

# Judicial Accountability and Transparency in India: Flaws and Road Ahead

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## **Abstract**

*In a democratic system judiciary is very important organ for upholding and protecting the rights of the people. Not only an organ of judiciary is required but it is also very essential that this branch of government must be independent in its functioning. Independence is required to ensure the impartiality in decision making process. Without impartiality in the decision making process public cannot witness the sense justice. Along with the independence, judicial accountability and transparency is also necessary. In absence of judicial accountability, transparency and independence; justice will be an illusion for public. Justice is one of the most important objects of a democratic system. Justice is a major goal of law. Justice is very important for flourishing any democratic system because injustice with public ultimately leads to dissatisfaction, disaffection to government or ruler and results in revolt against State. Judicial independence cannot be isolated to the accountability for their work which judges carried out. Judges are also human being and they work under the human fallibilities. Judges cannot be exempted from the institutional supervisory mechanism. Judicial Independence seeks for adopting a proper mechanism for transparency and accountability.*

**Key words:** Justice, Good Governance, Indian Judiciary Transparency, Accountability.

## **Introduction**

It is well known fact that judiciary is one of the most important organ of the government. It plays an important role in justice delivery system and in the governance of the country. Indian judiciary has been praised for playing an active role for promoting good governance in India but Indian judiciary itself is facing many challenges for true realization of good governance by public at large. There is lack of transparency in the appointment of judges and administrative functioning of judicial system in India. In the history of Indian judiciary, on 12<sup>th</sup> January, 2018 an unexpected thing was happened when four senior most judges of the Supreme Court held a press conference for their dissatisfaction with the unjust administrative functioning of the Supreme Court. They said to media that if judiciary will not be preserved as institution the democracy will

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not survive in this country<sup>3</sup>. Framer of the Constitution and our founding father has vested enormous power in the judiciary for the protection of the civil liberties and Constitution itself but they have not provided very effective mechanism for the accountability of judiciary. Justice is one of the Constitutional mandate and most important human right of citizen. There is a spreading rash of judicial delinquency in many forms<sup>4</sup>. Trust and fiduciary is the main component of power which has been vested in public authority. Accountability and trusteeship go together and constant monitoring and social audit is most important factor in this regard. Executive branch is accountable to the parliament and ultimately, the Parliament has been made accountable to the people. Theoretically, under the Constitutional scheme, judiciary too has been made accountable to the Parliament. Judiciary is one of the most important pillars of democracy; therefore it must be subject to the democratic discipline. Any branch of the government which is not subject to discipline of democratic principles may become uncontrolled and unaccountable. To save the prestige, trust and confidence which have been posed by the public in judiciary it is necessary that the working of the judiciary must be transparent and accountable. Founding father of the Constitution had thought that settled norms and peer pressure would act as adequate checks upon the judiciary but it has not happened. It is rightly observed by the Supreme Court that a single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system<sup>5</sup>. A scholar has listed three main benefits of the judicial accountability as follows<sup>6</sup>-

1. It promotes the rule of law.
2. It promotes public confidence in judges
3. It promotes institutional responsibility.

The process of accountability can be promoted and facilitated through the judicial accountability. To achieve judicial accountability it is necessary that judicial system must be made accountable to the law.

## Meaning and Concept of Judicial Accountability

Accountability means being “responsible for your decisions or actions and expected to explain them, when you are asked<sup>7</sup>”. In Webster’s dictionary, accountability is defined

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<sup>3</sup> Avinash Bhagi, “Judicial Accountability in India: An Illusion or Reality?”GNLU J.L. DEV. & POL.8 (2018) p 145.

<sup>4</sup> V R Krishna Iyer, “Judicial Accountability to the Community: A Democratic Necessity” ECONOMIC AND POLITICAL WEEKLY, July 27, 1991, Vol. 26, No. 30 (July 27, 1991) <https://www.jstor.org/stable/41498506>. (visited on 08/03/2021).

<sup>5</sup> Isha Terkey, “Judicial Accountability in India Understanding and Exploring the Failures and Solutions to Accountability” submitted CCS Working Paper No. 247 Summer Research Internship Programme 2011 Centre for Civil Society. [https://ccs.in/internship\\_papers/2011/247\\_judicial-accountability-in-india\\_isha-tirkey.pdf](https://ccs.in/internship_papers/2011/247_judicial-accountability-in-india_isha-tirkey.pdf)

<sup>6</sup> Isha Terkey, “Judicial Accountability in India Understanding and Exploring the Failures and Solutions to Accountability” submitted CCS Working Paper No. 247 Summer Research Internship Programme 2011 Centre for Civil Society. [https://ccs.in/internship\\_papers/2011/247\\_judicial-accountability-in-india\\_isha-tirkey.pdf](https://ccs.in/internship_papers/2011/247_judicial-accountability-in-india_isha-tirkey.pdf)

<sup>7</sup> Oxford Advanced Learner’s dictionary, 6<sup>th</sup> Edition, 2000.

as the quality or state of being accountable, liable, or responsible. Generally speaking, accountability implies the necessity to justify or explain ones past conduct, behaviour or action. Thus, the word “accountability” means responsibility with respect to the powers, functions and duties which are assigned to a person. Judicial accountability makes the judges accountable by holding them legally or politically responsible for their behaviour. In simple words accountability means to take responsibility for one’s own action, behaviour or decision and to be responsible to an external body. It is concerned with the qualitative work, quality of justice, conduct and behaviour of judges. It emphasizes upon the complete integrity of judges which is very basic trait of justice delivery system. Unimpeachable integrity, impartiality, fairness is utmost necessity for efficient functioning of judiciary. In NJAC Case it was observed by Justice J. Chelameswar that deep learning in law, incisive and alert mind to quickly grasp the controversy, energy and commitment to resolve the problem are critical elements which make a Judge efficient and enable him to decide cases quickly. However, every Judge who has all the above-mentioned qualities need not automatically be a Judge who can generate confidence in the litigants unless the litigant believes that the Judge is absolutely fair and impartial<sup>8</sup>. Judiciary is the watchdog of the Constitution and its fundamental values. It is also said to be the lifeblood of constitutionalism in democratic societies. People have expectations that their cases should be decided quickly by judges. It will generate confidence among people. Now, the question is that which is the formula and what are the qualities which can make a judge to decide cases quickly thereby generate confidence in the masses and litigants. Transparency is a vital factor in constitutional governance. It is well established fact that constitutionalism demands rationality in every sphere of State action. It may be the process of appointment or the process of justice delivery system.

Keeping in mind the concept of judicial accountability and independence it can be divided into three categories. One is political accountability, second is decisional accountability and third is behavioral accountability. Selection and appointment of judges, their tenure is part of the political accountability. Decisional accountability is concerned with the manner in which the judges are accountable for their judgments and ruling. Concept of judicial review, appeals, academic criticism of judicial actions is a part of decisional accountability. Legislatures do not provide adequate funding for proper functioning of the courts. Definitely, it adversely affects the decision making process of the court. Behavioral accountability involves the conduct of judges<sup>9</sup>. Transparency is an aspect of rationality. In process of appointment, transparency is required. The process of appointment by Collegium system in our country is absolutely opaque and inaccessible to public. Ruma Pal, J; has observed, that “Consensus within the Collegium is sometimes re-

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<sup>8</sup> Supreme Court Advocate on Record Association v. Union of India para 15 at 483.

<sup>9</sup> Wendell L. Griffen, “Comment: Judicial Accountability and Discipline” LAW AND CONTEMPORARY PROBLEMS Vol. 61 No. 3 1998 p 75, <https://www.jstor.org/stable/1192417>, (visited on February 10, 2021).

solved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Institutional independence has also been compromised by growing sweet talk and 'lobbying' within the system".<sup>10</sup> In the reference of judicial proceeding the Supreme Court has observed<sup>11</sup> that "Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial conducted by the court in open and which is open to public scrutiny and watch works naturally as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice has a such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open and must permit the public admission to the court-room. Jeremy Bentham has also observed that "In the darkness of secrecy sinister interest, and evil in every shape, has full swing. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity."

### **Illustrations (Incidents Which Questioned the Judiciary)**

Members of judiciary himself try to emancipate the judiciary from two organ of State. There are numerous instances, where public confidence in the functioning of the judiciary has been hampered. As already mentioned above the procedure of appointment of judges by Collegium system is not transparent and opaque. In a democratic system public have right to know about the functioning of the all organs of the government. Despite this, the judiciary has developed the concept of sealed envelope in veil of which the court claims their inherent privilege in public interest for not disclosing the fact of inquiry made in some sensitive cases<sup>12</sup>. In 1991, there were allegations of misappropriating funds against Justice Ramaswamy during his tenure as the Chief Justice of the Punjab High Court. In 1992, Parliament had started impeachment proceeding against him. An inquiry committee was set up which found Justice V. Ramaswamy guilty of willful and gross misuses of office and moral turpitude by using public fund for private pur-

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<sup>10</sup> "An Independent Judiciary"- Speech Delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on November 10, 2011 as quoted by J. Chelmeswar in Supreme Court Advocate on Record Association v. Union of India

<sup>11</sup> Naresh Shridhar Mirajkar v. State of Maharashtra AIR 1967 SC 1 para 20 as quoted by J. Chelmeswar in Supreme Court Advocate on Record Association v. Union of India para 195.

<sup>12</sup>Peter Ronald de Souza, "The question of the sealed envelope, in black money case, all our hopes are glued to a sealed envelope submitted by the government to the Supreme Court. But will ever question the political culture associated with it". <https://www.thehindu.com/opinion/lead/opinion-on-black-money-case/article6584159.ece>, (visited on February 15, 2021).

poses and reckless disregard of statutory rules<sup>13</sup>. As per the constitutional mandate it was required that motion for removal must be passed by the parliament with two- third majority. Congress party abstains from the voting therefore the motion could not get support of the parliament. In Prasad Medical case it was alleged that Justice S.N. Shukla received illegal gratification from retired Justice Quddusi and BP Yadav, Chairman of Prasad Educational Trust for getting favorable order<sup>14</sup>. After getting a nod from the then Chief Justice of India, CBI registered FIR against Justice SN Shukla on December 4, 2019<sup>15</sup>. Again a permanent female employee of the Supreme Court was removed from her post and her relatives were also dismissed from the service. She made allegations of sexual harassment against then Chief Justice of India. There was unusual hearing on Saturday without a petition having been moved<sup>16</sup>. It was termed a matter of great public importance touching upon the Independence of Judiciary. Attorney General advised that an external committee should be set up. Instead of following this advice a committee of Judges was set up by Chief Justice of India himself.

### **Appointment and Transfer of Judges and Functioning of Collegium System**

Under the Constitutional Scheme, the appointment of the judges of the Supreme Court and High Courts is required to be done by the President of India with the consultation of the Chief Justice of India. Collegium is a system which is developed and introduced by the Supreme Court of India. Its main function is to give the advice and recommendations to the President of India for the appointment of Judges of the Supreme Court and High Courts and for the transfers of judges of the different High Courts<sup>17</sup>. The major benefit given by this system to our country is to protect and safeguard the separation of powers between the three organs of Government. It ensures that the independent nature of the judiciary is not affected by the Legislature or the Executive. Justice Sathasivam is of the opinion that the Collegium System has become a little more transparent and the consultation is made to must be broad-based consultation, as a result it will be best suited for the appointment of the judges. He also said that, “we as judges know the capability and character of the persons who are considered for appointment as judge to the Supreme Court and High Courts”. This statement by him makes it clear that it would become difficult for people who are not associated with the daily work of

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<sup>13</sup> <https://ncert.nic.in/ncerts/l/keps206.pdf> (visited on March 09/03/2021).

<sup>14</sup> <https://www.news18.com/news/india/cbi-conducts-searches-in-delhi-lucknow-in-connection-with-medical-college-scam-2414699.html> (visited on March 09/03/2021).

<sup>15</sup> <https://www.news18.com/news/india/cbi-conducts-searches-in-delhi-lucknow-in-connection-with-medical-college-scam-2414699.html> (visited on March 09/03/2021).

<sup>16</sup> <https://thewire.in/law/cji-ranjan-gogoi-supreme-court-judiciary> (visited on March 08/03/2021).

<sup>17</sup> Available on:

<https://www.latestlaws.com/articles/the-collegium-system-in-india-history-status-quo-and-alternatives-by-samarth-luthra/#:~:text=Collegium%20System%20is%20a%20system,judges%20of%20the%20Supreme%20Court>, (visited on February 12, 2021).

courts to shortlist the best people for the required position. On comparing to the Judicial Appointment Commission (JAC), the current Collegium System scrutinizes the shortlisted candidates more accurately for the qualities expected of a judge in the Supreme Court or the High Court. Due to lack of transparency in the appointment of judges, the procedure adopted by Collegium system is being criticized since its inception. In the matter of *Anjali Bhardwaj v. Union of India* the Supreme Court held that it is mandatory to disclose the reasons for the appointment of the Public Relation Officers<sup>18</sup>. But in case of appointment of the judges of the Supreme Court and High Courts the reasons for the same is not required to be disclosed<sup>19</sup>.

### **Transfer of Judges**

Constitutionally, the power of appointment and transfer of judges is vested in President. Since many years not only the policy of appointment but the policy of transfer is also criticized because many transfer of judges of different High Courts has been made on extraneous motive. Under the Constitutional scheme, the transfer of judges is allowed but it is argued by a learned scholar<sup>20</sup> that it is not necessary to exercise this power. Further, it is argued that all the transferred judges should be transferred back to their parent High Courts. In future, none exercising of power of transfer of judges of High Court will make judiciary more independent, strong and efficient. In our country, the justice delivery system is very local. Each State has its own history, legislative track record and language. India is a Union of State and each State has its own geographical area, system of administration, laws and customs. Keeping in mind the above things policy of the transfer of judges in the past has been exercised with ill motive and opaque manner is not required to be implemented.

### **Roaster System**

Chief Justice of India has power to decide the roster of the cases. In this regard, dissatisfaction from the members of highest judiciary itself has been expressed. It was said that particular and some specific case are picked up and has been allotted to favorable bench of judges. This has a very great concern because it has damaged the image of judiciary. Such type of instances should have never occurred. The procedure for allotment of cases must be transparent, fair, just and reasonable. There should be no such scope to raise such type of voices. Unfortunately, there are no guidelines which can give confidence to the litigant and legal fraternity. If the system is transparent it will create confidence of public in the institution.

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<sup>18</sup> Vaidehi Misra, “Will the SC Finally Rule in Favour of Transparency in Judicial Appointment?” <https://thewire.in/law/supreme-court-judicial-appointments-transparency>, (visited on February 20, 2021).

<sup>19</sup> Vaidehi Misra, “Will the SC Finally Rule in Favour of Transparency in Judicial Appointment?” <https://thewire.in/law/supreme-court-judicial-appointments-transparency>, (visited on February 21, 2021).

<sup>20</sup> Justice (ret.) Kamaljit Singh Garewal, “Transfer of Judges: A Policy Needs Revision, India Legal”, <https://www.indialegallive.com/column-news/transfer-judges-high-courts-act/>, (visited on February 21, 2021).

## Practice of Sealed Envelope

Rule of law is the basic structure of the Constitution of India and the Supreme Court of India is the custodian of the Constitution as well as the Rule of Law. The courts in India are authorized to hold in Camera trial where in the interest of justice, it is required in the opinion of the court of law<sup>21</sup>. In a case, where the personal information of the litigants which relates to his privacy is required to be protected, it will not be appropriate to the court to conduct open hearing and the information will not be accessible by media but parties of the case are still entitled to receive all types of information regarding the case. Concept of sealed cover submission is totally different. In case of sealed cover submission the information is accessible only to the court and only to the party who has submitted it<sup>22</sup>. A Public Interest Litigation was filed seeking independent inquiry about the deal for purchase of Raffel Fighter Jet from France Dassault Aviation Company. The petition was dismissed by the Supreme Court but still the Court had sought a detail report about the pricing and negotiation process in sealed cover envelope. There are so many cases where the Court had sought detailed report in sealed cover envelope such as in case of former Chief of CBI Alok Verma, Assam National Register of Citizen, 2G Spectrums and Board for Control of Cricket in India etc<sup>23</sup>. In an interview<sup>24</sup> retired Justice J. Chelameswar, said that as I understand in the Rafale matter, the whole issue in front of the Supreme Court is on the integrity of the negotiating process and the pricing. I don't see any reason why it should be done. I wouldn't have done it. The retired judge elaborated that submission via sealed cover would be justified if information sought by the court was technical in nature and had national security implications. If any information regarding the aircraft and its technical specifications has to be gone into, whether the court should go into it at all is the first question. Second, even if it has to be gone into, then it's certainly not a matter for public debate as it concerns a serious security issue<sup>25</sup>. Justice Chelameswar said he would call for sealed-cover submissions only in two cases. Where it was a personal matter such as a marital dispute or in situa-

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<sup>21</sup> Civil Procedure Code 1908, Section 153 B read as under: Place of trial to be deemed to be open court- The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them:

Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

<sup>22</sup> "Sealed Covers v Judicial Transparency: How to Strike a Balance?" Copyright © Bloomberg Quint, <https://www.bloombergquint.com/law-and-policy/sealed-covers-vs-judicial-transparency-how-to-strike-a-balance>,

<sup>23</sup> Sealed Covers Vs Judicial Transparency: How To Strike A Balance? Copyright © Bloomberg Quint, :<https://www.bloombergquint.com/law-and-policy/sealed-covers-vs-judicial-transparency-how-to-strike-a-balance>, (visited on February 21, 2021).

<sup>24</sup> Justice J. Chelameswar told to Bloomberg Quint and available on <https://www.bloombergquint.com/law-and-policy/sealed-covers-vs-judicial-transparency-how-to-strike-a-balance>, (visited on February 21, 2021).

<sup>25</sup> Justice J. Chelameswar told to Bloomberg Quint and available on <https://www.bloombergquint.com/law-and-policy/sealed-covers-vs-judicial-transparency-how-to-strike-a-balance>, (visited on February 21, 2021).

tions where information is related to national security. Certain proceedings cannot be in public, the law always recognises it. But there are always exceptions to the rule. It all depends on case to case. Whether a particular case calls for sealed cover is a matter of assessment. If some material comes to me in a sealed cover and which in my opinion would be absolutely dangerous for national security, then I would record it saying that there is some sensitive material which if revealed to the public would be detrimental to national security. I would keep that confidential and order it may be revealed after five years or after such time when its revelation would not be detrimental to national security<sup>26</sup>.

## **Conclusion**

To create confidence and faith of the public it is necessary to adopt the principal of transparency and fairness in the functioning of any democratic institution. Judiciary has forced too many other organs of State and institutions to be transparent in its functioning. But eyebrows have been raised by different stakeholders and thinkers about the lack of transparency in the functioning of Indian judiciary itself. The judiciary should have not given this opportunity to others. It is necessary for the judiciary to adopt the transparency in its functioning. The ultimate object of judicial accountability is to maintain public confidence in the judiciary because a legal system works only if the decisions given by the court are being widely acceptable by public. Public will accept the decisions of the court if they are convinced that judiciary is fair, impartial and independent. It means that justice not only should be done but it also must appear to be done. Therefore judges not only should avoid not only any type of impropriety but it should be appear that they do not indulge any type of impropriety. One of the major criticisms against higher judiciary is about the lack of transparency in the appointment and transfer of judges. In this regard, judiciary has failed in maintaining the standard of accountability. Principal of good governance demands transparency in the all sphere of functioning of judiciary. Not only appointment of judges, all over functioning of the judiciary should be transparent and fair. It will increase the faith and confidence of the public in judiciary. It is equally important that while taking the major of judicial accountability the judicial independence should not be compromised.

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<sup>26</sup> Id.