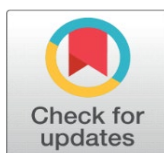
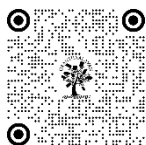


AN ANALYSIS OF THE MECHANISM OF REMOVAL OF JUDGES OF THE HIGHER JUDICIARY IN INDIA

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ABSTRACT

The higher judiciary in India is one of the most powerful judiciaries of the world owing to the abiding public faith in the integrity and impartiality of its judges. Over the years the higher judiciary in India through its creative constitutional adjudication has set out a robust rights-based regime for the citizenry. A gamut of judicial dictums has carved out a bundle of rights from Part 3rd of the Constitution by adopting a purposive approach to constitutional interpretation. This activist role played by the judiciary largely depends on the broad powers vested in the judiciary within the Constitution, especially about its power to do complete justice within the rubric of Article 142 of the Constitution. However, with ascendancy in judicial power, there has been a clamor for making the judges of the higher judiciary accountable, especially in light of a series of allegations of corruption against judges over the past decade or so. This paper attempts to analyze the mechanisms of judicial accountability in India, especially concerning the process of removing the judges set out in the Constitution.

Keywords: Higher Judiciary, Constitution, Judges

1. INTRODUCTION

It is widely acknowledged that there are limits to the independence of judges acting alone or of the judiciary as a whole. The public has a right to expect the legal system to carry out its duties effectively and efficiently, to base its decisions on cutting-edge information, and to behave honorably and with unwavering integrity. Without answering to society, no institution can function. While the concept of judicial independence is unbreakable, it is also a universal truism that the notion of independence is not absolute. Since judicial independence cannot be preserved in the absence of accountability for mistakes, misbehaviour, or failure, the judiciary must be held to the same standards as other branches of the government. While maintaining their independence, judges also need to be held responsible. Judicial accountability and independence are two essential principles of the administration of justice that are constantly at odds with one another. Every civilization finds a way to overcome this tension given its unique set of circumstances and values. This tension is resolved by each society in the light of its circumstances and value judgments. ¹

The nation-states' constitutions typically include provisions for judicial responsibility, which are further reinforced by additional statutory measures. Furthermore, the legal community has developed model codes of conduct or ethics that serve as informal procedures for judicial accountability. Most accountability systems centre on the procedures for choosing, punishing, and removing judges. A common thread across these accountability mechanisms would imply that the process is at its core free from any bias.ⁱⁱ

Many methods for holding judges accountable have been established in the majority of the world's most advanced legal systems, and they have been designed to minimize the impact on judicial independence. Finding the best possible balance between the two objectives of judicial independence and accountability has been the overarching focus. The majority of legal systems have had to deal with a wave of accusations of judicial misconduct and corruption in recent decades. This has led several nation-states to reconsider and reinforce their judicial accountability systems. Numerous nations have worked hard to create a strong system of judicial accountability without violating the fundamental principles of preserving judicial independence. Similar shifts in the common law community's philosophy towards judicial responsibility have been observed, particularly in nations like India, Canada, the United States of America, and the United Kingdom.

The judiciary has shown encouragement for these tactics and has developed numerous internal procedures to organize its affairs. India's court has grown to be the most potent branch of the government, extending its authority into previously reserved areas for the legislature and executive branch. The inability of the legislature and the executive branch to meet public expectations has been identified as one of the primary causes of the growth of judicial activism in India.

Therefore, it was up to the judiciary to intervene and start the government's machinery. The judiciary started to become involved in policy-making, which was formerly the preserve of the Executive. It also took on the role of the legislative to make laws. Strictly speaking, the judiciary's interventions were out of step with the judiciary's constitutional mandate. It is averred that the court has expanded its jurisdiction and powers well beyond what the Constitution's framers had in mind by using its authority to interpret the Constitution.ⁱⁱⁱ However because the public has faith in the judiciary as an institution, there was no public backlash against these overtures from the judiciary. India's judiciary has undoubtedly been more powerful than other government bodies over the years, and no other nation in the world has seen such a rise in judicial power.^{iv}

However, with the mounting allegations of corruption against the judiciary, the image of the judiciary has taken a turn for the worse, and questions have been raised regarding the limits of the judicial power in India and the need to make the judges accountable. In the present times, the notion that the judges are independent and therefore cannot be accountable has few takers, a fact, which is even accepted by the judges themselves. In the words of Justice Verma, "just as everyone else is accountable, we are also accountable, accountability to the same law, accountable to the same standards which we set up for others"^v.

2. FRAMERS VIEW ON THE MECHANISM OF JUDICIAL ACCOUNTABILITY

Like any other branch of government, the Indian judiciary was established by the Constitution, therefore it must operate within its bounds when executing its authority. The importance of an independent court was acknowledged by the Constitution's founders, but they also recognised the need to limit its authority. The calls for limiting the powers of the judiciary were echoed by many members of the Constituent Assembly such as Mr. A.K.Ayyar who advanced the view that the judiciary cannot intrude into the domain of the executive and the legislature. According to Ayyar "the doctrine of Independence (of the judiciary) is not to be raised to the level of a dogma to enable the judiciary to function as a super-legislature or super executive"^{vi}.

The framers of the Constitution were motivated by this worry to create procedures for judicial accountability that would not compromise the idea of judicial independence. Both individual and institutional responsibility are part of India's judicial accountability framework. The goal of institutional accountability is to establish procedures that hold the government's judicial branch accountable for how it is run. Comparably, individual accountability aims to hold judges responsible for their actions, which may include both extrajudicial and judicial behaviour.

Even though judicial independence was prioritized more, the Constitution's writers made an effort to include a system for holding judges accountable. The need to establish a system that would hold judges accountable while also preserving the judiciary's independence was carefully discussed in the Constituent Assembly. The Constitution's

provision for judges' dismissal is the only meaningful measure for holding negligent judges of the higher judiciary accountable. The procedure of removing judges from the higher judiciary was extensively discussed in the Constituent Assembly, with various opinions being voiced over the creation of an appropriate framework.

Within the Constituent Assembly, the deliberations centered on two specific modes of removal, one view advocated by Ayyar and Santhanam and the other proposed by Ayyangar. The mechanism proposed by Ayyar and Santhanam provided for the removal of the judges by the President for incapacity or proven misbehaviour, upon an address by both houses of the Parliament.^{vii} On the other hand, Ayyangar advocated the removal of judges on similar grounds but by a Special Tribunal.^{viii} Interestingly the Sapru Committee had also recommended that the power of removal of the judges of the Supreme Court should be vested in the President who could exercise this power with the concurrence of a special tribunal.^{ix} However, according to Ayyar, the weighty procedure of a parliamentary address enhanced the dignity of the Supreme Court and this method was preferable to a simple tribunal.^x

Before India gained its independence, clause (b) of the proviso to subsection 200 of the Government of India Act 1935 controlled the dismissal of federal court judges. This provision states that a judge of the Federal Court may be removed from office by order of the Governor-General for misconduct or physical or mental infirmity, provided that the Privy Council's judicial committee reports to them that the judge should be removed for any of these reasons. This procedure of removal of the judges required determination by a judicial body about the alleged grounds of mis-behaviour or infirmity of body or mind before the judge could be removed^{xi}.

This very process of removal of the judge was used to remove a permanent judge of the Allahabad High Court, Justice S.P.Sinha. In what can be termed as the first instance of removal of a judge of the Higher Judiciary in Independent India, Justice Sinha was held guilty of improper exercise of judicial functions.^{xii} After the charges of misconduct were proved against the judge, the Federal Court opined that his continuance in office would be prejudicial to the administration of justice and public interest. The Court recommended the removal of the judge. In the Constituent Assembly, a proposal on similar grounds was mooted by Tajamul Hussain, which suggested that a Supreme Court judge should be removable by the order of the President only after a committee consisting of all the judges of the Supreme Court had investigated the charge and reported on it to the President.^{xiii} Ultimately, the framers of the Constitution adopted the proposal of Ayyar by introducing Article 124(4) in the Indian Constitution.

3. MECHANISM OF REMOVAL OF JUDGES UNDER THE CONSTITUTION

Article 124(4) of the Constitution provides

A Judge of the Supreme Court shall not 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-thirds of the members 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 Constitution by Article 217(1) (b) provides for a similar procedure of removal for High Court judges.^{xiv} The Indian constitution provides for the removal of judges on the ground of proven misbehaviour but it does not define the term misbehaviour. The expression misbehaviour is a wide term, which is incapable of being defined precisely. In *Krishna Swami v Union of India, K. Ramaswamy*,^v acknowledged the difficulty in precisely defining the expression misbehaviour.

The constitution or the Act (referring to the Judges Inquiry Act) did not define misbehaviour. Several internal forums for judicial independence suggested defining misbehaviour but to no avail. No legislature in any democratic country attempted to do so as it would appear to be difficult to give a comprehensive definition to meet myriad situations.^{xv}

The term misbehaviour includes willful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude however the term misconduct does not refer to every act, conduct, or even error of judgment or negligent act by the Higher judiciary.^{xvi}

In India, the whole process of removal of judges is separated into two parts namely (a) the statutory process and (b) the parliamentary process. The process of initiation to investigation and proof of misbehaviour or incapacity is covered by an enacted law, the Judges (Inquiry) Act 1968 and therefore this process is known as the statutory process whereas the parliamentary process commences only on proof of misbehaviour or incapacity by the law enacted under Clause 5 of Article 124^{xvii}.

In India, the Parliament is empowered to regulate by law the procedure for presenting the address and for the investigation and proof of mis behaviour or incapacity of a judge.^{xviii} The law envisaged in Article 124(5) is a parliamentary law, which is of a higher quality and efficacy than the rules made by the house for itself under Article 118 of the Constitution.^{xix} I

The Judges (Inquiry) Act, passed by Parliament in 1968, lays out in great detail how the judge's removal proceedings are to be carried out. This statutory enactment governs the making of allegations, initiation of the proceedings investigation, and proof of mis behaviour or in-capacity of a judge.^{xx}

The process for the removal of the judges begins with a notice of motion for removal of the judge presented by 100 members of the Lok Sabha or 50 members of the Rajya Sabha.^{xxi} The Speaker/Chairman may admit the motion on admitting the motion the Speaker or Chairman is obliged to constitute a committee consisting of a Supreme Court judge, a Chief Justice of a High Court, and a distinguished jurist.

To make an investigation the Committee has the powers of a civil court.^{xxii} The Speaker or the Chairman receives a report from the committee that includes the conclusions on each of the allegations individually. The report is presented to the House by the Speaker or the Chairman, and if the committee finds the judge not guilty, the House cannot proceed further, leaving the political aspect of the removal process with no other choice. The House takes up the motion for consideration if the judge is found not guilty. The majority will triumph if the inquiry committee's report is not unanimous and it finds the judge not guilty. An address may be made to the President for the removal of the motion after it has been approved by the House by the applicable constitutional provisions.

A motion that is moved in either or both the houses for the removal of a judge does not lapse if the House is dissolved before it is taken up for consideration by that House, after the completion of the inquiry, after the completion of inquiry by the Inquiry committee and remains pending until it is taken up for consideration^{xxiii}. In the sense that even if the Committee for Investigation records a finding that the judge is guilty of the charges, the Parliament retains the final say over whether or not to present an address to the President for the judge's removal.

Few Indian judges have faced removal procedures thus far; Justice V. Ramaswamy was impeached in 1993, and Justice Soumitra Sen was targeted in 2011. In Ramaswamy's case, the Congress party's members of parliament refrained from voting in favour of the impeachment resolution, which prevented the Parliament from successfully impeaching the relevant judge. Ramaswamy was spared the disgrace of becoming the first Indian judge to be successfully impeached thanks to the political choice of parliamentarians not to cast ballots. The failure of the impeachment procedure to guarantee judicial accountability was made clear by Ramaswami's non-impeachment.

There are numerous reasons why the impeachment procedure has been criticised. One of the main complaints directed at the impeachment process is its highly politicized aspect. The impeachment procedure has frequently yielded to political considerations. Among the most notable examples is the case of Justice Ramaswami, in which the Parliament chose not to impeach the judge despite the Inquiry Committee's indictment of the judge for egregious judicial misconduct. Because the Congress members of Parliament refrained from voting due to political reasons, the impeachment process was unsuccessful. Impeached. Ramaswami's non-impeachment demonstrated the shortcomings of the impeachment procedure.

It is submitted that learned H.M.Seervai has proffered the view that during the process of removal of judges, the members of the parliament are performing a quasi-judicial duty, and just as a judge cannot refuse to decide a matter before him, a member of parliament cannot abstain from performing his duty.

The members of parliament by choosing to abstain from voting failed to discharge their quasi-judicial duty.^{xxiv}

In the recent past, Justice Soumitra Sen avoided being impeached by the Parliament by resigning from his position following the Rajya Sabha's approval of the judge's impeachment motion. In a similar vein, Justice P.D. Dinakaran was able to avoid impeachment by quitting his position. The judge in question had made a fruitless attempt to have the court overturn every accusation of corruption made against him. Ramaswami's impeachment revealed the shortcomings of the impeachment procedure in maintaining judicial accountability.

According to Seervai, the non-impeachment of Justice Ramaswami due to political considerations shows that the procedure for the removal of a judge for proven misbehaviour under Article 124(4) as also the provisions of the Judges (Inquiry) Act 1968 required to be amended. Seervai points out that when Article 124(4) was enacted, the framers of the Constitution could not have dreamt that corruption would creep into the high court and Supreme Court judiciary. Seervai

refers to the Government of India Act, which provided for the removal of a judge through a judicial process. In his opinion, an impartial judicial determination would successfully eliminate all political influence in retaining a judge who was found guilty of mis behaviour or incapacity. This is a novel suggestion, as it would play an important role in making judges accountable. Seervai has however left the question as regards the composition of such a body unanswered. In an atmosphere of all-pervasive corruption in the country, corrupt members of the judiciary must be dealt with firmly to save the institution. It is axiomatic that the judges of superior courts in the common law world are, so to say irremovable; their terms and conditions of service cannot be changed to their detriment and the law accords them almost complete immunity for their official acts. While the executive and legislative branches are accountable for their acts and omissions the judges of the superior courts remain largely free from shackles of accountability^{xxv}.

4. SELF REGULATORY MECHANISM OF MAKING THE JUDGES ACCOUNTABLE

A self-regulatory mechanism has been formed in India to penalise judges of the High Court by judicial decisions. It is said that the judiciary's interest in organising its affairs is a positive development. This ruling attempt to close the wide gap between behaviour that has been proven to be wrong and behaviour that is not appropriate for a high office such as that of a judge by establishing an internal process. However, concerns have been voiced in India about the internal system that the Supreme Court suggested in the instance of Justice Bhattacharjee.

There are genuine concerns about the impartiality and transparency of the whole process, this procedure makes the Chief Justice of India the sole judge in dealing with an erring official besides it, the whole system revolves around the Chief Justice of India, burdening the Chief Justice with this additional responsibility in addition to his responsibilities as the administrative and judicial head of the Supreme Court.

Second, there is no way to find out the status of the complaint until the Chief Justice has made a final decision, and the entire procedure once the complaint is filed is shrouded in secrecy. Thirdly, one of the process's other significant shortcomings is that individual complaints cannot be filed; instead, complaints may be filed by Bar Associations. Fourth, the ruling acknowledges using independent sources to do private research but doesn't offer any instructions on how to find such sources. This system will not be able to accomplish its goals unless its procedures are made more open and grievances from harmed parties are allowed to be filed. Furthermore, because it excludes Supreme Court judges from its purview, this method only applies to judges of the High Court.

5. CONCLUSION

In the common law community, the procedure of impeaching or removing a judge following an address by Parliament represents the highest level of judicial accountability. Not only is the parliamentary method of removing judges laborious, but it is also ineffectual. There aren't many examples in the United States of America and United Kingdom where judges of the Higher Judiciary have been disciplined through the impeachment process. The general conclusion drawn from the comparative study of the judicial accountability system emphasizes how difficult it is to remove judges in common law systems and how nearly irremovable they are. The intricate parliamentary procedure in India for dismissing judges lacks an efficient system for disciplining judges. Experience has demonstrated that this procedure is incredibly time-consuming, inefficient, and susceptible to small-minded political concerns. The Parliament's inability to remove Justice Ramswami from office despite evidence of serious misbehaviour against him serves as a sobering reminder that impeaching judges is a difficult procedure. The process of transfer does not adequately discipline judges whose integrity is in doubt. The relocation of a High Court rarely serves as a deterrent; rather, it may have the reverse effect, allowing corruption and serving only to keep a person of dubious integrity in a judicial position. Concerning the inhouse mechanism of making the judges accountable it is submitted though an efficient adjunct to the removal process; there are certain, the High Court's internal system for disciplining judges is severely flawed.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

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- ⁱ See Shimon Shetreet, *The Limits of Judicial Accountability-A Hard Look at the Judicial Officers Act 1986*. UNSW Law Journal (1987) Vol.10 page 4.
- ⁱⁱ Harikrishna Pramod and Arunima, *Judicial Accountability: An Overview of the Legislative and Judicial Trends in India*. (2011) 2NLIU Law.Rev. at page 11.
- ⁱⁱⁱ See, P.P. Rao, *Legal Complexities and Judicial Reforms*. In S. Kashyap, *Reviewing the Constitution*. Shipra Publications 2000 at pages 190,191.
- ^{iv} Milon,K Banerji, *Judicial Power, Judicial Workloads and the Role of Bar in the Judicial Process-Need for supporting infrastructure* 2009(1)SCC(J) at page 7.
- ^v J.S Verma, *The Constitutional Obligation of the Judiciary* (1997) 7 SCC(J) pages 9,10
- ^{vi} See, CAD XI, pages 9,837.
- ^{vii} See CAD IV, pages 12,889.
- ^{viii} Ibid. at page 895
- ^{ix} Granville Austin, *The Indian Constitution-Cornerstone of a Nation*. Oxford University Press 2009 at page 178
- ^x Ibid at page 176.
- ^{xi} See, Sub-Committee of Judicial Accountability v Union of India AIR 1992 SC 320 at pages 339,340.
- ^{xii} Harish R. Gadhia, *Judicial Accountabilty-Revisioning the Role of Judiciary*. AIR 2009 SC (J) 33 at page 35.
- ^{xiii} CAD Vol.VIII at pages 243,262.
- ^{xiv} Article 217(1)(b) provides that a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court
- ^{xv} Krishna Swami v Union of India (1992) 4 SCC 605 at page 651.
- ^{xvi} Ibid.
- ^{xvii} See, Subcommittee of Judicial Accountability v Union of India AIR 1992 SC 320; Sarojini Ramaswami v Union of India AIR 1992 SC 2218.
- ^{xviii} Article 124(5) of the Indian Constitution provides that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).
- ^{xix} Supra note 46 pages 344,345.
- ^{xx} Ibid at page 349.
- ^{xxi} See, Section 3(1)(a) and Section 3(1)(b) Judges (Inquiry) Act 1968.
- ^{xxii} Ibid. Section 5(a)
- ^{xxiii} Supra note 46 at page 354.
- ^{xxiv} See, Supra note 14 pages 2924, 2925.
- ^{xxv} D.N.Saraf, *Limits of Judges Domain: Some Policy Considerations*, Journal of Indian law Institute 30 JILI. (1998) at page 45.