INDIAN DEMOCRACY AT WORK

FOUNDATION FOR DEMOCRATIC REFORMS

SESSION 7: JUDICIAL STANDARDS AND ACCOUNTABILITY

28TH FEBRUARY, 2021 | 12 PM - 2PM

PANELISTS:

1. Shri Justice Jasti Chelameswar, Former Judge, Supreme Court of India
2. Dr. G. Mohan Gopal, Former Director, National Judicial Academy
3. Shri Harish Narasappa, Co-founder, Daksh

CHAIR: - Shri Justice B.N Srikrishna, Former Judge, Supreme Court of India

ABSTRACT

This session witnessed a thought-provoking discussion on Judicial Standards and Accountability. With over 37 million cases pending in the District and Taluka Courts and 5.6 million cases pending in High Courts, it has come to be very crucial that the discussion around Judicial Standards and Accountability take the centre-stage. The discussions were centred not only around the mere lack of number of judges but also the quality of the judges. The session also set the stage for discussion on Article 312 and the call for instituting an All-India Judicial Services. The discussion also touched upon various complexities in the judicial system such as the language problem, the lack of periodic review of judges, insufficient knowledge of the Judges' when it comes to technical cases, the tedious process of justice delivery and so on. Suggestions of adopting the western systems of rigorous process in the legal and judicial system were also heard. The panel pointed out their discontent over the lapse of Judicial Standards and Accountability Bill, 2010. The panelists agreed that a democratic judiciary is required for a democratic country and preservation of public trust in the rule of law.

Opening Remarks By Justice B.N. Srikrishna (Former Judge, Supreme Court of India)

Justice B.N. Srikrishna opened the discussion by calling for an acceptance of issues as they are in the current state, and remarked that the Indian judiciary is limping. The Chair attributed this to two main reasons:

1. The existing vacancies at all levels in the judiciary are not being filled.
2. The projected number of personnel required is very high.

The Chair made the point that people of merit should be enrolled into the judicial services, right from the bottom level to the highest level, and a broad horizontal level test in order to find such meritorious people would be ideal. Having done this, ensuring accountability is also crucial. The Chair said that these issues are heavily interlocked, and a resolution made in one will affect the other and vice versa.

The Chair questioned if the All-India Judicial Services was to ever come into existence on lines with the Indian Civil Services, should it or will it be subject to executive authority? Pushing further, he asked if the judiciary is made answerable to the executive, then what will happen to the holy cow of judicial independence.

Justice Jasti Chelameshwar, Former Judge, Supreme Court of India

Justice Chelameshwar began his address by stating that there is a problem of efficiency and integrity in the judicial system. The speaker mentioned that the facts and figures have already been stated, and that he would not dwell on it further. The speaker mainly had two points pertaining to this discussion on Judicial Accountability. The first was in relation to the All-India Judicial Services. While he mentioned that it can be experimented, he doubted that it will ever

come into existence. The speaker noted that in almost every successive Chief Justice conference, according to the best of his knowledge, the All-India Judicial Services figures as an item on the agenda only to be formally read and ceremoniously rejected. He also stated that changes are ultimately brought by the lawmakers.

Second, Justice Chelameshwar spoke in detail of the recruitment process of District Judges, as stated in the Constitution. One of the requirements for seeking appointment as a District Judge is that the person should have been an advocate for seven years, prior to the cut off date. The speaker stated that a person who is enrolled as an advocate but did not fight a single case in the court in those seven years is also qualified for the role.

Justice Chelameshwar expressed that if seven years of not attending the court or arguing a single case was valued more than three or four years in the judicial services, then he could not comprehend the point of constituting an All-India Judicial Services.

Justice Chelmeswar opined that filling all the vacancies will not help and it is also not possible to meet those numbers. He took the case of the Allahabad High Court to support this argument, wherein the sanctioned number of judges was 160 as on the date he retired. However, the number of judges in the High Court never crossed 105. He said that only numbers will not help the situation and that quality and efficiency matters too. The speaker also advanced that the Judicial Standard and Accountability Bill, 2010 visualised all the problems that plague the judiciary and expressed his discontent about it lapsing.

Justice Chelameswar observed that there is a Supreme Court judgement that mentions that at the age of 50, 55 or 58, the judges at the lower courts have to be scrutinised and reviewed and if the situation calls for it, removed from the service. He questioned why this is not being applied to the higher courts and emphasised the need for periodic review of the judges in the higher

judiciary. The speaker concluded by stating that reform has to take place from the top, not from the bottom.

Dr. G. Mohan Gopal, Former Director, National Judicial Academy

Dr. G. Mohan Gopal remarked that it is the absence of measurable performance standards that distinguishes the Indian judiciary from the judiciaries of other large countries where there is an abundance of performance standards which are measurable and judges are held accountable independently.

The speaker mentioned that today we have an extensive body of global norms and practises on the issue of judicial standards and accountability. The question now, according to the speaker, is why the standards are not being imported and applied to India. He observed that the entire legal profession, including lawyers and the legal academia is insulating itself from accountability and performance standards by not adopting rigorous processes and standards.

The speaker referred to the Rankin Committee (1924) which was setup in response to the searing and scathing attack on the judiciary by Mahatma Gandhi in the 1922 sedition trial speech. Gandhi's essential point was that the judicial system and the railway system were failing because of political reasons and not due to techno-managerial failures. The State is a political institution, which means that a Judge occupies a political position and cannot be more independent and neutral than the State. The speaker further explained that the response to Mahatma Gandhi's critique by the British was the Rankin Committee. The Committee looked into the resource constraints of the judiciary and produced techno-managerial recommendations; the same things which are being pondered upon even 100 years later.

Dr. Gopal stated what we are dealing with is a social and political issue. He hypothesised that the real function of the legal and judicial system today is to counter the constitutional project of social change and social revolution. The courts have exercised their power to limit reservation without legal basis, and to limit the power of the Parliament to amend the Constitution, contrary

to the intention of the makers of the Constitution. Ambedkar said that the Parliament should have complete freedom to amend the Constitution, and this went uncontested at that time. Quoting Oliver Holmes, Dr. Mohan Gopal said, "If the people of the United States want to go to Hell, I will help them to do that. That's my job as a judge, it's not my job to second guess them." The speaker asserted that freedom can only be balanced against freedom and nothing else, with reference to the United States, where the First Amendment states that Congress shall make no law to curb the freedom of speech and expression or the press. However, in the Indian context, we have expanded the grounds on which freedom can be constrained, and compromised equality.

Dr. Gopal postulated that the legal and judicial system is dominated by a very small social oligarchy, representing a very small proportion of the population. Article 38(1) of the Constitution mentions the 'project of the Constitution' which is to create a new social order, in which justice - social, economic and political, shall inform all institutions of national life. He explained that the people of India resolved to reconstitute India from what existed pre 1950 into a sovereign, socialist, secular, democratic republic. This is a project to transfer power from an oligarchy to the common people, and democratise the country. The speaker drew that the country has refused to see the link between democratisation and efficiency of the judiciary.

In contrast, the speaker highlighted, the judiciary of the USA is highly democratic. It comprises an independent police, an independent prosecutor, a jury which decides on questions of fact and questions of law, and a judge, whose role is limited to laying down the principles of law and conducting the proceedings according to those principles. India has enormously concentrated power over framing charges, investigation, prosecution, finding facts, determining guilt and punishing in the judiciary, with minimal standards. The speaker commented that the way in which pre-sentencing hearing is handled in India is disgraceful, and there is very little mental application of mind to sentencing. He recalled Justice Krishna Iyer's statement, "The mission of sentencing is humanising the crime-doer." Once the conviction happens, the Judge must see the offender as a human being and deal with him in a rational manner. Democratize the project from punishing the crime-doer to humanizing him. Democratisation is very crucial, it is a goal not a

process, wherein the power will be put in the hands of the common people, including that of the legal and judicial system. Dr. Gopal asserted that we cannot have a democratic country without a democratic judiciary. Standards and accountability flow from larger goals and vision, such as that of democratizing our society.

With his call for the democratisation of the society and judiciary, Dr. Gopal put forward an example of Docket Exclusion. In Bihar and Jharkhand, 3 cases are filed per thousand population, whereas in the United States 330 cases are filed per thousand population; 2000 in Europe, 100 in Singapore, about 45-50 cases per thousand population in Kerala; and in India as a whole, it's about 15-20 new cases per thousand population. This not because of less crime or violation of rights in Bihar, Jharkhand but because their docket is excluded. The speaker ascertained that the country needs more cases in order to protect all of its people equally.

Dr. Gopal further suggested that one should look at is not the judge-population ratio, rather than the case-judge ratio. The judge-population has distorted the allocation of judges. For example, Kerala's population is half the population of states like Karnataka and Tamil Nadu and consequently, half the number of judges. However, the case filing rate in Kerala is as high as that of the other two states. The speaker stated that the NCMS (National Court Management Systems) has evolved a scientific approach to calculate the number of judges required by a court but it hasn't been implemented.

The speaker concluded by restating his hypothesis that in order to improve the performance of the judicial system, we must understand the social and political context of the judicial standards and accountability. We must understand that the judiciary is a part of the State, which is a political institution, and the right political goals such as those defined in Part 3 and 4 of the Constitution must be set to improve judicial standards and accountability.

Shri Harish Narasappa, Co-Founder, Daksh

Shri Harish Narasappa began by expressing his concurrence with Dr. Mohan Gopal that the Judge-Population ratio is not a relevant metric to determine the number of judges required, which was rejected by the National Court Management Systems Committee (NCMS) as well. Instead it is the judge-case ratio that is relevant for such a purpose.

The speaker then spoke about efficiency in the judicial system, stating that currently the courts seem to function without any sense of time. Not merely the litigant's time or the lawyer's time but also judicial time. He was of the view that accountability is incompatible with the current system where a judge being an independent statutory or constitutional authority, is accountable only for the substantive aspect of his functions; in other words, his/ her adjudicatory functions. The larger problem according to the speaker is that nobody has a sense of ownership for the system as a whole resulting in lack of accountability.

Shri Narasappa noted that contrary to popular perception, the ownership for the working of the judicial system lies with the Chief Justices of the High Courts and not the Chief Justice of India. The Office of the Chief Justice of a High Court is, unfortunately, a very transitory office. The High Court Chief Justices hardly get the time to comprehend the needs of the particular state as they hail from a different state and their tenure is generally of one year. Hesitation to take actions, lest it endangers the prospects of being elevated to the apex court, is not uncommon. Therefore, there is no sense of ownership for the institution or the goals of the institution. In the absence of such a sense of ownership, accountability cannot be developed within the judicial system.

The speaker then addressed the argument of judicial independence. He concurred with Justice Srikrishna that it has now become a 'holy cow.' While its necessity cannot be disputed, the contours of judicial independence must be clearly understood. It ceases to apply in areas where the judges have no special expertise such as administrative matters. The speaker noted that even the British legal system had created a separate institution to deal with the administrative side of

the judiciary. He expressed concern that new ideas of administration are not being encouraged. Unless innovation is brought about on the administrative side that adequately addresses the several factors that prevent judges at various levels from taking ownership for the performance of the judicial system, standards to evaluate the performance of the judges and accountability cannot be developed.

The speaker further highlighted that the focus of judicial accountability must primarily be on the accountability that is assured to the litigant or the ordinary citizen rather than the misbehaviour of a few judges of the constitutional courts. While the latter must not be dismissed, the former is a much larger problem. In light of the inordinate delay in adjudication, the accountability of the judiciary towards the litigant is absolutely zero. Shri Narasappa concluded by stating that judges jump in very quickly to protect their own, but are not doing enough to protect the citizens.

PANEL DISCUSSION

Justice B.N. Srikrishna stated that the All-India Judicial Services is probably the most hated reform being discussed in the country, while concurring with the opinion of Justice Chelameshwar that the introduction of such a service may not be feasible. Referring to the federal structure, the speaker stated that each state having to administer justice in its own language has only added to the problems. This, in his opinion, makes it difficult for many judges who are posted in another state to write a judgement in that particular state's language. The counter argument to this is that IAS officials also write file notes in other languages when posted to other states. The Chair strongly asserted that writing a judgement is different from writing a file note and that one cannot write a judgement in the manner a file note is written.

He also opined that any man who comes as Chief Justice will take some time to imbibe the local culture, language, local thinking and local measures. He cited the various terms used in land measurements in states as an example.

The Chair tried to draw a comparison between a bureaucratic office and a private office, and mentioned how in a private setting the employer would set deadlines for employees which if not met, would result in their sacking. On the contrary, if they finish work efficiently, they will be offered bonuses. Whereas, in a government office, just marking their presence for 30 days in office would fetch them their salary. The speaker further went on to ask who the judges are accountable to if they leave the pending judgements in the courts and move around from court to court like "fluttering butterflies." He proposed that there should be an institution that the judge should be accountable to. Citing an example from England, all the prosecution officers are responsible to answer to the Director of Prosecution. Even in Germany, France and other European countries, an officer is deliberately assigned to look over such issues. In line with this, the Chair questioned why there cannot be a judge or a collegium of judges monitoring all the matters in the higher courts. This way, judicial accountability will not be compromised, since standards will be maintained and governed by the judge's brethren. The Chair also opined that if a judge is found to be at fault, then he/she should unconditionally quit. He suggested that this should be implemented through public opinion.

The Chair expressed his view that as a judge, he would not like to answer to a bureaucrat but to the public. He also agreed with the other panelists that the judge to population ratio is not relevant. More than the numbers, the speaker felt that the issue of personnel management is important, and seems to be neglected in courts. He expressed that there should be a qualified person in the required field to manage personnel.

Dr. Jayaprakash Narayan joined the discussion and elaborated that the larger idea behind the advocacy for the IJS is to attract the best talent in the country to the judiciary. Secondly, he stated that the extant distinction between the insider and outsider must be done away with even in the current All India Services. Thirdly, he clarified that the judges recruited under the IJS shall remain accountable to the High Court vide the operation of Article 235.

In response to the Chair's request for a comment, Justice Jasti Chelameswar accentuated the importance of transparency as an essential element for fixing accountability. Citing the example

of the use of local language in certain High Courts in the country and the inconsistent stand of the Supreme Court regarding the same, Justice Chelameswar highlighted that ad hoc decision making and the underlying lack of transparency are major problems. Shri Harish Narasappa noted that the judicial process that takes place in an open court is the most transparent out of the three organs of the State. However, such transparency is lost once the judge goes to his/ her chamber, especially on the administrative side when it comes to Chief justice being the master of roster. Shri Narasappa further observed that Constitutional Courts guide other branches of the government but they refrain from laying down administrative guidelines for themselves.

The Chair then commented that in addition to the administrative power of the Chief Justice, the other important consideration is appointment of judges. On that front, Dr. Narayan agreed that the National Judicial Appointments Commission is a democratic necessity but it is not the time to push for the same. He, therefore, emphasised on enacting a law to ensure judicial standards and accountability that operate after the judges are appointed. Shri Narsappa, however, observed that it is the judicial and legal fraternity that must take the lead for setting standards as well as accountability mechanisms since a parliamentary enactment to that effect is unlikely as it does not seem to be in the interest of the executive.

Shri Pradeep S. Mehta joined the discussion to pose a question on how to ensure accountability in the decisions of the lower judiciary citing the example of several instances where bail has not been granted to detenues. He further proposed that a possible solution could be the High Court taking up a few such cases and making an example out of them for the subordinate judiciary. The Chair responded that penalising a judge for a wrong decision is not possible in light of the Judges (Protection) Act. Moreover, the purpose of having a system of appeals is to provide for such aberrations.

Dr. G. Mohan Gopal then clarified that the administrative power structure of the High Courts is vested in the full court, whereas a similar provision for the Supreme Court does not exist. Justice Chelameshwar added that the reason for the same is that the Constitution, unlike in the case of

High Courts, did not vest any power of superintendence in the Supreme Court. Dr. Gopal then highlighted that there is a Registrar (Judicial) in every High Court who is responsible for looking into complaints against judicial officers. He stated that the District Judiciary judges are in reality subject to stringent systems of accountability. He opined that delays in trial proceedings are often due to the strategy of the litigants for which the judges cannot be blamed.

Drawing from his experience across the country, Dr. Gopal observed that the Courts are a mirror of society and they cannot be better than the society that they serve. He contrasted the state of trial court proceedings in Kerala and Maharashtra with that of states like Madhya Pradesh. He opined that a few legislations cannot result in judicial reform. It is the level of democratisation of the society that determines the culture and by extension, the court system. Judicial accountability, standards, timeliness and the like are all facets of a democratic society.

Dr. Narayan then sought clarification from Dr. G. Mohan Gopal as to the means of reining in the excesses of democratisation that can lead to abuse of power while simultaneously protecting democratic ideals. Responding to Dr. Narayan's concerns about majoritarianism, Dr. Gopal alluded to the principles of jus cogens or peremptory norms under international law. He was of the view that since no State can act in violation of such norms they act as a check on demagogic tendencies. He said that institutionalization of governance, including the judiciary, is necessary. Quoting Douglass North who defines institutions as 'rules and the way they are enforced', he elaborated that the arbitrariness in exercise of power can be removed when government functioning is circumspect by democratic norms. He emphasised that the focus must be on making courts a catalyst of democratisation, and not a system that functions in a non-democratic manner and blocks democratisation due to excessive concentration of power and arbitrariness. We must be governed by fidelity to institutions and to reason, which in turn facilitates accountability.

QUESTIONS AND COMMENTS

The first question was regarding the means of improving the quality and integrity of the subordinate judiciary, if not for the All India Judicial Services (AIJS). Justice Chelameshwar responded that there are two elements to ensuring efficiency and integrity - one, the recruitment process, and two, the periodic audit of judges. In respect of the latter, he put forth the idea of entrusting the assessment to a neutral third party. Dr. Gopal commented that an AIJS is counter-democratic. Noting that none of the OECD countries have an equivalent of the AIJS, he stated that it is unsuitable for India which is of a massive size. Additionally, 87% of the judges in the USA are elected. He stated that AIJS will not result in an efficient and democratic system, and we need to move towards greater localisation in the judiciary, including the use of local language in courts in consonance with federal values. Dr. Jayaprakash Narayan responded that the focus should be on creating mechanisms to attract the finest minds to the judiciary. He suggested that the highly successful recruitment practices of the UPSC can be suitably adopted. In response, Dr. Gopal commented that the recruitment process of the UPSC is weak and in comparison, the judicial inquiry committee procedure is better. However, there is a lack of political will to constitute judicial inquiry committees. He suggested that we must put pressure on the political class to hold the judiciary accountable. He noted that the recently developed in-house mechanism by the Supreme Court is a step in the right direction though not a perfect one. The Chair, however, pointed out that in case of the impeachment process of Justice Ramaswamy, the political class used the power for the contrary purpose.

Shri Narasappa emphasized that accountability is a nuanced topic and impeachment cannot be the only means of enforcing it. He illustrated the same with an example of the public admission of a former Chief Justice of the Karnataka High Court of being offered a bribe by a party. The focus should be on bringing about change incrementally within the existing system. Dr. Gopal concurred with Shri Narasappa that there is no ownership of the problem. However, he pointed out that impeachment is the only means of enforcing accountability in cases of judicial misconduct across the world. He noted that imposition of any soft mechanisms for accountability

runs the risk of impeding the independence of the judge. Focus must be on the quality of disposition and not simply on disposal.

The next question was about structuring and laying down criteria of evaluation for periodic audits. Dr. Gopal stated that it is not the individual judge but the court as an institution that must be evaluated. Besides the presiding officer, a court has multiple duty-holders such as the Bar, the ministerial staff, and the departments of forensics, jails and investigation whose performance must also be evaluated in the process. The exact cause of the problem can be identified and then rectified based on such multi-faceted evaluations. He elaborated that the independence of judges is paramount and must only be subject to the impeachment process at the highest level. He proposed that judicial promotions must be done away with and various judicial positions must be looked at as specialisations. He further noted the progress made by the Indian judiciary wherein judicial academies have become an integral part of the system, and formulation of performance standards by the NCMS which are being referred to by several High Courts. He opined that the judiciary is moving in the right direction in respect of institutionalising accountability mechanisms.

CONCLUSION

Before drawing the curtain on the discussions, Dr. Jayaprakash Narayan expressed heartfelt gratitude towards all the panelists. He averred on the need to make conscious efforts to build institutional mechanisms instead of waiting for an automatic democratisation of the society. He called for an institution building that does not cause damage to the existing system. He ended on a positive note, wherein he stated that the legal community, legislature and all the stakeholders can push for the changes together. Lastly, he deliberated upon the fact that problems should be seen in perspective and practical solutions should be brought to the fore for the same where esteemed panelists will guide us towards such a goal.