

## India needs mechanism for accountability of judicial misconduct.

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“Courts should observe the 'Lakshmana Rekha' of their jurisdiction and should not encroach upon the domain of executive and parliament. “

- Justice J.S.Verma.<sup>2</sup>

The public servants & the government must be role models in law abiding acts, for others to emulate & follow. If a student makes a mistake it is excusable & can be corrected by the teacher. If the teacher himself makes a mistake, all his students will do the same mistake. If a thief steals, he can be caught, legally punished & reformed. If a police himself commits crime, many thieves go scot-free under his patronage. Even if a police, public servant commits a crime, he can be legally prosecuted & justice can be sought by the aggrieved. Just think, if a judge himself that too apex court of the land itself commits crime, It gives a booster dose to the rich & mighty, those in power, criminals in public service to commit more crimes. That is exactly what is happening in India. The educated public must rise to the occasion & peacefully, democratically must oppose this criminalization of judiciary, public service. Then alone, we can build a RAM RAJYA OF MAHATMA GANDHI'S DREAM. The judiciary, an essential wing of the State, is also accountable.

Absence of any mechanism for enforcement of judicial accountability at the higher levels, other than by the process of impeachment [articles 124(4) and 217(1) Proviso (b)] in extreme cases, is because no such need was visualized when the Constitution was framed. At that level, it was expected that settled norms and peer pressure were sufficient checks.

The dreamers of the Indian Constitutional system would not have imagined that within 60 years of the making of the Constitution, the Judiciary would emerge as the most powerful institution of the country. No person is above the law. No institution is exempt from accountability, including the judiciary. Accountability of the judiciary in respect of its judicial functions and orders is vouchsafed by provisions for appeal, reversion and review of orders.<sup>3</sup> No public institution or public functionary is exempt from accountability although the manner of enforcing accountability may vary depending upon the nature of the office and the functions

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<sup>3</sup> Soli J Sorabjee, May 08, 2005.

discharged by the office holder. The judiciary, an essential wing of the State, is also accountable. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favor. The constitution of India provides many privileges to maintain the independence of judiciary. If the Preamble to our Constitution be regarded as the reflection of the aspirations and spirit of the people, then one thing that even a layman will note is that among the various goals that the Constitution-makers intended to secure for the citizens, "JUSTICE- Social, Economic & Political" has been mentioned before the rest." No person, however high, is above the law. Our Constitution provides for removal of a judge of the Supreme Court or the High Court for proved misbehavior or proved incapacity, by what is popularly called the process of impeachment, where under two thirds of the members of each House of Parliament can vote for the removal of the judge.

Accountability of the judiciary at every level, in a democracy cannot be doubted. The need of an effective mechanism for the enforcement of judicial accountability, when needed, is a felt need and must be accepted. Since judicial accountability is a facet of independence of the judiciary, article 235<sup>4</sup> of the Constitution of India provides for 'control' of the High Court over the subordinate judiciary clearly indicating that the provision of an effective mechanism to enforce judicial accountability is a part of our constitutional philosophy. Entrustment of the power over the subordinate judiciary to the High Court preserves the independence of judiciary, and respects the directive principle of separation of judiciary from executive (article 50). It cannot be doubted that the independence of a subordinate judge is as important as that of a judge in a High Court or in the Supreme Court.<sup>5</sup>

The Constitution made the Courts as protectors of rights of common man. 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<sup>6</sup> 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.

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<sup>4</sup> Constitution of India

<sup>5</sup> J. S. Verma Former Chief Justice of India ( Mechanism for Judicial Accountability)

<sup>6</sup> Menka Gandhi v. union of India

Hundreds of years ago, Francis Bacon<sup>7</sup>, in his essay on 'Judicature', emphasized that "the place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purpose thereof ought to be preserved without scandal and corruption." But such is the disgraced himself by indulging in acts of bribery and favoritisms at the fag end of his career. This highlights the complexities and the sensitivities in the matter of effective, implementation of judicial honesty.

The superior courts in India have emerged as 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.

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 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.

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

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<sup>7</sup> English philosopher, statesman, scientist, lawyer, jurist, and author.

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.

All this makes for an alarming picture of lack of accountability of the higher judiciary in India. We cannot practically take any disciplinary action against misconduct committed by judges. If we expose them publicly, we 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. Judiciary must function transparently and must devise a clear criteria and methodology of selecting judges and dealing with complaints against them. They must have small investigative machinery under their administrative control through which they could get disputed and relevant questions of fact investigated. .

Corruption in the judiciary is hardly a new phenomenon, though it has certainly increased over the years.

1. Case Of Justice V. Ramaswami,<sup>8</sup>
2. The Case Of Justice Ashok Kumar<sup>9</sup>,
3. Arundhati Roy's Case
4. The Case Of Justice Soumitra Sen,
5. Case Of Justice Ashwini Kumar Mata

It is worthwhile however to examine the reasons for the sudden spate of exposures of judicial corruption. Having enjoyed enormous powers, including the power of contempt, without any accountability, the higher judiciary has over the years; tread on the toes of many persons and institutions, particularly the media. Not wanting to suffer criticism, the judiciary has used its power of contempt to stifle criticism. More than 50 editors, publishers and journalists have been issued contempt notices by the Karnataka High Court for having written stories about a judicial sex scandal, reportedly involving three judges of the High Court. Small wonder then, that the media is enjoying every bit of the juicy judicial scandals that have exploded. That there has

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<sup>8</sup> IN THE YEAR OF,1993

<sup>9</sup> IN THE YEAR OF,2005

been corruption in the judiciary for many years One reason why judges have been treated as demigods in this country is because of the power of contempt wielded by them. This is a jurisdiction in which a judge against whom an allegation has been made can himself act as the complainant, prosecutor and judge. The judge can even refuse to allow the maker of the allegation to prove its truth. The very existence of this power has been enough to silence the media and inhibit them from exposing judicial misbehavior or corruption. The amendment recently moved in Parliament to make truth a defense in a contempt action is not an adequate safeguard for the citizens and the press<sup>10</sup>. As the case involving the journalists who wrote about the Karnataka sex scandal shows, though the allegation may be made bona fide and on a reasonable basis, it may not always be possible to prove its truth. This could be because the witnesses are won over or the evidence disappears for some other reason.

The Judicial Standards and Accountability Bill will set judicial standards and make judges accountable for their lapses. It will also mandate that judges of the high courts and the Supreme Court declare their assets and liabilities, including those of their spouses and dependants. The Union Cabinet has approved the draft Judicial Standards and Accountability Bill, 2010 that provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities. All these details will be put up on the websites of the Supreme Court and high courts. It will further require judges not to have close ties with any member of the Bar, especially those who practice in the same court. "The enactment of the Bill will address the growing concerns regarding the need to ensure greater accountability of the higher judiciary by bringing in more transparency, and will further strengthen the credibility and independence of the judiciary, Information and Broadcasting Minister Ambika Soni told reporters after a meeting of the Union Cabinet. The proposed oversight committee will be headed by a former chief justice of India and include the attorney general, a Supreme Court judge, a chief justice of a high court and an eminent person nominated by the President.

Reforms regarding judiciary in India are likely to take place only if there is a strong democratic pressure on the government. 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

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<sup>10</sup> "The Right to Transparent Governance", Aruna Roy, Jean Dreze and Nikhil Dey

ensuring that the executive and the legislature function in accordance with the ideals and principles of the Constitution.

It is a serious issue relating to judicial accountability requiring clarification without further delay. It is time that article 124(7) is made more specific to remove any ambiguities or grey areas amenable to differing individual interpretations in respect of prohibited activities after retirement from the Supreme Court. In a 'democratic republic' power with accountability of the individual enjoying it, is essential to avert disaster for any democratic system. The accountability must be comprehensive to include not only the politicians, but also the bureaucrats, judges and everyone invested with public power. Power and position in a democracy come attendant with responsibility, and every incumbent of a public office must remain constantly accountable to the people, who are the repository of political sovereignty. At last of the conclusion it is necessary to introduce the golden words said by Lord Woolf<sup>11</sup> -

"The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public."

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<sup>11</sup> The Chief Justice of England.