

## THE LACK OF JUDICIAL ACCOUNTABILITY IN INDIA

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The framers of the Indian Constitution would not have imagined that within 50 years of the framing of the Constitution, the Indian Judiciary would emerge as the most powerful institution of the State. The Constitution established the High Courts and the Supreme Court as watchdog institutions, independent of the executive and the legislature, to not merely dispense justice, but also to ensure that the executive and the legislature did not exceed the authority conferred upon them by the Constitution. Thus, the Judiciary was given the powers to interpret the laws and the Constitution, and also to strike down executive action which violated any law or the fundamental rights of citizens. It was also the authority to examine whether laws framed by Parliament conformed to the Constitution and declare them void if they violated it.

By a creative interpretation of the provision authorizing the Parliament to amend the Constitution, the Supreme Court in 1973 also acquired the power to strike down even constitutional amendments which were held by the Court to violate the basic structure of the Constitution. Many laws and some constitutional amendments have been struck down by the Courts during this period.

In the 80's, the Supreme Court evolved a new jurisdiction which has come to be known as Public Interest Litigation which involved a liberal interpretation of the fundamental right of life and liberty guaranteed by Article 21 to include the right to live with dignity and, therefore, to enjoy the basic amenities of life, such as food, water, shelter, basic education, healthcare and even the right to a healthy environment. Simultaneously, the Court declared that they could and should direct the executive to provide these amenities to citizens who were denied these.

Over the last 30 years, this jurisdiction of PIL has been used to occasionally direct the provision of basic amenities like food, water, education and shelter to the poor and marginalized sections of society. But increasingly, in

the last 15 years, the jurisdiction has been largely used whimsically and subjectively by judges ostensibly for protecting the environment. Thus, the Court has ordered the shutting down of “polluting industries” in and around Delhi, around the ‘Taj’ in Agra, the conversion of commercial vehicles in Delhi to Natural Gas fuel, the dismantling of all structures on the ridge running through Delhi, the stoppage of a non-forest activity in forest areas, etc. It has also ordered the demolition of the shanties of hundreds of thousands of slum dwellers in Delhi and Mumbai. In Delhi, it was done on the allegation that they were polluting the river near which they were living. While exercising the same PIL jurisdiction, they have also ordered the removal of hundreds of thousands of vendors from the streets of Delhi and Mumbai on the ground that streets were only meant for traffic and not for vendors. In short, using this PIL jurisdiction, the Courts acquired and have used the power to order anything that the individual judges considered to be in public interest. The recent actions of the Court have clearly shown that by and large, the Court has given precedence to ‘Environmental Protection’ if there was a perceived conflict between that and the socio-economic rights of the poor. But environmental protection has been made to give way, if it came into conflict with the interest of “Corporate Development”.

Through all this, the superior courts in India have emerged as perhaps the most powerful courts in the world, exercising virtually Imperial & unchecked powers. While executive action and even legislation could often be struck down by the courts, the directions of the courts, sometimes issued without even notice to the affected parties, were beyond question, and had to be obeyed by all executive officers on pain of contempt of court. Of course, often these powers were wisely exercised to correct gross executive inaction.

While the Court was acquiring these powers, by an even more inventive (called purposive) interpretation of the provision regarding appointment of judges by the government, it took over the power of appointment of judges. Thus judges of the High Court and Supreme Court are now appointed by a collegium of senior judges of the Supreme Court. The judiciary has thus become like a self-perpetrating oligarchy. There is no system followed in the selection of judges

and there is no transparency in the system. In particular, no regard is given to examining the record or credentials of judges in their ideological adherence to the constitutional ideals of a secular, socialist democratic republic or their understanding of or sensitivity towards the common people of the country who are poor, marginalized and unable to fight for their rights in the courts.

Thus, the courts in India enjoy virtually absolute and unchecked power unrivalled by any Court in the world. In these circumstances, it is absolutely vital that judges of the superior judiciary be accountable for their performance and their conduct – whether it be for corruption or for disregard of constitutional values and the rights of citizens.

Unfortunately, neither the Constitution, nor any other law has created any institution or system to examine the performance of judges or examine complaints against them. The Constitution provides that High Court and Supreme Court judges cannot be removed except by impeachment. That process requires signatures of 100 MPs of the House of People or 50 MPs of the Council of States for its initiation. If a motion containing charges of serious misconduct with the requisite signatures is submitted, and admitted by the Speaker of the House of People or the Chairperson of the Council of States, an Inquiry Committee of 3 judges is constituted to hold a trial of the judge. Only if he is found guilty, the motion is placed before each House of Parliament where it has to be passed by a 2/3 majority of each House. Our experience has shown that it is practically impossible to remove a Judge through impeachment even if one is somehow able to get documentary evidence of serious misconduct. This is because MPs and political parties to which they belong are very reluctant to take on a sitting Judge because virtually all of them have pending cases in courts. The judges often behave like a trade union and do not take kindly to brethren being accused of misconduct. It is, therefore, virtually impossible to get an impeachment off the ground unless the matter has become a big public scandal. Only in those cases, is it possible to get enough MPs to sign an impeachment motion.

The only impeachment of a Judge to have gone far was that of Justice V. Ramaswami in the early 90's. After the motion was presented, a Judges Inquiry Committee found him guilty of several charges of misconduct when the matter went up for voting to Parliament. The ruling Congress Party directed all their MPs to abstain from voting. Thus, though the motion was unanimously passed in the Lok Sabha, it did not get the support of the majority of the total membership of the House and, therefore, failed. The Judge remained in office till he retired, but was not assigned any judicial work by the then Chief Justice. Only last month, we have seen a second motion against a Judge of the Calcutta High Court signed and submitted to the Chairman of the Council of States.

Allegations and charges against a Judge even when supported by documentary evidence, rarely get any coverage in the media because of the widespread fear of contempt of court. The contempt law in India allows any judge of the High Court and Supreme Court to charge any one with criminal contempt and send him to jail, on the ground that he/she has "scandalized the Court or lowered the authority of the Court". What "scandalizes or lowers" the authority of a Court is also the subjective judgment of each Judge. In Arundhati Roy's (the well known writer) case, a bench of 2 judges of the Supreme Court charged her with contempt and sent her to jail merely because she criticized the Court in her affidavit. The facts were these: After the judgment of the Supreme Court in the Narmada Dam case, there was a public protest outside the Supreme Court in which Medha Patkar (the leader of the anti-Dam movement in India) and Arundhati Roy participated. A couple of lawyers (probably on the hint of the Court itself) filed a contempt petition against Patkar, Roy and myself (I was the lawyer of the anti-Dam movement) alleging that we had raised abusive slogans against the Court. The lawyers' contempt application, apart from being in grotesque language, also contained palpably absurd allegations that Roy and Patkar (who can hardly be considered rowdies) manhandled the burly lawyers. Roy, in her reply to the court notice said: "For the Court to have issued notice on such a ridiculous petition to three persons who have been vocal in their criticism of the Court shows a disquieting inclination on the part of the Court to muzzle

dissent and stifle criticism". Though he discharged the first notice, the same judge (Justice G.B. Patnaik) who had issued the first notice, issued a second contempt notice, this time to Roy alone for daring to berate the court in this manner. They eventually held her guilty of contempt and sent her to jail with Justice Patnaik sitting as a Judge in his own cause.

Earlier, the Supreme Court has declared that a person charged with "scandalizing the Court" will not be permitted to prove the truth of his allegation against a Judge. Though Parliament has recently amended the Contempt of Courts Act to expressly allow truth as a defence, nothing has been done to prevent judges against whom allegations are made from charging the person with contempt and hauling him to jail. The criminal contempt jurisdiction of the Court and the cavalier manner in which it is exercised, is another example of the enormous and unchecked power of the superior courts in India

Our campaign for Judicial Accountability has since long been demanding that the courts' power to punish for "scandalizing and lowering the authority of the Court" must be taken away by legislation. Of course, this demand has been stoutly resisted by the courts who claim that deleting this provision would greatly encourage baseless allegations and abuse of judges by disgruntled litigants and would thereby erode public confidence in the courts. But then, there is the law of civil and criminal defamation to protect judges against vilification. Moreover, public confidence in the courts as in any person or institution, is generated or eroded by the actions of the courts and not by any baseless allegations by disgruntled litigants. However, with such fierce opposition by the courts, the legislature has not had the courage to delete this provision from the Contempt of Courts Act.

In 1991, the Supreme Court by another ingenious judgment, involving Justice Veeraswami (the father-in-law of Ramaswami), who was Chief Justice of the Tamil Nadu High Court who was caught with assets, vastly disproportionate to his income, laid down that no judge of a superior court could be subjected to a criminal investigation without the written permission of the Chief Justice of India. This judgment has been use to prevent the investigation and prosecution of

many judges against whom there was documentary evidence of corruption, fraud, misappropriation, etc. This has also increased the impunity of judges who have now got used to the feeling that they can get away with any kind of misconduct or even criminal conduct, without any fear of any criminal action or action for removal. Armed additionally with the power of contempt, they also have little fear of public exposure.

In 2005, India got one of the most liberal and powerful RTI Acts in the world. It permits disclosure of internal notings and correspondence of public officials, has few exemptions from disclosure, creates an independent appellate body to decide disputes regarding refusal of information. It also provides for penalties against arbitrary and malafide refusal to disclose information. It applies to all public authorities including the judiciary. One would have expected that the courts which had held that even in the absence of any RTI Act, the fundamental right to free speech, encompassed that right anyway, would have welcomed the application of the right to the courts. Unfortunately, however, the court has fiercely resisted the disclosure of all critical information relating to the courts. Several High Courts have framed rules, in violation of the RTI Act, that no administrative or financial information would be given. The application fees for RTI applications in the courts are sometimes 50 times that of other public authorities. The courts have, therefore, refused information about appointments of employees of the courts, about appointment and transfer of judges, and about complaints against judges. The Supreme Court even refused to disclose whether any judges are declaring their assets in accordance with the Code of Conduct that they had framed.

All this makes for an alarming picture of lack of accountability of the higher judiciary in India. You cannot practically take any disciplinary or criminal action against misconduct or crimes committed by judges. If you expose them publicly, you run the risk of contempt. And with the effective blocking of the RTI Act in its application to the judiciary, they remain ensconced in their citadels safe in the knowledge that no one can even peer into their affairs. This lack of accountability coupled with the enormous unchecked powers that the courts have

acquired and are exercising make the judiciary a very dangerous institution and indeed a serious threat to Indian democracy. This lack of accountability has led to considerable corruption of the higher judiciary which is evident from the recent spate of judicial scandals which have erupted in India. The recent report of TI on corruption perception index shows that the judiciary is perceived to be the second most corrupt institution in India after the Police.

It is high time that this unhappy situation is corrected by reforms in the law and amendments in the Constitution. There need to be independent statutory and full time bodies for the appointment of judges as well as for the performance audit and disciplinary control over judges. These bodies must be independent of the executive as well as of the judiciary. We have suggested a five member judicial appointments commission and a similar judicial complaints commission. One Member each to these commissions could be nominated by (1) The Collegium of all Judges of the Supreme Court, (2) The Collegium of all Chief Justices of the High Courts, (3) The Cabinet, (4) a Collegium of Leader of Oppositions in the two Houses of Parliament, the Speaker of the House of People and the Chairman of the Council of States, and (5) A Collegium of the Chairman, NHRC, the CAG, the CVC and the CEC. However, once nominated, the members would have security of tenure and would not be under the control of the appointing authorities.

These bodies must function transparently and must devise a clear criteria and methodology of selecting judges and dealing with complaints against them. They must have a small investigative machinery under their administrative control through which they could get disputed and relevant questions of fact investigated. Their decisions about appointments and removal of judges should be final and not subject to executive, legislative or judicial approval.

The Veeraswami judgment must be judicially or legislatively reversed and there should be no additional impediment in the criminal investigation and prosecution of judges. That task could also be entrusted to the investigative organization under the Judicial Complaints Commission.

“Scandalising the Court or lowering the authority of the Court” must be deleted from the definition of Criminal Contempt of Court and it must be made clear that an allegation however scurrilous against a judge would amount to defamation, but not contempt, unless it presents a clear and present danger to the administration of justice (The US Law).

The High Court rules under the RTI Act, which conflict with the RTI Act must be rescinded.

Unfortunately, neither the government nor the judiciary have shown any seriousness about tackling the problem of Judicial Accountability or rather the lack of it. Nor have they shown any political will to bring in other much needed reforms to repair the virtually dysfunctional normal judicial system, as a result of which hardly anyone is able to get justice through the courts. The executive is happy with a failed, corrupt judiciary which will not hold it to account and the judiciary is happy to enjoy vast powers, without accountability. The government has proposed a Judicial Council which will be an in-house body of sitting judges to deal with complaints against judges. The judges also oppose any independent institution and want only an in-house body of sitting judges. Experience, however, shows that such in-house bodies and self-regulation rarely works, whether in the Judiciary or the Bar or with the Medical Community.

Judicial reforms in India are likely to take place only if there is a strong people’s movement and campaign which puts democratic pressure on the government and shames the judiciary. Unfortunately, all these years except during the last two, there has not been such a movement. The current campaign during the last 2 years has certainly brought the issue on the agenda of the media and even of the political parties to an extent. We hope that it will grow in strength and that we will gradually be able to reclaim the Judiciary and restore it as a robust, independent but accountable institution, not merely as an instrument for delivering justice, but also to for ensuring that the executive and the legislature function in accordance with the ideals and principles of the Constitution.