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Issues And Challenges”, Authored By: Dr. Kuldeep Chand, Professor,  
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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. To begin, it is necessary to comprehend and accept the concept of judicial accountability.*

*Accountability essentially includes developing a feeling of transparency in the legal system and subjecting it to rigorous public scrutiny in order to avoid judicial delinquency from penetrating. Simultaneously, the long-running argument about accountability continues. Infringing on the independence of the judiciary is a problem that has to be addressed. However, judicial independence cannot stand by itself; something like judicial accountability must also be there. The conflict arises because the Constitution authors did not directly provide a mechanism to hold the judiciary accountable. The reason for the same was to prevent violation of judicial independence which is an essential to build and free and fair judiciary. The goal moving forth is to promote accountability through a self-regulation method without jeopardizing independence”.*

### **I. INTRODUCTION:**

***“The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society.”***

***- Justice P.N. Bhagwati***

The meaning of accountability, literally and in general sense, is the sense of being answerable to someone. Accountability is sine qua non of democracy. Accountability is aided by



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transparency. No public institution or public functionary is immune from responsibility, albeit how accountability is enforced varies depending on the nature of the office and the functions carried out by the office holder. Judiciary is one of the three pillars of democracy in India. The accountability of judiciary is however is not the same as of accountability of the legislature or the executive. It is well known fact that judiciary is one of the most important organs 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 12th January, 2018 an unexpected thing was happened when four seniors 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 not survive in this country.<sup>1</sup> Framers 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 mandates and most important human right of citizen. There is a spreading rash of judicial delinquency in many forms.<sup>2</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

<sup>1</sup> Avinash Bhagi, “Judicial Accountability in India: An Illusion or Reality?”GNLU J.L. DEV. & POL.8 (2018) p 145.

<sup>2</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) available at <https://www.jstor.org/stable/41498506>. (visited on 08/12/2022).

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important pillars of democracy; therefore, it must be subject to the democratic discipline. 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>3</sup> ***A scholar has listed three main benefits of the judicial accountability as follows:***

- 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.<sup>4</sup>*

## **II. 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>5</sup> In Webster’s dictionary, accountability is defined as the quality or state of being accountable, liable, or responsible. Generally speaking, accountability implies the necessity to justify or explain one’s 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

<sup>3</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. *available at* [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) last visit on 9-12-2022.

<sup>4</sup> *Ibid*

<sup>5</sup> Oxford Advanced Learner’s dictionary, 6<sup>th</sup> Edition, 2000.

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justice, conduct and behaviour of judges. 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>6</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 resolved 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>7</sup>.

In the reference of judicial proceeding the Supreme Court has observed<sup>8</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*

<sup>6</sup> Wendell L. Griffen, “Comment: Judicial Accountability and Discipline” LAW AND CONTEMPORARY PROBLEMS Vol. 61 No. 3 1998 p 75, available at <https://www.jstor.org/stable/1192417>, (visited on 12-12-2022).

<sup>7</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>8</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.

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*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”.*

### **III. THE NEED FOR JUDICIAL ACCOUNTABILITY:**

The Supreme Court had rightly asserted that *“A single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system.”* Accountability and Reforms had mentioned. *“The judicial system of the country far from being an instrument for protecting the rights of the weak and the oppressed has become an instrument of harassment of the common people of the country....The system remains dysfunctional for the weak and the poor...(and has been) displaying their elitist bias.”*<sup>9</sup> **Mona Shukla has listed down three promotions done by Judicial Accountability:**

- 1. It promotes the rule of law by deterring conduct that might compromise judicial independence, integrity and impartiality.*
- 2. It promotes public confidence in judges and judiciary.*
- 3. It promotes institutional responsibility by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.*

Transparency is facilitated through the process of accountability. It is best achieved when one is accountable to law. The existing systems of accountability have failed, and the growing corruption is eating away the vitals of this branch of democracy. This lack of accountability has been best put forward by ***Pt. Nehru*** in a diatribe, *“judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them.”*

### **IV. ACCOUNTABILITY IN THE LIGHT OF INDEPENDENCE OF JUDICIARY:**

<sup>9</sup> Mona Shukla, ‘Judicial Accountability: an aspect of judicial independence’ in Judicial Accountability, Regal Publications, New Delhi, 2010, p. 4



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Independence of judiciary is an essential attribute of the Rule of Law, and is a part of the basic structure of the Constitution.<sup>10</sup> First of all, judicial independence cannot stand by itself, something like judicial accountability must also be there. Even in the US, often the debate over judicial selection methods is distilled to a single trade off: *independence vs. accountability*.<sup>11</sup> Elected judges are more accountable than appointed judges in the sense that the public can turn them out of office if they do not like their decisions. 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. 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. Each wing of governance had to be accountable.<sup>12</sup> The control of High Courts over all subordinate Courts<sup>13</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.

In the case of *S. P. Gupta vs. Union of India*,<sup>14</sup> the judiciary needs to be independent of outside influence, particularly of political and economic entities such as government agencies or industry associations. But judicial independence does not mean that judges and court officials should have free rein to behave as they please. Indeed, judicial independence is founded on public trust and, to maintain it, judges must uphold the highest standards of

<sup>10</sup> Supreme Court Advocates on Record Association and another v. Union of India, AIR 1994 SC 268.

<sup>11</sup> John L. Warren III, Holding the Bench Accountable: Judges Qua Representatives, Washington Jurisprudence Law Review, Vol. 5, Issue 2, 2014 Edition.

<sup>12</sup> *Supra* no.10.

<sup>13</sup> Article 235, The Constitution of India

<sup>14</sup> AIR 1982 SC 149

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integrity and be held accountable to them. Where judges or court personnel are suspected of breaching the public's trust, fair measures must be in place to detect, investigate and sanction corrupt practices.

## **V. CHALLENGES IN HOLDING JUDICIARY ACCOUNTABLE:**

### **V.I IMPEACHMENT BEING THE SOLE PROCEDURE:**

According to the Indian Constitution, the only way through which the members of the higher judiciary that is the Chief Justices and Judges of Supreme Court and High Courts are accountable or can be removed is through impeachment. The process of impeachment is carried out only on the grounds of proven misbehaviour or incapacity.<sup>15</sup> No one being judge has been impeached till date. However, it will be a misjudgment if one thinks that the judiciary is free from corruption. The loophole is the entire process of impeachment itself. It is undoubtedly lengthy and cumbersome. To begin an impeachment, one needs signatures to pass the resolutions. However, that becomes quite an impossible task since many MPs have their own pending individual or party cases in these judges court, so they are not willing to risk themselves. **Conclusive documentary evidences are also required before they put their signatures to the motion'**

- *In one of his interviews, Prashant Bhushan cites an example where in an impeachment proceeding against Justice Bhalla, the BJP declined to sign because L.K. Advani had been acquitted by him in the Babri Masjid demolition case.*
- *In the Justice Ramaswamy case, who had been charged with misusing of courts fund, yet the Congress (I) refused to cast their vote.*

Although, the special 2/3rd majority will maintain the independence and also adds the seriousness to the issue. It is important to understand that at the end of the day judiciary is an important organ with huge responsibilities. An organ with extraordinary functions demands to be treated differently. A simple majority on the other hand can prove to be detrimental to independence.

<sup>15</sup> Article 124(4), The Constitution of India

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## **V.II THE VEERASWAMY CASE:**

The additional immunity with which the judges have cloaked themselves was in the Justice R. Veeraswamy case, in which it was declared that judges of *SC or HC cannot be subjected to investigation in any criminal offence of corruption*, or a FIR be registered against them without the prior permission of the CJI.<sup>16</sup> Again it's not likely that the CJI will allow such permission, as it can bring shame to the entire Judiciary.

## **V.III THE RAMASWAMY CASE<sup>17</sup>:**

The impeachment issued by the apex court failed badly due to the lack of majority vote from the Houses of the Parliament. Justice Ramaswamy was charged with misusing the court's fund but was not impeached for the refusal of one of the parties to cast a vote.

## **V.IV NEPOTISM AND LACK OF CASTE DIVERSITY:**

It is an issue which has entered the nucleus in all the spheres of the profession in India.<sup>18</sup> There have been many instances where there are judges appointed whose fathers and uncles have served as judges in the higher court and Supreme Court including being the CJI<sup>19</sup>. The collegiums system has provided opportunity to select Judges in the will of the CJI and many cases of Nepotism has been observed, which was dissent by a High Court judge in 2019.<sup>20</sup> Justice Chelameswar notes that judicial independence introduced in the second and third judge case are not the safest way to protect the interest of the Judiciary, which was also referred previously against the loopholes in the collegium system in other matters of the Apex Court.<sup>21</sup> As established in the *First Judge Case*, judicial independence “*fearless to powerful centre, impartiality to socio-economic prejudice to the class even to one the judge affiliated*”. The Indian judiciary is the only organ whose selection is done in total secrecy and holds no

<sup>16</sup> Mona Shukla, ‘Judicial Accountability: an aspect of judicial independence’ in Judicial Accountability, Regal Publications, New Delhi, 2010, p. 8

<sup>17</sup> Sarojini Ramaswami vs Union Of India & Ors on 27<sup>th</sup> August, 1992.

<sup>18</sup> NGR Prasad, *The costly tyranny of secrecy*, July 5 2013, The Hindu.

<sup>19</sup> R Balaji, *Shot at the list of Judicial Clan*, October 6, 2016, The Telegraph

<sup>20</sup> ANI, *Allahabad High Court Judge Writes to PM Modi On "Nepotism" In Appointments*, July 03, 2019, Hindustan Times.

<sup>21</sup> Shanti Bhushan & Another V Union, (2009) 1 SCC 657 and P.D Dinakaran V Judges Inquiry Committee, (2011) 8 SCC 380

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accountability for the judgements but to one self. When 33 judges were nominated by the collegium in the Allahabad High Court there was huge uproar and dissent in the legal fraternity, as one third of them were directly or indirectly a close family member of the sitting or a retired judge of Supreme Court or the High Court. There are many examples where the Supreme Court Judges has their family members as judges in SC or HC in the Past.<sup>22</sup> In 2009, the Law Commission too said regarding the existing practice of nepotism in the higher judiciary and the main cause was the collegium system which has become a system of monopoly for some families.<sup>23</sup>

## **V.V CONTROVERSY OF CJI ROSTER AND FOUR JUDGES**

### **COMING IN PUBLIC:**

In a writ petition filed concerning Judicial Accountability to a bench headed by Justice Chelameswar concerning an investigation of a corruption and the Honorable Justice Chelameswar ordered the formation of a constitutional bench of five judges, later the same case was nullified by CJI after the transfer of the case.<sup>24</sup> In another case where the *CJI (J. Misra)* was alleged involved heard that case for himself and held that an advocate is not qualified to appeal to CJI concerning not to preside over a particular case, which further led to uproar and dissent by the legal fraternity.<sup>25</sup> Another case where the inquiry elated to death of Justice Loya was handled with gross negligence concerning in the fair investigation of the demise of the CBI judge, irregularity in the court administration etc led to dissent among the senior judges of the apex court.<sup>26</sup> All these actions clubbed compelled the four senior most Judges to come up the press openly and address the constitutional violation issues straight to the public and media.

## **V.VI CJI SEXUAL HARASSMENT CASE IN 2019:**

<sup>22</sup> Mishra, Chandrachud, Kapadi, Sikri.

<sup>23</sup> EIGHTY SEVENTH REPORT, Delay in Filling up the Vacancies in the Court and High Courts, pg. 29

<sup>24</sup> Damayanti Datta, SC judge-bribing scandal: An ugly meltdown that left behind suspicion, unanswered questions, November 17, 2017, India Today

<sup>25</sup> PTI, *CJI hearing own case is "legally, morally" wrong: Santosh Hegde*, April 23, 2019, Business Standard

<sup>26</sup> Suyash Sahai, SC Judges' Press Conference – The Tussle within the Judicial System, January 22, 2018, available at <https://blog.ipleaders.in/the-tussle-within-the-judicial-system-judges-vs-cji/>



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Recently the CJI, Justice Ranjan Gogoi, was accused of sexual harassment by a woman. A complaint of sexual harassment against the sitting Chief Justice of India was made and the complainant also furnished affidavit and other supporting evidence to the other judges of Supreme Court asking for an inquiry. ***After the complaint was taken up but there were many legal issues cropped up which needed immediate attention such as:***

- i. The respondent was himself sitting in judgment over his own case, defying the principles of natural justice.*
- ii. There were no woman judges on the special bench, violating the terms of POSH Act.*
- iii. Why this matter was taken into as an in-house procedure instead of judicial side?*
- iv. Why the allegation against an individual being treated as attack on Institution?*
- v. Does Judicial Independence mean immunity from the charges of Sexual harassment?*
- vi. Can the judiciary communicate to media through judicial hearing?*
- vii. What justice remains to the aggrieved person?*

It is an accepted belief that the same amount of accusation would have initiated an inquiry against the Prime Minister, or would have also led to his resignation, but the supreme court judge gets away because of the immunity provided to him from such investigation.<sup>27</sup> The Supreme Court has the benefit of having an In-House Procedure to check the conduct of the court but have protection against the police investigation.<sup>28</sup>

## **VI. SUGGESTIONS:**

There is a need for a more nuanced and balanced procedure where we also demand some degree of accountability of assessing the product that comes out of the court, the amount of judicial time that has been devoted to cases and the number of adjournments which are granted. Seeking accountability is not so much a simplistic issue that can be solved by just bringing the judges to book as it is of a wider dialogue within society of what is it that ails the

<sup>27</sup> Live Law Reporter, *Allegations Against The CJI And Taking Up The Issue On The Judicial Side – Key Issues*, April 20, 2019, available at <https://www.livelaw.in/columns/allegations-against-the-cji-and-taking-up-the-issue-on-the-judicial-side-key-issues-144408>

<sup>28</sup> Live Law Reporter, *Clean Chit to CJI : Why The Doors Of Justice Completely Closed ?*, May 21, 2019, available at <https://www.livelaw.in/columns/controversial-clean-chitto-cji-145164>

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system and how to find answers within the system while still protecting the its independence. Developing principle within the judiciary to find the issues which is being face is needed to maintain faith of the people in the superiority of the court. One solution could be setting up a permanent committee of very eminent retired judges who can look into an enquiry and then make recommendations to the Chief justice. An independent enquiry like such would also give answers to the rumours that float around in media.

## **VII. 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 appeared 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 whole 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.