment of women at work place and issued guidelines also in the form of law which will continue to be working till an act was not made by the parliament.

Against the barbarism of the police in west Bengal, SC gave the detailed guidelines regarding arrests in D.K. Basu vs. State of West Bengal.¹⁸ In the case of DC Wadhwa vs. State of Bihar,¹⁹ Apex court's position is that ordinances through the executive cannot replace the legislature for such a long time. Apart from this, giving direction to create an all India Judicial service by Supreme Court is clearly a breaching in the legislative domain because Parliament alone has this right to create under Article 312. Many times, it is observed that police officers are transferred for political reasons and to protect the nexus between criminals and politicians. In that context, the Supreme Court gave the direction to give fixed tenure to the police officials and creation of Security Commission.²⁰

Supreme Court has also given the detailed guidelines that how the CVC selection process would be,²¹ which the matter of executive domain is again. Encroaching into the legislative domain can also be observed in the case of Swami Shradhanand and Murli Manohar Mishra Vs. State of Karnataka,²² where the Supreme Court created a third category of punishment in murder case, that is lifelong imprisonment. However it is purely the job of a legislature to decide.

On the issue of interlinking rivers also, the Supreme Court opinion was 'The parties are at liberty to file in court any reports or papers containing studies in respect of the said project'. Actually the above issue is within the domain of legislature and until all the stakeholders, states and centre do not come and build common consensus over the issue, things cannot materialize in court pressure. There are cases where the Supreme Court simply encroached by snatching the jurisdiction of the other organ.

In second judges case²³, the constitution bench of nine

¹⁴ 12/03/2011, The TOI, The India Express

¹⁵ Lakshmikanth Pandey Vs. Union of India, (1984) 2 SCC 244 : AIR 1984 SC 469.

¹⁶ Aruna Ramchandra Shanbang Vs. Union of India, (2011) 4 SCC 454.

¹⁷ AIR 1997 SC 2011 : JT 1997 (7) SC 384 : 1997 (5) SCALE453: (1997) 6 SCC 241.

¹⁸ (1997) 1 SCC 416: 1997 SCC (Cri) 92 : AIR 1997 SC 610.

¹⁹ AIR 1987 SC 579.

²⁰ Sudhanshu Ragav P. 133.

²¹ Court for PII and Amn. V. Union of India and Air, (2011) 4 SCC1.

²² AIR SC 2008 2040 (2008) 11 SCR 93.

²³ Supreme Court Advocates on Record Vs. Union of India, (1993) 4 SCC 441: AIR 1994 SC 268

¹⁰ Sudhanshu Ranjan, P. 116

¹¹ The TOI, the Indian Express, The Hindu, 4th Dec. 2007.

¹² Hardwari Lal 'Separation of Powers', HT 17-10-96

¹³ 09/04/2007, The TOI, The Indian Express, The Hindu N. Delhi

judges with two dissenting has snatched the power of appointment of judges to the higher judiciary from the executive. The valid ground claimed by the majority of judges that the Supreme Court must have the final say in the appointment to the higher judiciary if the independence of the judiciary is to be preserved. Clearly the one sided message means Supreme Court wants to remain powerful in appointment of judges to the higher judiciary.

In Jain Hawala case, CBI was asked to submit the progress report to the Supreme Court not the minister concerned and same way in famous fodder scam case, it gave direction to the Patna High Court to monitor the investigation. In both the cases, Apex Court remained suspicious about the mighty person could influence the investigation process but the domain which judiciary was using was others. Supreme Court in a direction to the Election Commission that please obtain five vital information's from candidates who are filing nomination for the assembly or parliamentary elections. If any criminal cases pending against, their assets and liabilities, educational qualifications etc.²⁴ It ruled that without knowing the details of the candidates background, it would be the violation of freedom of expression in the form of vote which is a fundamental right. Supreme Courts direction to seal the commercial properties in Delhi which were violating the Master plan norms of Delhi Development Act, 1957 is a rare example of encroaching the legislative domain which led unrest at many places. Finally to control the situation, Parliament made a special provision 'Delhi laws Act 2006', and Status quo could be maintained.

In the name of protecting forests, the Supreme Court got a petition titled T.N. Godaraman Thirumpuped vs. Union of India & others.²⁵ The motive of the cases was to stop the large scale illegal timber cutting. First, Supreme Court instructed that except Supreme Court, other would entertain any forest related issues. A judgment in 1996, Supreme Court clarified that forest land as found in Section II will include those areas also which is recorded as forests in government's records and any non forest activity is permissible only with the prior approval of the Central government. Supreme Court forgot to think about the person residing in the place like J&K where firewood is the lifeline in winter season. In a case, Nandini Sundar Vs. State of Chattisgarh,²⁶ the Supreme court invalidated the appointment of SPO (Special Police Officer) who were given the task to train and arm a civilian group 'Salva Judum', the Court went to the extent to openly criticize the neoliberal economic policy of the government and held responsible for growing inequality among the society and spread of Maoism. Court should not have entered into a policy issue of the government which was not its domain. The question is that who is assigned to formulate the economic policy?

Justice A.K. Ganguli of Supreme Court have admitted the fact at Amity University recently and said that "Courts are widening their jurisdiction and now are functioning as institutions of governance and not merely as arbitrators of disputes."²⁷ Starting the decade of 1990's saw a surge in defection cases quite frequently. Speakers of different state

Assemblies used their power to disqualify the membership of the legislators under Anti-Defection Law, 1985. When legislators approached judiciary, and the higher Judiciary entertained such complaint and passed either stay order or asked for Speakers explanation, it was taken as judicial interference in legislatures authority.

In S.R. Bommai case, 1994, popularly known as 'Assembly Dissolution Case', a nine judge Constitution bench of the Supreme Court, with a majority of six ordered that presidential satisfaction for dismissing state government is also the matter of judicial review.²⁸ Supreme Court made the condition only under which the state government could be dismissed and the proclamation issued by the President have to be approved by both the houses of Parliament. Dissolution of Bihar assembly was declared unconstitutional by the Supreme Court.²⁹ The Supreme Court has gone to such an extent of ruling that the convicts who has been awarded death sentence and got the pardon by the President or the Governor, would be the subject of judicial review.³⁰

So the above mentioned cases show how the Supreme Court has affected the balance of power in its favor. In the name of independence of Judiciary, at many places it took over the powers of the executive. In the corruption charges against the judges, no FIR can be registered against the judges of the higher judiciary without prior approval of the chief justice of India. Now the ninth schedule (Art 31-B) which was introduced by the first Prime Minister Jawaharlal Nehru to keep certain law beyond the scope of judicial review is not immune, it is reviewable now. So if the balance of power tilts to one side, it is the citizens who suffer immensely because the stronger institution starts behaving as autocratic ruler.

In a democracy, Parliament is the supreme law making body and it represents the interests of different social classes through their representatives. If all the laws made by the Parliament can be the subject of judicial review, then the question arises which institution of the state would be left to guarantee the protection of citizen's rights? Judiciary is not directly accountable to the people of India. The conflict of autonomy should have a boundary not to be breached otherwise it would be very difficult to fix the role and responsibility of different organs and in that way substantial accountability of the higher judiciary towards the common citizen will not be fulfilled."

A big question that haunts in this regard is to whom are the judges accountable? And how is such accountability to be fixed? Past experience shows that the current provisions are inadequate and no political parties in power have taken firm stand in this regard. If a judge of doubtful integrity be allowed to continue in the system, will this not affect the legitimacy of the court and beset legitimacy of justice system? Our constitution does not allow a judge to practice as a lawyer after retirement, how a Judge after retirement is made arbitrator, and is this not the compromise with the independence of judiciary? After retirement, judges are appointed to the NHRC, different National Commission's and State Commissions,

²⁴ Union of India v. Association for Democratic Rights, (2002) 5 SCC 294.

²⁵ W.P. (Civil) No. 202 of 1995.

²⁶ (2011) 7SCC 547: MANU/SC/0724/2011.

²⁷ Harish v. Nair, 'Supreme Court Judge : Courts now institutions of government, H.T. New Delhi 15/03/201.

²⁸ S.R. Bommai vs Union of India, (1990) 3 SCC 1: AIR 1994SC1918,

²⁹ Rameshwar Prasad & Others (VI) Vs. Union of India & Air (2006) 2 SCC 1.

³⁰ Kehar Singh & Amr. Vs. Union of India & Air, 1989 SC 653; 1989 CriLJ 941: JT 1988 (4) SC 193: 1988(2) SCALE 1965: (1989)1. SCC 204.

Under Consumer Protection Act, National Environment Appellate Authority Act, 1997, and several other tribunals. How those appointments are made? By looking forward to these post retirement appointments by the government, will a judge be not be compromising with his independence? Of course judiciary is not responsible to Parliament directly but indirectly there are several issues where union legislature is in influential

position like salary of a judge, impeachment procedure, post retirement benefits, etc. So finally, it can be concluded that there are well demarcated line between the functioning area of legislature/executive and judiciary. If procedural accountability of judiciary towards Union Legislative is not fulfilled, substantive accountability of Judiciary towards citizen could be at stake and compromised.