

# Is Judiciary Accountable For Its Actions?

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## Abstract:

*Judges are not final because they are infallible. They are infallible because they are final.*"

-Jackson, J.

As the quote makes it very clear, that the power of the judges is not supreme by virtue of it being "*the judge's power*", but by the virtue of many different factors that give the judges and the judiciary the power it has.

The topic of the essay, which is in the form of a question, is inclined to be answered in an affirmative, by any layman—or a layman law student, or maybe anyone who understands what the words *judiciary* and *accountability* mean. Importance of judiciary in the Indian democracy, without any supplied emphasis or exaggeration, is immense. This organ of paramount importance, if not accountable, would be something with only rights and powers and without duties and liabilities. Or will it?

This question at all arises in the absence of numerous mechanisms and implications of accountability, as against the Parliament (for instance) that has to guard itself against no confidence motions and other measures of financial accountability. The only procedure and implication for the judiciary is of *impeachment*.

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## I. INTRODUCTION

The meaning of accountability, literally and in general sense, is the sense of being answerable/liable to someone or a community. What is judiciary? Is it the Judges? Is it the Bar? When we talk about the accountability of the judiciary, do we talk about the accountability of the judges or the advocates?

### *The Judiciary*

The Union Judiciary refers to the Supreme Court.<sup>1</sup> Talking of the States, the Constitution mentions the High Court and the Subordinate Courts.<sup>2</sup> The Courts, as talked about in the Constitution, throughout the country form the Judiciary. The Court and the Judges of these Courts find place in the above mentioned sections of the Constitution. Hence, it is the determination accountability of these Courts and Judges that is the purpose of the essay.

Before answering the question that whether the judiciary is accountable for its actions, in affirmative or negative, we need to determine the recipients of this accountability. In other words, it is first to be decided that towards whom is the accountability possibly directed.

### *Accountability to Whom?*

About the ideal direction of accountability of the judges of India as quoted by P.N. Bhagwati, J. in *S.P.*

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<sup>1</sup> Part V, The Constitution of India.

<sup>2</sup> Article 214-237, The Constitution of India.

*Gupta's case*<sup>3</sup>, it is indeed important to have judges who are prepared to fashion new tools, methods strategies and are ready to evolve a new jurisprudence, who are judicial statesmen with a social vision and creative faculty and *who have*, above all, a deep sense of commitment to the Constitution with an activist approach and *obligation for accountability*—not to any political party in power nor to the classes which are vociferous but *to the half hungry millions of India who are continually denied their human rights*.

## II. ACCOUNTABLE OR NOT?

If one refrains from answering the question about accountability in a haste, one's mind would redirect to the case where P.N. Bhagwati, J. says that the Chief Justice of India or of the High Courts have no accountability to the people. "The power of appointment of Judges is not entrusted with the Chief Justice of India or the Chief Justice of a High Court *because they have no accountability to the people* and even if any wrong or improper appointment is made, *they are not liable to account to anyone for such appointment*."<sup>4</sup> Despite the fact that statement on the accountability of the Judges of supreme order is given with reference to the purpose of appointment of Judges only, this statement lightly diverts us from the affirmative answer we were ready to give in the beginning of the essay.

Further, quoting Justice Bhagwati said that "*Justice Krishna Iyer was not oblivious to the fact that the judiciary is a non-elective institution and which has an elitist approach, with little or no accountability*."<sup>5</sup>

The position of this Bench is quite clear, hence.

In the next Judges Transfer case, however, this position was completely refuted. The majority view in *S.P. Gupta* to the effect that an executive should have the primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which punishes on a mere touch.<sup>6</sup> In actual practice, real accountability in the appointments of superior judges is of the Chief Justice of India and the Chief Justice of the High Courts.<sup>7</sup>

## III. ACCOUNTABILITY IN LIGHT OF INDEPENDENCE OF JUDICIARY

Independence of judiciary is an essential attribute of the Rule of Law, and is a part of the basic structure of the Constitution.<sup>8</sup>

First of all, judicial independence cannot stand by itself, something like judicial accountability must also be there, which should be kept in mind.<sup>9</sup>

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<sup>3</sup> S.P. Gupta v. President of India and ors., AIR 1982 SC 149

<sup>4</sup> Ibid

<sup>5</sup> Supra 3

<sup>6</sup> Supreme Court Advocates on Record Association and anr. v. Union of India, AIR 1994 SC 268

<sup>7</sup> Ibid

<sup>8</sup> Supra 6

<sup>9</sup> Supreme Court Advocates on Record Association and anr. v. Union of India, Writ (Civil) Petition No. 13 of 2015, decided on 16 October, 2015

Even in the US, often the debate over judicial selection methods is distilled to a single tradeoff: independence v. accountability.<sup>10</sup> Elected judges are less accountable (more accountable) than appointed judges in the sense that the public can turn them out of office if they do not like their decisions.<sup>11</sup> Hence, even in the jurisprudence of America, the difference or rather the reciprocity of the concepts of independence and accountability is prevalent. Accountability is considered inversely proportional to independence of judiciary.

However, in reality, it is not so. The main aim of separation of powers is to achieve the maximum extent of accountability.<sup>12</sup> The separation of powers is in consonance with the independence of judiciary, in fact both imply the same thing. This would go on to mean that independence of judiciary implies accountability of the people. Conversely, till this principle of accountability is preserved, there is no violation of separation of powers.<sup>13</sup> Each wing of governance had to be accountable.<sup>14</sup>

#### ***Accountability as a facet of independence***

The control of High Courts over all subordinate Courts<sup>15</sup> for instance, is one of the effective measures to enforce accountability. The power to check over subordinate Courts entrusted to the High Court preserves independence as well. No accountability to or interference of the executive and the legislature is a part of judicial independence.

When it comes to the accountability of Supreme or High Court Judges, it is rightly said that the holder of office of a Judge of Supreme Court or High Court should, therefore, be above the conducts and ordinary mortals of the Society.<sup>16</sup>

In the words of Justice Krishna Iyer, “Independence of judiciary is neither government made to opposition measure nor to government’s pleasure.”

#### **IV. IMPEACHMENT IN PRACTICE**

In the words of Lord Acton, *power corrupts and absolute power corrupts absolutely*. It is, therefore, very important to determine the accountability of the Judges of the High Courts and the Supreme Court. These Judges of higher echelons should not merely be men of clay with all frailties and foibles, human failings and weak character which may be found in those in other walks of life.<sup>17</sup> The actual as well as apparent independence of Judiciary would be transparent only when the office holders endow those qualities which

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<sup>10</sup> John L. Warren III, Holding the Bench Accountable: Judges Qua Representatives, Washington Jurisprudence Law Review, Vol. 5, Issue 2, 2014 ed.

<sup>11</sup> Ibid

<sup>12</sup> Supra 9

<sup>13</sup> Supra 9

<sup>14</sup> Supra 9

<sup>15</sup> Article 235, The Constitution of India

<sup>16</sup> Krishna Swami v. Union of India, (1992) 4 SCC 605

<sup>17</sup> Dr. Janak Raj Jai, Commissions and Omissions in the Administration of Justice, Daya Books, 2003

would operate as impregnable fortress against surreptitious attempts to undermine the independence of judiciary.<sup>18</sup> The Judge whose character is clouded and whose standards of morality and rectitude are low may not have the judicial independence and may not command confidence of the public.<sup>19</sup> A single dishonest judge not only dishonors himself and disgraces his office, but also jeopardizes the integrity of the entire judicial system.<sup>20</sup>

The relationship between a master and a servant is such that the servant may disobey the master only at his peril—but there is no such relation between the Judges and their appointing authority, that is the government.<sup>21</sup> Even in relation to proceedings for impeachment of a Judge, there is an area of judicial review.<sup>22</sup> Thus, it is clear that the Constitution has insulated the Judiciary from both the Executive and the Legislature, but the intent was to make it free from any pressure of the government or the outside.<sup>23</sup> Moreover, the Judges owe their appointment to the Constitution and hold a position of privilege under it, and they are required to uphold the Constitution and the laws without fear of the executive and without favor (i.e., without expecting any favor from the executive).<sup>24</sup>

Coming to the sub-topic of impeachment, it is indeed correct to be held as an essential counterpart to the independence secured to the holders of high office by making their tenure one of good behavior, instead of at pleasure.<sup>25</sup> Innumerable provisions have been embodied in the legal system of the country for the protection of the Judges, viz. Section 1 of the Judicial Officers Protection Act, 1850 that gives protection from civil liability and Section 77 of the Indian Penal Code, 1860 that ensures protection from criminal liability. Moreover, the power for civil and criminal proceedings for contempt has been under the Contempt of Courts Act, 1971 along with Articles 129 and 215 of the Constitution. Article 121 and 211 of the Constitution provides immunity from scrutiny in Legislature. The Executive has the power to appoint the Judges, but it does not have the power to remove them—this power lies with the Parliament (legislature)<sup>26</sup>.

‘In absence of a statute, misfeasance of a judicial officer is not a criminal offence, impeachment being the exclusive remedy.’

The question here is, how much is the impeachment procedure practicable, or of the possibility of its execution. There is no need to go in lengths about the procedure that is highly simplified and endowed in the Constitution. All it can be said is that it is indeed rare to have reached the last stage of the process, and finally remove a judge. Mention may be made in this connection to the decision in C.K. Daphtary v. O.P.

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<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> K. Veeraswami v. Union of India, 1991 SCC (3) 655

<sup>21</sup> Supra 17

<sup>22</sup> Sub-Committee on Judicial Accountability v. Union of India and ors., (1991) 4SCC 699

<sup>23</sup> Supra 17

<sup>24</sup> Union of India v. S.H. Sethi, AIR 1977 SC 2328

<sup>25</sup> Supra 20

<sup>26</sup> Article 124, The Constitution of India

Gupta<sup>27</sup>, and it may in fact conclude this whole discussion:

“It seems to us that whoever drafted the impeachment motion, drafted it with a view to bring the facts within the meaning of the express ‘misbehavior’ in Article 124(4) for he must have realized that to say that a Judge committed errors, even gross errors cannot amount to misbehavior.”

## V. THE PHENOMENON OF UNCLE JUDGES SYNDROME

The words of the former Union Law Minister explain the phenomenon in simplicity:

“Let’s say there are four judges whose sons are practicing as lawyers in the same court. Obviously, the son of A will not appear in his father’s court and son of B will not appear in his father’s court and so on. But they will appear in each other’s courts and there is a general understanding that if you help my son, I will help your son. This is happening in many cases.”

The minority view in the case of K. Veeraswami<sup>28</sup> expressed support for bringing the Judiciary under the purview of the Prevention of Corruption Act. Phenomena like those of the syndrome are the cause behind such a strict stance of the Judges of the Supreme Court.

## VI. THE RELEVANCE OF APPOINTMENT OF JUDGES

As remarked by the Law Commission of India, the relevance of appointment of judges is summarized below:

“It is obvious that the selection of Judges constituting a Court is of such pivotal importance to the progress of the nation, it is responsibility to be exercised with great care. The constitution of the Court must command the faith of the judiciary and the Bar as a whole, as well as that of the people.”<sup>29</sup>

It may be stated that only learned men of sterling qualities can dispense justice who can withstand all sorts of pressures, both internal and external. In other words, the system of appointment of judges of higher judiciary has to be such that it ensures:<sup>30</sup>

- i. That qualified, competent, meritorious and suitable persons are appointed
- ii. A wrong appointment is not made on the basis of erroneous or inadequate information.

If the selectee bears a particular stamp for the purpose of changing the cause of decision bowing to the dictate of his appointing authority, then the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity.<sup>31</sup>

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<sup>27</sup> AIR 1971 SC 1132

<sup>28</sup> Supra 20

<sup>29</sup> 14<sup>th</sup> Report, Law Commission of India, 1958

<sup>30</sup> Supra 17

<sup>31</sup> Supra 6

### *Bench-bar relationship and the accountability of the advocate*

Since the accountability of the judiciary is said to be towards the Bar as well as the general public, it is of equal importance that the advocate is equally responsible to the Bench. This accountability is emphasized and ensured in many Supreme Court cases, like Harish Uppal v. Union of India<sup>32</sup>, Pandurang Khandekar v. Bar Council of Maharashtra, Bombay<sup>33</sup>, etc.

The author believes that a vigilant advocate ensures an accountable judiciary.

## VII. CONCLUDING REMARKS

If we concede to the Constitution for the correct answer in the end, it has none. The purpose of the Constitution is not to answer in a *yes* or a *no*. The Constitution made us our own masters, every question we create—we impose on ourselves.

Quoting Dr. Ambedkar's last speech in the Constituent Assembly is relevant here:

"I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. *The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics.*"<sup>34</sup>

One thing which is very general but worth quoting is the concept of judgement. The judiciary pronounces judgements. Judgements include the Court's reasoning and rationale behind the verdict it has propounded. This explanation, too, stands for a form of *accountability*. And in the end, it is pertinent to note that the Constituent Assembly agreed that the judiciary's *independence* is important but not its *insulation*. Accountability, if not already existent in its entirety, must come into play and in full force.

In the words of Chief Justice Burger of the American Supreme Court, *a sense of confidence* in the Courts is essential to maintain the fabric of ordered society for free people. It can be conclusively said that this sense of confidence, is impossible without some degree of accountability.

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<sup>32</sup> AIR 2003 SC 739

<sup>33</sup> AIR 1984 SC 110

<sup>34</sup> Rudranshu Mukherjee, *The Great Speeches of Modern India*, Random House India, 2007 ed.