

# MISINTERPRETING THE JUDICIAL INDEPENDENCE

--ANOOP, 4<sup>th</sup> Semester

“We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our property and our liberty and our property under the Constitution”.

**Charles Evans Hughes**

From the ‘*Basic Structure doctrine*<sup>1</sup>’ to the ‘*Natural Justice principle*<sup>2</sup>’, from *Golaknath*<sup>3</sup> to the *Keshavanand Bharati*<sup>4</sup>, the Indian judiciary has treaded a long way to act as a guardian of the Constitution rather than a mere adjudicating body. Whenever the Executive or Legislature tried to exceed their jurisdictions, it was the Judiciary, which always got the above wings back on track. Due to the spate of its landmark judgments<sup>5</sup>, the judiciary in India commanded profound respect. Those who questioned the freedom and impartiality of the Judiciary had to think many a time before harbouring such fallacies. No doubt, the previous impressive record of the Indian judiciary is evident in its viability, but the question remains: can the judicial accountability be relied upon any more? Does the judiciary command the same respect, as it had earlier? Is the judiciary making right use of its freedom?

Till recently, the people of India were proud that the judiciary in India was a successful machinery to uphold the ‘Rule of Law’, making the right use of its independence. Not only that, it was the only mechanism to keep the Executive and

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<sup>1</sup> Laid down in the landmark case of *Kesavananda Bharati v. State of Kerala*, AIR 1973SC 1461.

<sup>2</sup> Propounded in the landmark judgment of *Menaka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>3</sup> *Golaknath v. State of Punjab*, AIR 1967 SC 1943.

<sup>4</sup> AIR 1973SC 1461

<sup>5</sup> Some of these judgments are *Kesavananda Bharati v. State of Kerala*, AIR 1973SC 1461; *Menaka Gandhi Vs. Union of India*, (1978) 1 SCC 248; *Golaknath v. State of Punjab*, AIR 1967 SC 1943; *Minerva Mills Ltd. v. Union of India* 1980 AIR 1789 1981 SCR (1) 206 1980 SCC (3) 625.

Legislature within their jurisdictions. But the present scene of corruption in the judiciary will definitely lead the Deity of Justice to shed tears. Corruption in the higher judiciary is an open secret, as at one point of time, the former Chief Justice Sam Piroj Bharucha lamented over the rampant corruption in the higher judiciary. He further brought to notice that around 20 percent judges of the higher judiciary are corrupt. If we go over the 2005 India Corruption Study, the data reveals a startling picture. The value of corruption in judiciary has been estimated to be around Rs. 2630 crore per annum<sup>6</sup>. Around 64 percent of those who have interacted with the judicial process claim that the corruption in the judiciary has increased during the course of time.

Until recently, there was an image of the judge in the mind of the people, which depicted the true character of the judiciary. This image was that of a statue, with its eyes covered by a dark cloth and a balance in one hand. This image tended to show the unbiased nature of the judge. But its role changed rapidly from mere an adjudicating body to a guardian of the Indian Constitution. Its larger than life role in keeping the other two wings within their respective jurisdictions, gave credence to the judicial accountability.

But the recent incidents of the disclosure of the recommendation by the Chief Justice of India for the impeachment of a Calcutta High Court judge<sup>7</sup>, the alleged involvement of some high-profile judges in the Ghaziabad provident fund case<sup>8</sup> and the money received at the residence of a judge of Punjab and Haryana High Court<sup>9</sup>, call for an effective mechanism to ensure the accountability and honesty in the judiciary.

At present, in our Constitution, the only legal method for looking into the misconduct of the High Courts and Supreme Court judge is the removal from office by vote of Parliament on the ground of “proved misbehaviour”. The framers of our Constitution, probably, did not give credence to existing large scale misconduct by the judges of the higher judiciary. Further, in 1993, the unsuccessful attempt of impeachment of the Justice V. Ramaswamy, a Supreme Court judge, discerned the flawed and political aspect of the impeachment process. The contention is not that no investigation is initiated

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<sup>6</sup> <http://www.cmsindia.org/cms/events/judiciary.pdf>

<sup>7</sup> <http://www.hindu.com/2008/09/09/stories/2008090958460100.htm>

<sup>8</sup> <http://news.webindia123.com/news/Articles/India/20080911/1049931.html>

<sup>9</sup> <http://in.news.yahoo.com/48/20080823/814/tnl-cash-scam-high-court-judge-who-goes.html>

in such matters. Rather the contention touches upon the flaw of the investigation process. Such investigations, conducted by the judges appointed by the Chief Justice of India, are secret and reports remain undisclosed. This, in turn, results in the loss of confidence of the people in our judiciary, resulting in the wrong impression that the judges enjoy immunity.

The *Veeraswamy*<sup>10</sup> judgment of the Supreme Court in 1992, has further led to the fragile faith in our judiciary. The judgment entailed the necessity of the prior sanction of the CJI, to initiate the criminal prosecution of a judge of higher judiciary.

There was hue and cry over the issue of transfer and appointment of the judges of higher judiciary. In 1982, controversy that arose in the landmark the *SP Gupta*<sup>11</sup> case was grounded in the pretext of the political interference in the freedom of judiciary. It was laid down in that case that the recommendation made by the CJI, will not have the primacy. After much hullabaloo, the situation changed around ten years later, when in the landmark judgment of *Supreme Court in Advocates on Record Association v. Union of India*<sup>12</sup>, the *SP Gupta* case was overturned. With effect of that judgment, the recommendation of the CJI in the matter of appointment of judges of higher judiciary was held to be the final. That day must have been a day for rejoice for the judiciary.

There have been few instances, that discern the bitter reality that judiciary has several times tried to escape its accountability. Hackle was raised by the present Chief Justice of India, Justice KG Balakrishnan, over the application of the Right to Information Act, 2005 in case of the judiciary<sup>13</sup>, in the name of freedom of the judiciary. The Parliamentary Standing Committee on Personnel, Law and Justice cleared the stand that except the “judicial pronouncements”, other aspects of judiciary come under the purview of the Act<sup>14</sup>.

But instead of criticizing the judicial independence, we must focus on the steps taken to reform the judiciary. In an attempt to weed out the corruption in the judiciary, in 2005, the Law Commission of India in its 195<sup>th</sup> report laid down the provision of Judges

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<sup>10</sup> [http://judgesplot4plot.com/Plot4Plot/049\\_04.htm](http://judgesplot4plot.com/Plot4Plot/049_04.htm)

<sup>11</sup> S.P. Gupta v. Union of India, AIR 1982 SC 149.

<sup>12</sup> MANU/SC/0073/1994.

<sup>13</sup> <http://timesofindia.indiatimes.com/articleshow/1917524.cms>

<sup>14</sup> <http://www.financialexpress.com/news/Judiciary-comes-under-RTI-ambit-says-House-panel/303342/>

(Enquiry) Bill to ensure the proper functioning of the judiciary<sup>15</sup>. The Judges (Enquiry) Act, 1968 strives to form the National Judicial Council (NJC) to look into the misbehaviour or incapacity of the high court and the Supreme Court judges. The Constitution (98th Amendment) Bill to establish a National Judicial Commission bill was an attempt to secure judicial accountability, but it could not succeed due to the dissolution of the Lok Sabha. The Judges (Enquiry) Bill, 2005 was presented in 2006 by the Law Commission. The bill tends to replace the Judges (Inquiry) Act, 1968, which looks into the matters of misbehaviour and incapacity of the high court and the Supreme Court judges<sup>16</sup>. The bill also lays down the provisions which can be relied upon, such as, the camera trial of the accused judge, disclosure of the assets of the judges, the filing of complaint by any individual before the NJC, et al. Once the recommendations of the report are applied, there would be an easy mechanism to weed out the corruption from judiciary.

However the doubts have been raised over the working of the Council, as the committee formed by the NJC to investigate the charges comprises of the members of the NJC, i.e., the judges of the higher judiciary. But the doubts seem to be groundless, as the same pattern is followed in the countries like United States, United Kingdom, Canada, Germany and Australia, keeping in view the independence of the judiciary<sup>17</sup>. In 1998, the Supreme Court upheld the earlier decision that only judges would oversee the judicial appointments<sup>18</sup>. Moreover, when it provides for the camera trial, one should not doubt the impartiality of the committee.

To keep the 'Rule of Law' pristine in our country, the impartiality and fair-functioning of our judiciary are the essential conditions. Therefore, the judiciary should not misinterpret or overstep its freedom, which may lead to loss of the popular faith, resulting in wither away the constitutional objectives and goals, which, 'We the People of India' have enshrined. Is not time ripe when the judicial accountability be left to 'Ourselves'? Unless this is done, many more V. Ramaswamies will go scot-free. The

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<sup>15</sup> <http://www.hindu.com/2006/02/01/stories/2006020115770900.htm>

<sup>16</sup> <http://www.indiatogether.org/2008/jan/law-judges.htm>

<sup>17</sup> <http://www.indiatogether.org/2008/jan/law-judges.htm>

<sup>18</sup> In the Presidential Reference A.I.R. 1999 SC 1.

judges must know that they are under the fundamental duty to strive for excellence. If they cannot stand tall, 'We' fail, and consequently, the Constitution of India fails.