

CHAPTER VIII

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

‘Justice is a consumer product and must therefore meet the test of confidence, reliability and dependability like any other product if it is to survive market scrutiny. It exists for the citizenry at whose service only the system of justice must work. Judicial responsibility, accountability and independence are in every sense inseparable. They are, and must be, embodied in the institution of the judiciary’.¹

Before the 1960s actions of the administrators were classified as administrative or judicial. Review was for illegalities. Lord Greene, in 1944, neatly summed up the view that prevailed from 1880s saying that ‘the function of the legislature is to make the law; the function of the administration is to administer the law and the function of the judiciary is to interpret the law. The judiciary is not concerned with policy. It is not for the judiciary to decide what is in the public interest. These are the tasks of the legislature, which is put for the purpose, and it is not right that it should shirk its responsibilities’.²

By mid 1950s the period of judicial restraint began to close. In 1985 Lord Roskill noticed an upsurge of judicial activism.³ As public bodies rarely act blatantly illegally, judicial review will be in grey areas which the legislature is, realistically unlikely to tackle. This allows scope for creativity. Thus judges are not often filling the vacuum but re-writing policy. The current restructuring of

¹ Cyrus Das and K. Chandra, eds., *Judges and Judicial Accountability* Universal Law Publishing Co., Pvt., Ltd., Delhi, 2005, at 130.

relationship between the judges and other organs of the Government moves beyond traditional constitutional arrangement crisis and raises questions about their legitimacy.⁴

This is more with controlling constitutions like the Indian. Lord Woolf state strongly that the principles of 'fairness' and 'reasonableness' used in judicial review can not be found in statutes but were the creations of judges. He was of the view that the legislature and the judges were partners in upholding the rule of law.⁵ Lord Donaldson, former Master of the Rolls, said in 1995 that

'it is one thing to be governed by the rule of law. It is quite another to be governed by a despotic, albeit no doubt benevolent, government. And any government which seeks to makes itself immune to an independent review of whether its actions are lawful or un-lawful is potentially despotic'.⁶

The Indian judiciary's repeated re-affirmations of judicial review as their province from which they cannot be ousted by even constitutional amendments would stand testimony to their strong assertions of judicial independence. The know positioning by judges the legislature would not make unjust laws would suggest, *sub silentio*, that judges would find some higher principles superseding legislature authority. This would be relatively difficult

² Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism*, Dartmouth Publishing Co.Ltd., England, 1998, at 8 (rel. on).

³ *Ibid.*, at 10.

⁴ *Supra*, n. 2 at 13.

under a controlling constitution like the Indian which defines the limits of the states power.

Increasing judicialisation of political life has been noticed all over the world by the U.N. based International Association of Judges.⁷ The superior judiciary in India namely the Supreme Court and the High Courts, have jurisdiction not only to decide civil and criminal cases, but by judicial review, also to safeguard civil and political rights of individuals and define and control the powers of every organ of the State. The vast and far-reaching judicial review jurisdiction conferred on and exercised by the superior courts in India is the most conspicuous and distinguishing feature of the present day Indian judiciary. The Indian judiciary has become the most powerful judiciary in the world today, and the societal perception of it is very high.

The power of judicial review conferred on the superior courts by the Constitution of India gave the first real opportunity for exercises involving independence of the judiciary. Conceptually, impendence of the judiciary will require that the judiciary shall decide the matters before it in accordance with its impartial

⁵ *ibid.*, at 14.

⁶ *ibid.*, at 15 (rel. on).

⁷ *ibid.*, at 21.

assessment of the facts and its understanding of the law without improper influences direct or indirect, from any quarter. This would necessarily require that judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature. This is absolutely essential to ensure the rule of law.

The first case of judicial review in terms of the Constitution was *A. K. Gopalan v State of Madras* ⁸ in which the state action was challenged for violation of the Preamble, as well as Arts. 14, 19, and 21 of the Constitution. The court's response was to find the state action valid. Between 1950 and 1957, the court however invalidated certain acts of the State for infringement of Art. 19 freedoms and the right to property in terms of Art. 31. The response of the State was to amend the Constitution by the First Amendment Act to add three grounds of restriction viz., public order, friendly relations with foreign states and incitement to an offence against the right to free speech and to add Arts. 31 A and 31B to validate certain land reforms laws which were found to offend Art. 31 by the court and were put in the IX Schedule, insulated from judicial challenge against Arts. 14, 19, and 31. It

⁸ AIR 1950 SC 27.

also added clause 4 to Art. 15 to counter the court's decision in *Champakam Dorairajan v. State of Madras*.⁹

When the court ordered payment of market value compensation for deprivation of property, the Constitution (Fourth) Amendment Act, 1955 was the response to remove compensation from justiciability. More Acts were put in the IX Schedule to insulate them from judicial review. In 1964, the Constitution (Seventeenth Amendment) Act extended the scope of Art. 31A and elongated the IX schedule, increasing the number of Acts which were insulated from judicial scrutiny. When the court found that the Parliament was seeking to set itself up as the final arbiter of the Constitution, the court responded in the famous *Golak Nath* ¹⁰ case that the Parliament had no power to amend any of the fundamental rights. In 1970, in *R.C. Cooper v. Union of India*, ¹¹ popularly known as Bank Nationalisation case, the Supreme Court by majority of 6:5 invalidated the Bank Nationalisation Act, 1969, for offending Art. 31. The Constitution (Twenty Fifth Amendment) Act, 1971 was the Government's response insulating from judicial review any law passed to implement the Directive Principles State Policy in clauses (b) and (c) of Art.39 and asserting Parliament's power to amend

⁹ AIR 1957 SC 257.

¹⁰ *I. C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

¹¹ AIR 1970 SC 564.

every part of the Constitution. These amendments were questioned in the famous *Keshavanand Bharati* ¹² case which has become watershed in India's constitutional jurisprudence.

When the Parliament rested its power of amendment on its 'constituent power' to escape judicial review because the court in *Golak Nath's*¹³ case had placed the power under entry 97 of list I, Schedule VII, the court responded with an acknowledgment that Parliament had power to amend fundamental rights but in exercising its constituent power the Parliament could not damage or destroy the 'basic structure' of the Constitution.

This decision of 1973, was challenged by the Government in *Minerva Mills v. Union of India*¹⁴ questioning the basis structure theory itself by the Supreme Court reaffirmed the 'basis structure limitation' to the amending power. Thus the theory of 'inviolability of the basic structure' of the Constitution has become a part constitutional lore of the country and has acquired legitimacy. The basic structure doctrine cannot be abrogated legislatively or even by a review by the court. Thus, when there were clashes between the Supreme Court and the Government over the court's decisions

¹² AIR 1967 SC 1643.

¹³ *ibid.*,

¹⁴ AIR 1980 SC 1789.

on property, agrarian and economic reforms, the court has strived to protect individual liberty while conceding a legitimate allowance of power to the Government to determine economic policy questions in answer to the Government's view that the Supreme Court was unsympathetic and at times hostile to its legislation on such matters.

After 1973 the judiciary has directed its concern to human rights, civil rights and community rights of the citizens more than property rights. During the Emergency between 1975 and 1977, the High Courts have displayed a remarkable and robust independence in upholding the fundamental freedoms of detainees who were arrested illegally or arbitrarily. Sadly, the Supreme Court of India, was perceived to have let down the expectations of the people by holding in *Shukla's*¹⁵ case that as during the Emergency the right to personal freedom guaranteed by the Constitution had been suspended by the Presidential Order under Art.359 a detainee did not have even the common law right of securing from the courts his release from an order which was illegal, arbitrary and without the authority of law. This holding in what is popularly known as the *habeas corpus* case, resulted in the Constitution (Forty Fourth Amendment) Act, to Art. 359, thereby providing that

¹⁵ A. D. M. Jabalpur v. Shukla, AIR 1976 SC 1207.

the enforcement of the right to life and liberty under Art. 21 cannot be suspended by the Presidential Order even during an emergency. This amendment is intended to prevent the re-occurrence of the situation in future which arose in the *habeas corpus* case. As such the decision of the court in this case is no longer a good law.

Justice H. R. Khanna for his lone dissent earned the tribute of generations but also the wrath of the Government who superseded him, although he was the senior most judge, when the office of Chief Justice of India became vacant. This was the second supersession of a senior most judge for appointment to the office of Chief Justice of India, this time for having shown courage and independence in performing the duties of a judge. Justice Khanna resigned immediately.

During the emergency, few of the judges of the High Courts who had displayed independence and had made decisions without fear or favour were sought to be muzzled by arbitrary transfers from one High Court to another. Additional Judges were appointed by the Government to the High Courts subject to their confirmation against a regular vacancy occurring subsequently. During the Emergency, several additional judges in the High Courts were denied confirmation or were given extensions for short periods.

The two supersessions of Supreme Court judges in 1973 and 1976 and actions of Government in the appointments, confirmations and transfer of High Court judges had a powerful negative impact on the minds of judges and lawyers in the country.

After the lifting of the emergency in 1977 and against the background of interference in judicial appointments by the executive, the Supreme Court was called upon to safeguard the independence of judiciary from undesirable appointments and arbitrary transfers by the executive. The apex court seized its opportunity when it rendered decisions in three important cases - popularly known as the first, second and third Judge's cases.

In *S. P. Gupta v. Union of India*,¹⁶ a bench of five judges of the Supreme Court was called upon to consider the method of appointment of judges of the Supreme Court and the High Courts. Several writ petitions had been filed in various High Courts under Art. 226 by several lawyers practicing in various High Courts. All these petitions were transferred to the Supreme Court for disposal. The main question considered by the Court was that of the several functionaries participating in the process of appointment of a High

¹⁶ AIR 1982 SC 149.

Court judge and whose opinion should have primacy in the process of selection.

The court held that 'the power of appointment resides solely and exclusively in the Central Government' and that the Union Government could override the opinions given by the constitutional functionaries (viz. the Chief Justice of India and the Chief Justice of the concerned High Court). This meant that the view of the Chief justice of India did not have primacy in the matter of appointment of the High Court judges and that the primacy lay with the Union Government which could decide after consulting the various constitutional functionaries and that the Union Government, was not bound to act in accordance with the opinions of all the constitutional functionaries consulted, even if their opinions be identical. The majority gave a literal meaning to the word 'consultation' in Arts. 124 (2) and 217 (1) in relation to all consultees and final decision in the matter was left in the hands of the Union Executive. The majority of the Court speaking through Justice Bhagwati held that

'this is, of course, not an ideal system of appointment of judges, but the reason why the power of appointment of judges is left to the Executive appears to be that the executive is responsible to the Legislature and through the Legislature, it is accountable to the people who are consumers of justice. The power of appointment of judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any 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'.

In reality, this view made consultation with the Chief Justice inconsequential in the matter of appointment of High Court judges. However, even after this decision, the Union Government always maintained that it had, as a matter of policy, not appointed any judge without the name being cleared by the Chief Justice of India. However, it is to be noted that in the decade ending 1993, seven appointments were not in accordance with the opinion of the Chief Justice of India, although 540 were made in accordance with the procedure mentioned above and after consultation.¹⁷

The majority ruling in *Gupta* came to be criticized in course of time by the Supreme Court in *Subhesh Sharma*.¹⁸ The court emphasized that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The court opined that primacy be given to the views of the Chief Justice of India in the matter of selection of the High Court judges. This would improve the quality of selection. In India, judicial review is a part of basic constitutional structure and one of the basic features of the essential Indian Constitutional policy. Therefore, to contemplate a

¹⁷ T. R. Andhiyarujina, *Judicial Accountability: India's Methods and Experience*, in Cyrus Das and K. Chandra, eds., *Judges and Judicial Accountability*, Universal Law Publishing Co., Pvt., Ltd., Delhi, 2005, at 114.

¹⁸ *Subhesh Sharma v. Union of India*, AIR 1991 SC 631.

power for the Executive to appoint a person despite his being disapproved or not recommended by the Chief Justice of the State and the Chief Justice of India would be wholly inappropriate and would constitute an arbitrary exercise of the power. The court observed that

‘in India, however, the judicial institutions, by tradition, have an avowed a-political commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of ‘consultation’ has to be understood and explained consistent with and to promote this constitutional spirit...The appointment is rather the result of collective constitutional process. It is participatory constitutional function. It is, perhaps, inappropriate to refer to any ‘power’ or ‘right’ to appoint judges. It is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories...’

The bench, therefore, suggested reconsideration for a larger bench on this aspect of the process of appointment of judges.

The Second Judges Case

As a consequence of the observations by the court in *Subhesh*,¹⁹ a nine judge bench was constituted in 1993 to reconsider the correctness of the *first judge’s* case in which the court had held that the Chief Justice of India did not have any primacy of his opinion. In *Supreme Court Advocates on Record Association v. Union of India*,²⁰ the court interpreted the constitutional provisions relating to the High Courts so as to strengthen the ‘foundational

¹⁹ AIR 1991 SC 631.

²⁰ AIR 1994 SC 268.

features and the basic structure of the Constitution'. The court ruled that 'in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight as he is best suited to know the worth of the appointee; the selection should be made as a result of a participatory consultative process in which the Executive has the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated'.²¹ The primacy of the Chief Justice of India was, according to the second judge's case, to be formed collectively after taking into account the views of two of his senior colleagues who were required to be consulted by him in the formation of his opinion in the case of the appointment of a judge of the High Court. As regards the appointment of Chief Justice of India himself, the second judge's case requires that the senior most judge of the Supreme Court should, in the normal circumstances, be appointed in accordance with the existing convention which had been strictly followed excepting the cases of supersessions in 1973 and 1997. The court has declared that no judicial review can be entertained by any person aggrieved by the Chief Justice's action

²¹ AIR 1994 SC 430.

e.g. by a judge who is transferred from one High Court to another by the collegium.

The majority view expressed by the Court in the first judge's case that the Executive should have primacy since it is accountable to the people, while the judiciary had no such accountability, was dismissed in the second judge's case as 'an early exploded myth, a bubble which vanishes on a mere touch. Accountability of the Executive to the people in the matter of appointment of superior judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the Legislature on account of the restriction imposed by Arts. 121 and 211 of the Constitution. Experience has shown that it also does not form a part of the manifesto of any political party, and is not a matter which is, or can be debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism leveled by the ever vigilant Bar. That controversy is raised

primarily in the courts. Similarly, the judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts and whose opinion is taken into account in the selection process, bear the consequences and become accountable’.

The Third Judges case

The Second judge’s case left an area of uncertainty as regards the collective opinion of the Chief Justice and his senior colleagues. It presumed that the Chief Justice would consult his senior-most colleagues and his recommendation would be generally acceptable and not controversial. What was the position if the Chief Justice had not consulted his senior colleagues or if it was apparent that majority of the existing Supreme Court judges were against the Chief Justice’s recommendation? During eight months of Chief Justice Punchhi’s tenure as the Chief Justice of India, a number of recommendations for appointment were found controversial and the Law Ministry alleged that the Chief Justice had not consulted with his colleagues as required by the second judge’s case. The Chief Justice denied this and is reported to have maintained that the Law Ministry was not entitled to enquire into the extent of the Chief Justice’s consultations. It was even feared that a Bench of the Supreme Court constituted by the Chief justice could issue a

mandamus to the Government to appoint a judge recommended by him. Under these circumstances, the President on the advice of the Union Government hurriedly decided in July 1998 to make a reference to the Supreme Court of India under Art. 143 (1) seeking the opinion of the Court.²² Nine questions were formulated for the opinion of the Court, some of them appearing to be quite inconsequential and obviously answered by the second judge's case itself.

The nine judge bench answered the reference and opined that the Chief Justice must make a recommendation to appoint the judge of the Supreme Court this time in consultation with the four senior most *pusine* judges of the Supreme Court, and in so far as the appointment to the High Court was concerned, the recommendation must be in consultation with two senior most *pusine* judges of the Supreme Court. They would in making their decision take into account the opinion of the Chief Justice if the High Court, the views of other High Court judges who may have may have been consulted and the views of the Supreme Court judges who are conversant with the affairs of the concerned High Court. All these views should be expressed in writing and conveyed to the Government of India along with the recommendation. The

²² (1998) 7 SCC 739.

court further stated, apparently in the context of the unstated situation which had arisen from the Chief Justice's proposals, that the recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process as stated in the latest opinion, would not be binding upon the Government of India.

The effect of the second and third judge's cases is that the executive's function in the appointment process has for all practical purposes been reduced to an authority formally approving the recommendations made by the Chief Justice of India and his collegium. The method of appointments, transfers and disciplinary control including a removal of a judge of superior judiciary have now become well settled.

Thus the Supreme Court has wrested from an unwilling executive a decisive say in the matter of appointment of judges of the Superior Courts and consequently strengthened the Independence of the judiciary.

The Supreme Court of India has not subscribed to the theory of avoidance of a political question and has never declined to exercise its powers merely because a legal question has political

overtones.²³ A measure of the court's relevance in the Indian public life is the ready invitation and resort to it by the other branches of government to find solutions for political and social questions which in other countries would be the concern of either the legislature or the executive, and the equally ready acceptance of that function by the court.

In 1992, a verdict on reservations policy for backward castes and backward classes in the services of the state, also a highly volatile political matter, was defused by the court's verdict.²⁴ The court has been the conscience keeper and a moral force when the political branches of the government have failed to measure up to the expected moral standards of political behaviour as when the court quashed the action of the State of Karnataka in releasing criminals as ransom for a hostage captured by a notorious brigand, or when the court declared a Chief Minister disqualified for the office because of her convictions in a criminal case of misappropriation and corruption.²⁵ On 13th March 2002 the Supreme Court ordered a *status quo* over the burning issue of the demand for a Hindu temple at Ayodhya over the place where a mosque stood till it was

²³ *State of Rajasthan v. Union of India*, (1978) 1 SCR 1.

²⁴ *Indira Sawhney v. Union of India*, (1992) Suppl. 3 SCC 217.

²⁵ *B.B.Kapoor v. Tamil Nadu*, (2001) 7 SCC 231.

demolished. After that all the parties and the government declared their willingness to abide by the order of the Court.

On the Golden jubilee celebrations in January 2000, the then President of India Mr. K. R. Narayanan said that

‘it is not an exaggeration to say that the degree of respect and Public confidence enjoyed by the Supreme Court is not matched by many other institutions in the country’.²⁶

Dr. A. S. Anand, the then Chief Justice of India, responded on the same occasion and observed that

‘it is a matter of pride and satisfaction that the judiciary today enjoys credibility far greater than that enjoyed by the other two wings of the State’.²⁷

To ensure the independence of superior judiciary in India the Constitution has adopted certain significant provisions. A judge of the Supreme Court by reason of Art. 124 (4) cannot be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two third of the majority of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity. The

²⁶ *Supra*, n. 1, at 104 (rel. on).

²⁷ *ibid.*

Judges (Inquiry) Act, 1968 regulates the procedure for the investigation and proof of the misbehavior.

To guarantee their independence and functions judges salaries, allowances and pensions are to be charged on the consolidated fund of India or the consolidated fund of the state as the case may be in terms of Art. 112 (3) (d) (i) and (iii) or Art. 202 (3) (d). They are thus immune from political hostility. Their salaries cannot be reduced to their disadvantage, except during financial emergency under Art. 360. Until their salaries are fixed by law of Parliament they are entitled to the remuneration as indicated in Schedule II, Part D.

Judicial Independence is said to consist of five elements:²⁸

- (a) Constitutional Protection (Including security of tenure, salary and immunity from suit);
- (b) Independent Administration of the judiciary by the judiciary;
- (c) Judicial disciplinary authority over misconduct of judges;
- (d) Manner in which conflicts of interest are addressed (including impartiality); and
- (e) Assurance of effective judicial decisions (including ensuring a judiciary free from executive interference).

²⁸ *Supra*, n. 1, at 177.

In India constitutional protection is present, administration of judiciary is by the judiciary itself; misconduct by judges is subject to in-house correction procedure, conflicts of interest are addressed through judicial review of decisions even of the Supreme Court and a curative petition where necessary and effectiveness of the judicial decision are assured through the power to punish for contempt of its authority.

Judicial accountability

The power of judicial review has given judges of the superior courts more power. The human rights dimension has added power. Alongside, the awareness that judges do make policy has enabled noticing that judges are part of political landscape it is now clear that judges do not operate outside politics. They are part of the machinery of the authority within the state and cannot avoid making political decisions.²⁹ All this has attracted increasing public attention on the judiciary. Globalization has served to break their traditionally inward-looking culture and create awareness that judges are members of a global legal community where

²⁹ J. A. Griffith, *Politics of the Judiciary*, Fontana Press, London, 1991, at 190.

knowledge and idea are exchanged across jurisdictional boundaries.³⁰

If judging is seen *per se* a political activity, judges will have to be socially and politically accountable. Judges however feel that increasing accountability will undermine judicial independence. Mechanisms of accountability are seen principally as to hard political accountability and soft accountability of openness and representativeness.³¹

Political accountability of the judges of the superior courts is provided for through their impeachability by parliament in terms of Art.124 (4) and Proviso (b) to Art. 217 for judges of the Supreme Court and High Courts, respectively. This however would leave their independence untouched. The traditional mechanisms of openness of court proceedings and structured appeals have been found adequate to control judicial decision making. For soft accountability judges are to be responsive to the needs of the people they serve and more than reasons for the decisions for proceedings in open court to which public have access is now considered necessary. They are now expected to engage in wider debates of

³⁰ *Supra*, n. 2, at 2.

³¹ *ibid* at 39, 41.

how they work and why and to be receptive, collectively, to wider criticism.³²

The principal provision for judicial Accountability in India consists in the provision for impeachment of judges of the Superior Courts for misbehaviour and incapacity. While this is the political accountability of the judges of the superior courts, their accountability to themselves perhaps what keeps the strong instrument of state power under check. Lord Donaldson a former English Master of the Rolls has said that judges are without constituency and answerable to no one except to their conscience and the law.³³ Primarily a judge will be answerable to his own conscience.

According to D. D. Basu,³⁴ a judge would be under the following limitations:

- (a) Constitutional limitations;
- (b) Intrinsic limitations; and
- (c) Self-imposed limitations.

The Supreme Court has ruled that Art. 14 applied to judiciary and any judicial pronouncement violative of fundamental rights is void.

³² *ibid* at 41.

³³ See Sturgess & Chubb, *Judging the World*, Butterworths, London, 1988, at 182.

This sets constitutional limitations for the judiciary. The intrinsic limitations are those that are set by the very hierarchy of courts and supervision of subordinate courts by the Superior Courts with the power to do complete justice in a case being vested with Supreme Court. The law laid down by Supreme Court being law throughout the country obligates subordinate judges to implement the law and failure to do so would attract correctional measures. Self imposed limitations are perhaps the largest of the set of principles for accountability of the judges. It is axomatic that judicial accountability includes the requirement that proceeding in the court shall be open to the public so that justice is not only done but is also seen to be done.

To begin with, it is life of relative seclusion. According to Justice R. C. Lahoti the 'life of a judge is not an easy thing. Performing the functions of a judicial office, an occupant at times rises towards the heights and at times all will seem to reverse itself. Living by cannons of judicial ethics enables the occupant of judicial office to draw a line of life with an upward trend traveling through the middle of peaks and valleys'.³⁵ The discharge of judicial function is as act of divinity.

³⁴ D.D. Basu, *Commentary on the Constitution of India*, 6th ed., S. C. Sarkar & Sons, Calcutta, 1985, at 170.

³⁵ *ibid.*,

Judicial ethics are the basic principles of right action for the judges. Observance of Canons of Judicial Ethics enables the judiciary to struggle with confidence; to chasten oneself and be wise and to learn by them the true values of judicial life. The judges have to honour the judicial office which they hold as a public trust and strive to enhance and maintain the people's confidence in the judicial system. 'The greatest strength of the judiciary is the faith of the people in it. Faith, confidence and acceptability cannot be commanded; they have to be earned. And that can be done only by developing the inner strength of morality and ethics'.³⁶

To keep the stream of justice clean and pure, the judge must be endowed with sterling character, unimpeachable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and working of the Constitution itself. In short, the behaviour of the judge is the bastion for the people to reap the fruits of democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.³⁷ A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the

³⁶ Justice R.C.Lahoiti 'Cannons of Judicial Ethics' Universal Law Pub. Co., Delhi, 2005, at 14.

³⁷ *C. Ravichandran Iyer v. Justice A. M. Bhattacharjee*, (1995) 5 SCC 457, per K. Ramaswamy, J.

integrity of the entire judicial system.

In 1991, the procedure for removal of Supreme Court judge was activated for the first time for removing Mr. Justice Ramaswamy for misconduct in office prior to his appointment of Supreme Court when he was the Chief Justice of Punjab & Haryana High Court. The speaker of the Lok Sabha admitted the motion and constituted a committee in terms of Sec. 3(2) of the Judges (Inquiry) Act, 1968, but before the committee could present his report the Lok Sabha was dissolved. In *Sub-Committee of judicial Accountability v Union of India*,³⁸ the Supreme Court was required to consider whether the dissolution put an end to the motion for removal. The court ruled that it did not because the committee of Inquiry under Judges (inquiry) Act, had separate identity which continued till it furnished its report. The court was of the view that under written Constitution judicial review is inevitable and the usual incidents of parliamentary sovereignty had no application. The court pointed out that if the Inquiry Committee reached the verdict of 'not guilty' Parliament cannot take up motion for removal on that there is no judicial review. Only on a finding of 'guilty' can parliament proceed for a full consideration on merits of the report including the findings. If parliament did not adopt motion for removal the matter

³⁸ AIR 1992 SC 320.

ended without opportunity for challenge. On the order of removal by the President there could be a judicial review pertaining to the legality only.

A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or a member of the legislature. 'A legislator or an administrator may be found guilty of corruption without apparently endangering the foundation of the State. But a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof'.³⁹

According to Justice P. B. Gajendragadkar the 'judges ordinarily must observe certain rules of decorum in their social behaviour. A little isolation and aloofness are the price which one has to pay for being a judge, because a judge can never know which case will come before him and who may be concerned in it. No hard and fast rule can be laid down in this matter, but some discretion must be exercised'.⁴⁰

Justice Hidayatullah has placed observance by judges of the

³⁹K. Veeraswami v. Union of India, (1991) 3 SCC 655, para 79, per Sharma, J.

⁴⁰ P. B. Gajendragadkar, *To the Best of My Memory*, Bhavans Book University, Bombay, 1966, at 138.

punctuality of time on a very high pedestal. According to him a judge who does not observe punctuality of time does not believe in rule of law. According to Justice V. R. Krishna Iyer the judges who do not pronounce judgment in time commit turpitude.⁴¹

A reference may be made to the following canons of judicial ethics:

- (i) Restatement of values of Judicial life adopted by the Chief Justices' Conference of India, 1999;⁴²
- (ii) Remedial action against judges; ⁴³
- (iii) Code of conduct in respect of declaration Assets; ⁴⁴
- (iv) The Bangalore Principles of Judicial Conduct, 2002;⁴⁵
- (v) The Oath of a judge as contained in the Third Schedule of the Constitution of India.⁴⁶

It is argued by few members of the Bar that the corridors of all courts are full of sons, daughters, father, grandfather, uncle, brother, nephew, first cousin, husband, wife, mother, sister, aunt, niece, father-in-law, mother-in-law or sister- in-law, brother in law practicing law in the court where his / her relation is sitting as

⁴¹ P. Krishanswamy, *V. R. Krishna Iyer- A Living Legend*, Universal Law Pub. Co., New Delhi, 2000, at 138.

⁴² Annexure-I.

⁴³ Annexure-II.

⁴⁴ Annexure-III.

⁴⁵ Annexure-IV.

⁴⁶ Annexure-V.

judge. What about friends of sitting judges? Is it ignorance or omission to mention? Indian Judiciary is one of the best judiciaries in the World. Nobody can influence the Judiciary. If any one succumbs to such influence the existing procedure would take care of the situation to deal with it firmly. The judges are working within a frame work and follow the canons of judicial ethics strictly. The one who comments against the judiciary should know that 'one swallow does not make a summer'

The judiciary and the judges are accountable to the people. On 7.5.1997, the Full Court of the Supreme Court and the Chief Justices Conference in December 1999 adopted 16 Standards of Conduct for Judges by way of rules of self-imposed discipline, for due observance by all judges of the country. Steps have also been taken for remedial action by laying down in-house procedures.⁴⁷ Judges are already accountable in various ways. The judges' oath of office encapsulates the whole duty of a judge. To be faithful to his oath is the test of his integrity as a judge. Judges are obliged to give reasons for the decisions which are subject to critical appraisal by other judges, legislators, interest organizations and the public. Judges now are scrutinized, criticized by the citizenry. Fostering accountability is through the processes for selection,

⁴⁷ Annexure I

discipline and removal. Judicial accountability takes into consideration judicial power. Judicial accountability is an indispensable counter balance of judicial impotence. Ultimately it is the judges themselves who must come to grips with the problems of independence and accountability and appreciate that they are trustees and must give an account for their conduct in that trust.

The only meaningful form of political accountability in the appointment process is the requirement that the appointer is required to explain and justify the appointment to the parliament. Such a requirement does not exist in India. In the Indian constitutional arrangement and Art.361 of the Constitution would seem to provide total immunity to the president, the appointer, from liability to answer before any court including the High Court of Parliament for the exercise of his powers and performance of duties of office except in terms of impeachment Art. 61 which is contemplated only for violations of the Constitution. The practice of keeping the appointments within the control of the senior judiciary favours judicial independence. This is what has been sought to be achieved through the consultative procedure which gives weight to the opinion of the collegium of senior-most judges and the Chief Justice of India.

In its report submitted in 1958, the Law Commission regretted that executive influence has matters in some judicial appointments.⁴⁸ Justice Khanna wanted only the cream of judicial talents on the Supreme Court. In 1977, a controversy was raised over the appointment of justice D. A. Desai but when V. R. Krishna Iyer was appointed he was 106 in the all India Seniority List and yet no controversy erupted.⁴⁹ In India the procedure is not open and through closed consultations the government can avoid controversy. It is too early to say how the Right to Information Act, would affect accountability in the matter of making judicial appointment.

In 1997, when three senior-most judges of the Supreme Court were superseded for the position of Chief Justice of India, the Minister openly stated in the parliament that judicial appointment can be without reference to the social philosophy of the judges and a commitment to government policies. All the three resigned. Later in 1977, Justice Khanna was superseded by Justice Beg. Again in 1978 Justice Chandrachud superseded other for the position of Chief Justice. The public criticism of an hierarchy built on commitment, and so arranged that two senior most sitting judges

⁴⁸ P. B. Sawant, *Judicial Independence Myth & Reality*, Poona University Press, Pune, 1988 at 32.

⁴⁹ *ibid.*, at 33.

will outlive all other judges in the court, many with unexceptional records, was that it was to guarantee of succession committed judges.⁵⁰ The practice of appointing the senior most judges of the Supreme Court as Chief Justice of India has been put back in place after strong resentment from within the judiciary and the public of the selection of committed judges. Independence has prevailed over accountability.

The power vested in the Chief Justices of High Court to initiate appointments to the respective courts has been noted has resulting in ignoring deserving candidates and appointing juniors to build up sedulously an artificial seniority with an eye to the future.⁵¹ If parliament were to perceive it as a mis-conduct impeachment can be consequence. Such a criticism has not so far surfaced and it can be said the present practice is considered satisfactory by the political actors before whom question of hard accountability would lie.

Judicial independence and judicial accountability are inter-linked. Judicial independence would depend on the way judges are appointed, paid, disciplined and dismissed in all of which the

⁵⁰ *ibid.*, at 36-37.

⁵¹ *ibid.*, at 37.

executive and legislature currently play a role.⁵² In some of these areas senior judges also have a role. The executive has to set judicial salary levels and the legislature has to provide the funds. At the commencement of the Constitution Schedule II indicated salary of the superior court judges. Presently it rests on the Act of parliament for an upward revision. The only Constitution protection is salaries and allowances cannot be reduced to their disadvantage after their appointment.

The record of the Indian judiciary so far in the 56 years of Independence can be said to be creditable. It has successfully asserted its independence and has not given an occasion to call it to account barring the two exceptions of Ramaswamy and Veeraswamy. In the case of Veeraswamy the court boldly applied Rule of Law and held the judge to face prosecution under the Prevention of Corruption Act. In the case of Ramaswamy the impeachment process in Parliament failed to get required number of votes for the motion because a political party directed its members in Parliament not to vote on the motion. It is necessary to bear in mind that when the Parliament sits to impeach and return a verdict of guilty not guilty, the members are similar to members of a Grand Jury and no member of a jury directed to vote or

⁵² *Supra*, n. 2 at 66.

abstain from voting on the question before it. The finding of fact will have to be independent judgment and the procedures and practices that can be applicable when the parliament sits as a legislature chamber would be distinctly out of place. The procedure for hard accountability is hard enough and it should operate without pricks and frauds. If this procedural modification is brought in place in the existing provision governing hard accountability would seem adequate to enforce accountability without interfering with judicial independence.