

Above the law

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The Supreme Court granting immunity to Judges from accountability to criminal law goes against fundamental rules of law.

PRIME Minister Manmohan Singh obviously feels deeply about corruption in government and especially in the judiciary. He spoke on it publicly twice within five months; on both occasions, in the presence of the Chief Justice of India (CJI), Justice K.G. Balakrishnan. On April 19, he said: "Corruption is another challenge that we face both in the government and the judiciary."

On September 11, he went to the root of the problem – a process of appointment that ensures that no dodgy character escapes its scrutiny and becomes a Judge. The Prime Minister said "the time has come for introspection to ensure that judicial appointments at all levels" live up to "exacting standards".

He was speaking in a specific context that is known to all. The country has been treated to judicial scandals in recent years that it could well have done without. As many as four Chief Justices of India have incurred censures from leading and responsible members of the Bar to the point that demands were made for their impeachment on the strength of evidence that did disclose a *prima facie* case for inquiry – K.N. Singh, A.S. Anand, M.M. Punchhi and Y.K. Sabharwal (K.N. Singh's lapses became known after he retired). This is an unprecedented situation, as unprecedented, indeed, as the Central Vigilance Commission examining the charges against Y.K. Sabharwal and then forwarding the complaints from the Campaign for Judicial Accountability to the Law Ministry for "necessary action". This was confirmed by "a senior Law Ministry official", *Hindustan Times* reported (June 9). Ironically, the Supreme Court ruled in the case of a former Chief Justice of the Madras High Court, Justice K. Veeraswami, that "no criminal case shall be registered under Section 154, Criminal Procedure Code [Cr.P.C], against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the government to the opinion expressed by the Chief Justice. If the Chief Justice is of opinion that it is not a fit case for proceeding under the [Prevention of Corruption] Act, the case shall not be registered."

Consent for FIR

Thus, it is not *consultation* that is enjoined, with "due regard" to the CJI's opinion, but his *consent* that is mandatorily stipulated. Since even a first information report (FIR) cannot be filed under Section 154, no police investigation can commence unless and until the CJI gives his consent, which will not and cannot be immediate.

The danger of loss of evidence is obvious. In no other democracy governed by the rule of law does such a rule exist. In India, it has not been laid down by a law enacted by Parliament, but by a narrow majority (3-2) of the Bench that heard the case. It was laid down consciously, avowedly in the act of law-making, by tortuous reasoning and assumptions as unfounded as they are unflattering to our democracy and constitutional system, especially to the President of India, as will be pointed out in detail presently.

This judgment was delivered on July 25, 1991, before any of the distinguished Judges became CJI. Its consequences have been baleful. It flagrantly violated a fundamental of the rule of law, namely, “the universal subjection of all classes to one law administered by the ordinary courts”.

Where, for good reason recognised in all countries, some protection was deemed necessary, it was for the Head of State alone. The framers of the Constitution provided it in explicit words. Article 361(2) and (3) say: “No criminal proceedings whatsoever shall be instituted or continued against the President or the Governor in any Court during his term of office” and “no process for the arrest or imprisonment of the President or the Governor of a State shall issue from any Court during his term of office.”

An attempt was made during the Emergency to amend Article 361 so as to extend the immunity to the Prime Minister as well (the Constitution’s 41st Amendment Bill No.16 of 1975). It was dropped. Extension of the immunity, in howsoever a qualified process, by judicial interpretation is impermissible.

The ruling acquired sanctity and instilled smugness and complacency in CJIs. Hours after his appointment as CJI was announced, Y.K. Sabharwal proclaimed that the Supreme Court’s “in-house mechanism”, comprising five of the most senior Judges, which handles all complaints and allegations against the Judges was “doing fine”.

He indicated that he would oppose any other mechanism proposed by the government to deal with such issues (*Hindustan Times*; October 19, 2005). He amplified, on the same day: “I don’t think the National Judicial Commission is necessary. The present system of internal checks and balances is working very well. It should be permitted to work for some more time” (*The Times of India*; October 19, 2005).

That smugness and complacency persist despite the public disquiet to which the Prime Minister alluded on September 11: “Perceptions are formed about efficiency, fairness, honesty and integrity and about competence and compassion. These perceptions cannot be willed. They are shaped by experience, by hearsay, and by public debate and discourse. But there is no doubt that the personal record and reputation of those who sit in judgment does shape our view of the judicial system.”

Those perceptions have been shaped by the three judicial scandals that have been the subject of “public debate and discourse”. Manmohan Singh spoke pointedly in that immediate context. A month earlier, Justice Balakrishnan had sought his “intervention to initiate the impeachment process” against Justice Soumitra Sen of the Calcutta High Court for “misconduct”. He had allegedly “appropriated” Rs.32 lakh.

As a practising lawyer he had been appointed Court Receiver in a case in 1993 and received the money in that capacity, which, it is alleged, he deposited in his personal account and retained it even after he became Judge in December 2003. He parted with it only after the High Court ordered him to do so in April 2006.

Last year, a Division Bench of the Court expunged the strictures passed against Justice Sen by a single Judge who had held him guilty of misappropriation. Justice Sen was facing proceedings in that very High Court of which he was appointed Judge in December 2003.

Justice Balakrishnan carries no conviction when he shifts the blame on the Intelligence Bureau (I.B.). This was not a secret or furtive affair. Chief Justices have always solicited, in private, opinion from trusted members of the Bar. “The process of appointment includes an inquiry by I.B. to verify the candidate’s antecedents. It is *possible [sic.]* that when he was appointed, there was no criminal case *or complaint* against him” (*Hindustan Times*; September 14, 2008). The CJI appointed a Committee of Judges to inquire into the matter. His letter to the Prime Minister followed its report.

Cash-by-courier scandal

The cash-by-courier scandal in the Punjab High Court came to light on August 13 when Rs.15 lakh in cash was delivered by mistake to the house of Justice Nirmaljit Kaur by an assistant of the former Additional Advocate General Sanjeev Bansal. She instantly called the Chandigarh Police and handed the money over.

The next day, an identical amount, was delivered at Justice Nirmal Yadav's house. Once again, the CJI appointed the "in-house" three-Judge committee. But while the inquiry was still on, the Central Bureau of Investigation (CBI) sought his permission to examine those involved in the scam, including the two Judges. The CJI accorded his consent (*The Indian Express*, September 10).

On September 29, a three-Judge committee, set up by the CJI, recorded statements by Justice Nirmaljit Kaur and others (*The Indian Express*, September 30). This was the "in-house" mechanism at work. But for the Supreme Court's ruling in the Veeraswami case, the police could, and doubtless would, have registered the case on August 13 and proceeded with its investigation. The Delhi hotelier, who allegedly sent the money for a property deal, one Ravinder Singh Bhasin, managed to abscond.

The Ghaziabad case

It is in the Ghaziabad case that the baleful consequences of the Supreme Court's ruling have appeared in so revoltingly bold a relief that one hopes public pressure will mount for its reversal, if not by the court, by legislation. It does not provide a good example of efficient, earnest and expeditious eradication of corruption though it is the grossest of the three scandals.

The Allahabad High Court remarked: "The scam unearthed in the Judgeship of Ghaziabad puts all scams in the shade and it is also the first involving the judiciary." Some might differ on the second proposition.

Involved were a whopping Rs.23 crore, withdrawn fraudulently from Provident Fund accounts from the Ghaziabad District Treasury of Class III and Class IV employees of the Ghaziabad District Court by forging their signatures. The money so withdrawn was used to provide gifts to 34 "judicial officers".

They include a *sitting* Judge of the Supreme Court and a *sitting* Judge of the Allahabad High Court. Reportedly, they comprise altogether eight Judges from the Allahabad High Court, one each in Uttarakhand and Calcutta High Courts, and 23 lower court Judges (*The Times of India*, September 17).

The scam was detected on January 21, by Rama Jain, Vigilance Officer of the District Court, who reported the matter to the High Court.

The linchpin was the administrative officer, known as nazir, Ashutosh Asthana, who used to prepare notes on the basis of which the District Judge would sanction the payments. Nine successive District Judges gave the sanction. Six of them were elevated to the High Court, one in 2005 another in 2006. Asthana made a full confession before a Magistrate under Section 164 of the Cr.P.C., which is admissible as evidence in court.

On the High Court's orders, an FIR was registered *seven months ago on February 15*. Sixty employees were arrested. Asthana revealed that the money so drawn was used for payment of various household articles such as house construction material, air conditioners, mobile phones, refrigerators and furniture.

These articles were supplied to a large number of sitting and retired judicial officers, including some who were High Court Judges and one Supreme Court Judge. One Judge, who had elevated tastes, was given “on three or four occasions costly Scotch bottles”. Asthana produced documents showing the purchases and their transport to the residences of many of these Judges.

Yet, while the role of Class III and Class IV employees was investigated by the police, *the apparent role of the judicial officers* was not. As far back as *in June*, the Senior Superintendent of Police (SSP), Ghaziabad, wrote to the CJI seeking his permission to interrogate the judicial officers who were allegedly involved in the scam.

This could not by the wildest stretch of imagination be described as a case of harassment of Judges who would need protection under the Veeraswami ruling. A *prima facie* case existed, as disclosed by Asthana’s confession and the documents. Permission should have been given straightaway. Indeed, the CJI should have taken *suo motu* notice of the extensive press reportage and sanctioned police investigation. What followed was distressing.

Apparently on the orders of the CJI, the Registrar of the Supreme Court wrote to the SSP not only to submit in writing the questions he proposed to ask the Judges, *but also reveal the evidence he had against them*. The SSP complied. But, he was not granted an opportunity of any oral interrogation. Have you ever heard of such fetters on police investigations in any democracy? Or a scam of this magnitude? This raises a question which must be answered. Is the CJI not accountable for “administrative” orders? Surely a writ would lie to quash them on proper grounds. They are made in his capacity *as Judge*. All, Ministers, civil servants, and Judges, are accountable to the law.

The Bar Association of Ghaziabad, by a resolution, asked for an investigation by the CBI. Its president and the chairperson of a non-governmental organisation (NGO) moved the High Court for this relief, which was refused by a judgement of March 19, which, however, gave certain directions to the police.

They moved the Supreme Court on May 6. It came up for hearing on July 7 when notice was issued to the Solicitor-General and it was stated that the next hearing would be held on July 14 *in the chambers* of the Chief Justice. On July 11, meanwhile, Transparency International moved the Court in a petition filed in the public interest seeking a CBI probe with “no fetters” on it.

The Supreme Court gave the Uttar Pradesh government time until October 22 to decide whether it wanted a CBI probe or not. It readily agreed. A State’s consent is essential to a CBI probe, but the Court has ruled that the consent is not necessary if the court itself ordered a CBI probe. (*State of West Bengal vs Sampat Lal* (1985) 1 SCC 317).

It was in June that the SSP of Ghaziabad requested CJI Balakrishnan for his consent to interrogate the Judges. Had the CJI consented, interrogations, raids, searches and seizures would have been carried out. Of what avail is a consent three months later? Belatedly on September 23, Justices Arijit Pasayat, V.S. Sirpurkar and G.S. Singhvi directed the CBI to conduct the probe. The CJI, indeed the Court itself, has not set an example of earnest, expeditious effort to combat corruption in the judiciary.

Process of appointment

It is a sorry episode altogether and it raises two related questions. What is one to say of a process of appointment of High Court and Supreme Court Judges, which enabled the persons suspected of

involvement in the three scandals to become Judges of their High Courts – in Calcutta, Allahabad and Chandigarh, despite reasonable suspicion? The other concerns the Veeraswami ruling. Bad appointments are linked to bad practices.

There is another linkage. The Supreme Court's ruling on October 6, 1993, on the appointment of Judges to High Courts and the Supreme Court, subverted the existing settled law and practice of 43 years and made itself virtually the appointing authority (*Supreme Court Advocates on Record vs Union of India* (1993) 4 SCC 441). In a detailed critique in Volume III of his classic *Constitutional Law of India* (1996) the late H.M. Seervai opined that the judgments delivered by the majority "bristle with almost every fault which can be committed in a judgement". He held the ruling to be "null and void" (pages 2,936, 2,937 and 2,964).

The Judges had not followed the mandatory provisions of Article 145 (4) and (5) of the Constitution. The ruling in the Veeraswami case on July 25, 1991, is also a case of what Lord Simonds called "a naked usurpation of the legislative function under thin guise of interpretation" (*Major and St. Mellors Rural District Councils Newport Corporation* (1951) 2 All. E.R. 838; (1952) A.C. 189 at 191).

Lord Diplock, a confirmed judicial activist, pointed out in 1980 that "it endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes, which experience of their operation has shown to have had consequence that members of the court, before whom the matter comes, consider to be injurious to the public interest" (*Duport Steels Ltd vs Sirs* (1980) 1 WLR 142 at 157).

Robert Stevens, a scholar among barristers, opines that "Judges choosing judges is the anti-thesis of democracy". (*The English Judges, Their Role in the Changing Constitution*; Hart Publishing; page 144). That is the very system the Supreme Court has established. This erudite work is of particular relevance to us in India, faced as we have been for nearly two decades with unconstitutional judicial usurpation of power, legislative and executive, to the menace of democratic governance. Stevens traces the chequered course of such a trend in the United Kingdom and its effective check. "History is littered with examples of judicial hubris ending in judicial terms" (page 149).

In 1993, the Supreme Court appointed its Chief as head of a collegium of two other Judges – whose numbers it fixed only to increase them to four in another judgment only five years later on October 28, 1998 (*Special Reference No.1 of 1998* (1993) 7 SCC 739) as the appointing authority for Judges of the Supreme Court and of the High Courts.

It flouted the constitutional provisions and B.R. Ambedkar's authoritative exposition in the Constituent Assembly on May 24, 1949 (*Constituent Assembly Debates* Volume viii, page 258). The collegium has no place in the Constitution, only in the Court's *ipse dixit*.

In Veeraswami's case, the Court created immunity for Judges from accountability to criminal law, which violates the fundamentals of the rule of law. Both rulings are clear cases of usurpation of power, both are unknown in any other country and both are not only unsupported by legal erudition or authority, but rest entirely on subjective assertiveness that is what drives Judges to excesses. It is amazing that the country has submitted to this. There is, of course, a reason for it.

Let us analyse the Veeraswami ruling in detail. The facts were all too clear and they are set out with admirable brevity by Justice K. Jagannatha Shetty, a member of the Bench with Justices B.C. Ray, L.M. Sharma, M.N. Venkatachaliah and J.S. Verma. (*K. Veeraswami vs Union of India* (1991) 3 SCC 655).

Veeraswami joined the Madras Bar in 1941. He became Government Pleader in 1959, High Court Judge in 1960 and Chief Justice in 1969. The CBI filed an FIR and registered a case against him on February 24, 1976, in a Court in New Delhi.

He was alleged to be in possession of assets that were far disproportionate to his known sources of income and thereby committed offences under Section 5(1) (e) and (2) of Prevention of Corruption Act, 1947. On February 28, 1976, a copy of the FIR was filed before the Sessions Court in Madras. On learning of these developments Justice Veeraswami proceeded on leave on March 9, 1976. He retired on April 8, 1976, on attaining the age of superannuation.

A charge-sheet was filed on December 15, 1977. It alleged that after assuming the office of Chief Justice, Justice Veeraswami “gradually commenced accumulation of disproportionate assets” and that for the period between May 1, 1969 to February 24, 1976 he was in possession of funds and property disproportionate by Rs.6,41,416.36 to the known sources of income over the same period. (Thirty years ago, that was a lot). The Sessions Judge issued process for Justice Veeraswami’s appearance. He moved the High Court to quash the proceedings. A full Bench of the Court dismissed his petition whereupon he appealed to the Supreme Court.

Justice Veeraswami raised two points – one concerned the ingredients of the offence and the validity of the charge-sheet. The Court rejected it. The other was whether a Judge is a “public servant” as defined by the Act and if so, which was the authority competent to sanction his prosecution.

Justice J.S. Verma was a solitary dissent on this point. He held that a Judge was not “a public servant” but a “Constitutional functionary” outside the purview of the Act. Impeachment was the only remedy. He conceded that “Parliament being the sole arbiter” was competent to make a law for trial and punishment of Judges charged with corruption (page 751).

All the other four Judges held to the contrary and rightly so. Section 21 of the Indian Penal Code includes “every judge” within the definition of “public servant”. Section 2 of the Prevention of Corruption Act 1947 defined him as one so defined by that Code. In 1964, Section 21 was amended to cover all who discharged adjudicatory functions by law. Section 2(c) (iv) of the Prevention of Corruption Act, 1998, covers “any judge” empowered by law to discharge “any adjudicatory functions” within the definition of public servant.

The Court had ruled in A.R. Antulay’s case that if “by the time the Court is called upon to take cognizance of the offence committed by him as a public servant, he has ceased to be public servant, no sanction would be necessary for taking cognizance of the offence against him” [(1984) 2 SCC 183].

All the four Judges who discussed this point agreed that since the charge-sheet was filed after Veeraswami’s retirement, no sanction was required. (Justice Sharma did not discuss this.) It being the incontestable position that no sanction was required, there was surely no need to discuss who the sanctioning authority was in this case. It was pure *obiter*.

All that the Court had to do was to decide whether a Judge is a “public servant” covered by the Prevention of Corruption Act – and no more.

The *obiter* on the sanctioning authority was unnecessary; the further directions as to the CJI’s permission *before* filing the FIR were clearly beyond the Court’s powers, why were they issued?