

“Judicial Independence: Is It Threatened?”¹

by

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“The place of justice is a hallowed place, and therefore not only the Bench, but also the foot space and precincts and purpose thereof ought to be preserved without scandal and corruption”.

“On Judicature” by Francis Bacon

In the year 1995 I delivered the First P.K.Goswami Memorial Lecture at Guwahati with the title “*The Independence of The Judiciary—Some Latent Dangers*”. In a way it was a sequel to my apprehension over the years expressed judicially in my separate opinion in the K. Veeraswami case, 1991(3) SCC 655 followed by the events leading to the V. Ramaswami cases that I had to hear and decide. Fifteen years later I am anguished that some of my apprehensions threaten to come true! Hence, the choice of this topic for the lecture to pay homage to the memory of a doyen of the Madras Bar, S.Govind Swaminadhan who was a true professional practicing the highest standards of professional conduct and ethics in the Bar, which is the greatest assurance for judicial independence. In my vocabulary, the word ‘Bar’ denotes the entire legal profession—the practicing lawyers as well as the judges on the Bench.

Another reason for this choice goes back to the time of my entry to the Bar in 1955 when the first book to read and digest given to me by my senior, G.P.Singh (later Chief Justice of the M.P.High Court) was a compilation of lectures delivered by a senior member of the Madras Bar, K.V.Krishnaswami Iyer to the junior members on professional conduct and ethics. The high tradition of professional conduct and ethics of the Madras Bar coupled with my baptism in the Bar with this lesson indicated the obvious choice of the topic for beginning the Lecture series in the memory of S.Govind Swaminadhan at this venue. It is not merely contextual but also of great constitutional significance at a time when prompt measures are needed for protecting judicial independence from lurking dangers.

II

Judicial Independence & Accountability

The independence of the judiciary is a necessary concomitant of the power of judicial review under a democratic Constitution. The foundation for judicial review without a specific provision under the American Constitution was laid by Marshall, C.J. in 1803 in *Marbury v. Madison*; even though much earlier in 1608 it was Lord Coke whose opinion in *Dr. Bonham’s case* germinated that concept. In the Indian Constitution, judicial review is expressly provided *inter alia* in Articles 13, 32, 136, 141, 142, 226 and 227. It is also recognized as a basic feature forming an indestructible part of the basic structure of the Constitution pursuant to the decision in *Keshavananda Bharti*, AIR 1973 SC 1461. The directive principle of State policy in Article 50

¹ First S.Govind Swaminadhan Memorial Lecture at the Madras High Court Bar in Chennai on 29 January 2010.

mandates separation of judiciary from the executive to maintain its independence, as essential for its function as the watchdog under the Constitution. However, like every organ of the State and every public functionary in a democracy the judiciary as an institution and every judge as a public functionary is accountable to the political sovereign—the People. The only difference is in the form or nature of the mechanism needed to enforce their accountability. In short, judicial accountability is a facet of the independence of the judiciary; and the mechanism to enforce judicial accountability must also preserve the independence of the judiciary.

The rule of law which is the bedrock of democracy will be adversely affected if the independence of the judiciary is compromised by the erosion of the integrity of the judiciary. Such erosion can be from within as well as from without. Safeguards to protect the judicial independence are in our Constitution in addition to the several international instruments, which can be read into the constitutional guarantees by virtue of the canons of construction evolved in *Vishakha*, AIR 1997 SC 3011.

In addition to the UDHR and the ICCPR, the UN has set forth a set of standards known as the '*Basic Principles on the Independence of the Judiciary*'. Also '*The Beijing Principles on the Independence of the Judiciary, 1997*' adopted at Manila by the Chief Justices of the Asia Pacific Region; and '*The Bangalore Principles of Judicial Conduct, 2002*' are two such documents needing particular mention. **The essential values stated in the Bangalore Principles are: *judicial independence, both individual and institutional, as a prerequisite to the rule of law; impartiality, not only to the decision itself but also to the process; integrity; propriety, and the appearance of propriety; equality of treatment to all; competence and diligence.* It concludes with the need for effective measures to be adopted to provide mechanisms to implement these principles.**

To protect the judiciary from dangers within, the framers of Indian Constitution considered it sufficient to provide for removal of a judge of a High Court or the Supreme Court in the extreme case of proved misbehaviour or incapacity under Articles 217 and 124 respectively; and to vest the control over the subordinate judiciary in the respective High Court under Article 235. In this manner the Constitution provides for enforcing judicial accountability preserving the independence of the judiciary.

III

Mechanism for Judicial Accountability

A serious debate is now raging about the inadequacy of the existing mechanism for enforcing the judicial accountability of any erring judge in a High Court or in the Supreme Court. There is now a general consensus that some recent incidents involving a few in the higher judiciary has exposed the inadequacy of the existing provisions to deal with the situation; and it calls for an effective mechanism to enforce the judicial accountability of the higher judiciary, in case of need.

There can be no doubt that the public perception in this behalf cannot be ignored. Public confidence in the judiciary is its real strength that has also legitimized '*judicial activism*' through Public Interest Litigation; and converted the judiciary's image from the '*least dangerous branch*' without the '*purse or the sword*' (borrowing from Alexander Hamilton in the 78th Federalist) to a strong arm of the State. The recent clamour for effective judicial accountability justified by a few recent incidents must be properly channelised to ensure that an effective mechanism for accountability of the higher judiciary is developed without eroding the independence of the judiciary. It must be borne in mind that the number of erring superior judges is miniscule which

must not embarrass the vast majority of correct judges. The threat to the independence of the judiciary must be averted by a sensible balancing act.

Once the integrity and accountability of the higher judiciary is assured, the subordinate judiciary can be easily managed by virtue of Articles 50 and 235. High Courts are pivotal in the administration of justice. Once they justify people's confidence, the subordinate courts would not lag behind. The best way to exercise control over the subordinate courts is for the High Courts to lead by example. It is well known that "*An ounce of practice is worth more than a ton of precept*". All the precept in the form of circulars and guidelines to the subordinate judiciary from the higher judiciary is ineffective unless it is identified with the practice of the preachers. That does not appear to be the current perception in all cases.

IV

Areas of Concern

Focus on some important areas is needed. A few of these were identified in my above 1995 lecture, separate opinion in the K.Veeraswami case, and the majority opinion in the Second Judges case. A brief mention of these in the present context is helpful.

In the 1995 lecture, I pointed out the latent dangers to judicial independence from within and concluded thus:

"The existence of power must be accompanied by accountability...Erosion of credibility in the public mind resulting from any internal danger is the greatest latent threat to the independence of the judiciary. Eternal vigilance to guard against any latent internal danger is necessary, lest we suffer from self-inflicted mortal wounds...The absence of any codified rules or norms to regulate judicial behaviour at the higher levels has been on account of the view that those entrusted with the task of regulating the conduct and behaviour of others do not need to be told of the requirement from them. However, if we fail in living up to that expectation, it should not be surprising if in the near future there is move by an outside agency to step in and provide a solution to the felt need...The need of the hour, therefore, is to realize this clear and present danger as an imminent threat to the independence of the judiciary from within...In my view there is no time to lose and we must act promptly...Observance by us of the norms and guidelines indicated for the members of the judiciary by the ancient texts and the judicial verdicts is a sure way to prevent any threat from the lurking latent dangers from within. It would also satisfy the legitimate expectation of the people of our accountability which must accompany the investment of any public power".

Earlier in the K.Veeraswami case, 1991 (3) SCC 655 my dissent recognized the felt need for suitable legislation, the existing provision being inadequate, to ensure accountability of the higher judiciary protecting the judicial independence.

Therein, I had said:

"If there is now a felt need to provide for such a situation, the remedy lies in suitable legislation for the purpose of preserving the independence of judiciary free from likely executive influence while providing a proper and adequate machinery for investigation into allegations of corruption against such constitutional functionaries and for their trial and punishment ...The social sanction of their own community was visualized as sufficient safeguard with impeachment and removal from office under Article 124(4) being the extreme step needed, if at all. It appears that the social

sanction of the community has been waning and inadequate of late. If so, the time for legal sanction being provided may have been reached”.

Having been convinced that the majority opinion in the K.Veeraswami case was not workable (as proved by later events), I added a warning in one para at the end of my draft dissent, which I omitted at the time of its pronouncement because of its strong language. The apprehension therein of a later intrusion by the executive to prescribe for us having now come true, it may help to recall that sentiment with the hope that some prestige may be salvaged even now in enactment of the impending legislation to cover the field. **I believe that self regulation is dignified while outside imposition is demeaning.** The omitted draft para from that opinion was:

“With no pretensions of a ‘prophet with honour’ to borrow the title from Alan Barth’s compilation of opinions of some great dissenters, and no desire to be a prophet of doom, I deem it fit to end on a note of caution. My view is not shared by the majority. I hope they are right. But, if it be not so, let not posterity accuse us that the control over the judiciary denied to the executive by the Constitution and the Parliament, and which the executive could not wrest through the Parliament was conferred on it by judicial craftsmanship itself. I do hope that in spite of the present clamour for the majority view, in calmer times, when present pressures, passions and fears subside, and the potential threat of the yet unknown and unexpected power in the executive without the requisite statutory safeguards is fully realized, there will be time enough to effectively check any intrusion into the independence of judiciary by this means. Undoubtedly, there is erosion of values in all spheres but even now the higher judiciary retains comparatively the greatest credibility in public eye, as it did in earlier times. Is it, therefore, correct and wise to vest the executive, which does not enjoy even equal, much less greater credibility, with this extra power not envisaged by the Constitution and the Parliament? The answer at present by the majority is in the affirmative, which would be the law. It is the future, which will unfold the true canvass’.

The need to regulate this area by internal discipline to prevent outside intrusion prompted resolutions to this effect in the Chief Justice’s conferences, but the general reluctance from within kept the matter in abeyance till the three resolutions were adopted unanimously by the Supreme Court on May 7, 1997: *Restatement of Values in Judicial Life; Declaration of Assets by the Supreme Court and High Court judges; and ‘In-house Procedure’ for inquiry into allegations against these judges.* These resolutions were later adopted in the Chief Justice’s Conference in 1999. The Bangalore Principles, 2002 also affirmed the Restatement of Values. **These resolutions provided the framework for the needed legislation to cover the field without any scope for executive intrusion in enactment of the legislation.** Before demitting the office of the CJI, I also wrote a letter on December 1, 1997 to the Prime Minister to this effect in a bid to ensure judicial accountability preserving the independence of the judiciary. After my retirement, I have reiterated it in a letter of April 7, 2005 to the present Prime Minister.

V

Self-regulation

It saddens me to find that the judiciary appears to have lost the initiative and the political executive who also controls the Parliament in our constitutional scheme is now to determine the contents of the impending legislation. What troubles me even more is the reported initial assertion of the CJI, K. G. Balakrishnan that the superior judges need not declare their assets unless bound to do so by a law, in spite of the unanimous resolution of the Supreme Court on May 7, 1997 since that has only moral authority; and later the judicial challenge to applicability of the RTI Act

in the High Court and then to itself! I am distressed at the comments made publicly and heard privately about the higher judiciary in this context. However, the subsequent dilution of that stand is welcome news. The *perception* that law alone and not morality binds the judiciary is in conflict with the judicial tradition and is disturbing. It ignores Jeffrey Jowell's wise enunciation that '*law is seen as institutionalized morality*'; and David Pannick's conclusion in his book--'Judges': "*The qualities desired of a Judge can be simply stated: that he be a good one and that he be thoughts be so*".

However, the recent response of the Delhi High Court (in L.P.A. No. 501 of 2009 decided on 12 January 2010) led by Chief Justice A.P.Shah in rejecting the tenuous stand of the Chief Justice of India, K.G.Balakrishnan that the office of CJI and the Supreme Court are above the law (RTI Act) applicable to all public functionaries in our republican democracy is to be hailed as a welcome blow for transparency and accountability, which are acknowledged principles of standards in public life. The decision first by a single judge, S.Ravindra Bhat, affirmed on appeal by the full bench of the Delhi High Court is a glaring proof of judicial independence. The observations of A.P.Shah, C.J. speaking for the full bench that "*Judicial independence is not the personal privilege of the individual judge, but a responsibility cast on him*", and "*Democracy expects openness...don't wait for Parliament to compel judges to disclose assets and undermine judicial independence*", provide strong fillip to judicial independence.

Chief Justice A.P.Shah has articulated the true concept of judicial independence reiterating the modern view. He has echoed the words of Lord Woolf, C.J. in an article wherein he said, "*The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public*". It is time the Chief Justice of India, takes the lead in this direction provided admirably by the High Court to bring quietus to the unsavory controversy threatening judicial independence.

Indira Gandhi's case, AIR 1975 SC 2299 enunciated certain propositions: accountability is an integral part of a democratic polity; it implies the people's right to know the manner of working of the government; accountability improves the quality of governance; secrecy, on the other hand, promotes nepotism and arbitrariness; and, therefore, article 19(1)(a), which implies open government, is premised on the 'right to know'. This view has been reiterated in later decisions: S P Gupta, AIR 1982 SC 149; Secretary, Ministry of IB, AIR 1995 SC 1236.

It is reasonable to assume that the Supreme Court will practice what it has preached and made the law of the land. It is useful to recall Lord Acton's summary of the imperative of the people's 'right to know'. He said: "*Every thing secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity*".

Let me hope that the Supreme Court led by the Chief Justice of India will now accept the verdict in good grace and not appeal to itself to re-examine its obvious merit of the Delhi High Court judgment! Conflict of interest in the further appeal to itself is obvious, since the doctrine of necessity is not attracted. Otherwise, we are bound to go down in the public estimation which would rightly conclude that we do not practice what we preach.

VI

Role of the Bar

The Bar has a significant role in such a situation. I wish the Attorney General, G.E.Vahanvati who appears for the Supreme Court draws inspiration from some of his illustrious predecessors to

advise the CJI against a further appeal by the Supreme Court now to itself. Govind Swaminadhan as Advocate General of Tamil Nadu boldly contradicted Chief Justice A.N.Ray at the hearing of the review of Kashavananda Bharti decision when the CJI attempted to justify the review saying it was at the behest of the former. Lal Narayan Sinha as the Solicitor General refused to argue the Union Government's untenable plea in the Habeas Corpus matter during the Emergency (1975--'77). M.C.Setalvad, C.K.Daftary, S.V.Gupte and H.M.Seervai to name a few, were similar leaders of the Bar who did not hesitate to guide correctly the Chief Justices when ever need arose to preserve the dignity, credibility and the independence of the judiciary. M.C.Setalvad and Sir Alladi Krishnaswami Aiyer had no hesitation in giving an opinion to the President of India, Dr. Rajendra Prasad, which was not to his liking. Leaders of the Bar must not abdicate their role to preserve judicial independence with judicial accountability.

VII

Appointments

Another issue relevant in this context is of the appointment of judges in the Supreme Court and the High Courts. Chief Justice of India, K.G.Balakrishnan asserts that the collegium headed by him is strictly following the decision in the Second Judges case by which they are bound. The general perception voiced eloquently by the executive is that the executive has no part in making these appointments for which the judicial collegium alone is responsible and answerable. In this manner the judiciary is held responsible for the aberrations in these appointments in the recent years. It is true that the veto power granted to the executive by the First Judge's case, AIR 1982 SC 149 is taken away by the Second Judge's case, AIR 1994 SC 268; but it is not correct that the executive has been denuded of all power in adjudging the suitability of the candidates for appointment. However, greater responsibility does lie in the judicial collegium because of its role under the existing system. A brief reference to the Second Judge's case is necessary.

The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in K.Veerawami case. It said:

“A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system...a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof”.

In my separate opinion I had also emphasized the need for strict scrutiny at the entry point that will avoid the need for later removal of a bad appointment. I had said:

“The collective wisdom of the constitutional functionaries involved in the process of appointing a superior judge is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful person gains entry...even if sometime a good appointment does not go through. This is not difficult to achieve”.

A brief reference to the Second Judge's case, AIR 1994 SC 268 is apposite. The majority opinion held:

“The process of appointment of judges of the Supreme Court and the High Courts is an integrated ‘participatory consultative process’ for selecting the best and most suitable persons available for appointment...There may be a certain area, relating to suitability of the candidate,

such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India...If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment...non-appointment for reasons of doubtful antecedents relating to personal character and conduct, would also be permissible”.

The clear language of the decision leaves no room for any doubt that the executive has a participatory role in these appointments; the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc. are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegium, if not unanimous does not bind the executive to make the appointment.

Some reported instances in the recent past of the executive failing to perform its duty by exercise of this power even when the recommendation of the judicial collegium was not unanimous and the then President of India had returned it for reconsideration, are not only inexplicable but also a misapplication of the decision, which the CJI, Balakrishnan rightly says is binding during its validity. Such instances only prove the prophecy of Dr. Rajendra Prasad that the Constitution will be as good as the people who work it. Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability.

The Second Judge’s case affirmed by the Third Judge’s case in the Presidential Reference, merely formalizes the procedure developed and followed till executive supremacy in the matter of appointments was given by the First Judge’s case (1982); and that practiced even later by Chief Justices who did not succumb to executive pressure. A few earlier observations to this effect are significant to prove the point.

Granville Austin in his book—‘*Working A Democratic Constitution: The Indian Experience*’ (1999), has dealt with the issue of judicial independence. Some portions therein summarise the experience of the first fifty years. He says: “*The CJI during the Nehru period had virtually a veto over appointment decisions, a result of the conventions and practices of the time and the Chief Justice’s strength of character*”. He quotes Mahajan, C.J. saying “*Nehru has always acted in accordance with the advice of the CJI*”, except in rare circumstances, despite efforts by State politicians with ‘*considerable pull*’ to influence him. The Law Commission chaired by M.C.Setalvad in its 14th report recommended that appointments to the Supreme Court and the High Courts be made solely on the basis of merit sans any other consideration; and on the recommendation of the Chief Justice of the High Court with *concurrence* of the CJI.

The recent aberrations are in the application of the Second Judge’s case in making the appointments, and not because of it. This is what I had pointed out in my letter of 5 December 2005 to CJI, Y.K.Sabharwal with copy to the two senior most judges, who included the present CJI, K.G.Balakrishnan.

VIII

Post-retirement Behaviour

Post-retirement conduct of the superior judges, particularly those of the Supreme Court is also relevant in this context to require mention.

In addition to the system providing for the appointment of persons of proven integrity as guardian of the constitutional values, there is the need for constitutional safeguards to insulate them also from possible executive influence through temptations in subtle ways to preserve judicial independence. One such method to penetrate the resolve of even a few of the best is the temptation of lucrative post-retiral benefits given by the executive to a favoured few. The obverse of the constitutional guarantee of security of tenure and conditions of service is the obligation of such constitutional functionaries to the observance of a code of post-retiral conduct eschewing any such temptation. To the extent possible, the needed constitutional prohibitions should also be enacted, to enable the development of healthy conventions. The environment of eroding ethical values calls for this preventive measure.

Some instances of post-retirement activity of judges of Supreme Court (including the CJI) are attracting public disapproval, even if voiced privately. Chamber practice of giving written opinions by name to be used by litigants/parties before court/tribunal or any authority; arbitrations for high fees; doing arbitrations even while heading Commissions/Tribunals availing the salary, perquisites and benefits of a sitting Judge/CJI are some activities inviting adverse comments and seen as eroding judicial independence.

This too is a threat to judicial independence, which must be averted.

IX

Conclusion

The Constitution needs to provide for systems with checks and balances to eliminate abuse and misuse of public power. The caution administered by Dr. Rajendra Prasad at the concluding session of the Constituent Assembly is worth recalling. He then said:

“Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it... a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them”.

This is the crux of the matter.

The expectation from the judiciary is indeed very high in view of the nature of its role in the Constitution. The independence of the judiciary is meant to empower it as the guardian of the rule of law. It is not merely for its honour, but essentially to serve the public interest and to preserve the rule of law. Judicial accountability is a facet of the independence of the judiciary in the republican democracy. There are, therefore, recognized norms of judicial behaviour expected from the judges.

In the words of Addison, *‘to be perfectly just is an attribute of the divine nature, to be so to the utmost of our abilities is the glory of man’*. This is an apt description of the nature of judicial function.

How to ensure this result, and to achieve the true purpose of judicial independence? It has been answered in the texts and by the recognized judicial conventions restated generally in the above 1997 resolutions.

The Allahabad High Court Post-Centenary Silver Jubilee Commemoration Volume reminds us with a quote from the ancient texts:

“Let the king appoint, as members of the courts of justice, honourable men of proved integrity, who are able to bear the burden of administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends and foes”.

Recently David Pannick in his book—‘Judges’ concludes:

“The qualities desired of a judge can be simply stated: *‘that he be a good judge and that he be thought to be so’*...Such credentials are not easily acquired. The judge needs to have *‘the strength to put an end to injustice’* and *‘the faculties that are demanded of the historian and the philosopher and the prophet’*...Because the judiciary has a central role in the government of society, we should (in the words of Justice Oliver Wendell Holmes) *‘wash...with cynical acid’* this aspect of public life”.

The stated principles on the independence of the judiciary are meant to cover these aspects. The appointment process and the mechanism for ensuring judicial independence with judicial accountability at all levels are significant to thwart the impending threats to judicial independence. Sincere commitment and resolve of the entire Bar (including the Bench) towards this end is the need of the hour.

This would be our true homage to the memory of S.Govind Swaminadhan, a doyen of the Madras Bar who practiced these norms and has been a role model for the legal profession!
