

[Working Paper Series: Horizontal Accountability in Asia]

Ensuring Horizontal Accountability in India: The Role of Judiciary

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1. Introduction

Vertical and horizontal accountability act as countervailing forces to strengthen democracy. Specifically, horizontal accountability operates through the separation of powers among the legislative, executive, and judiciary branches. In a complex federal country like India, it operates via the division of powers at three levels of government: the Union, States, and local bodies (Mitra 2020). Such juxtaposition (division and separation of powers among different democratic institutions) has worked well to maintain the vitality of democracy in a large and diverse country like India. The judiciary, in particular, has played vital roles as the key institution of accountability: acting as the custodian of the constitution and protector of the rights of the most marginalized groups against the state (executive) excesses. By far, the judiciary has made earnest attempts to uphold the rule of law and act as a counter-majoritarian court.

However, with the arrival of a strong executive in 2014, there are increasing tendencies to overrule and control independent institutions, including the judiciary. The judiciary, which earned the distinction of the most powerful branch in previous decades, has been found struggling to safeguard against the violation of fundamental rights in a growing number of cases in recent times. Not only are courts increasingly following executive lines, but they progressively look like mere spectator in the face of growing state excesses, whether on the illegal arrest of democracy defenders, human rights activists, or political opponents, among others. An ineffectual judiciary has emboldened the executive to usurp key constitutional principles of constitutional democracy. Although there are moments of stress in its long-established constitutional principle of ‘separation of powers,’ there have been moments of great courage by individual judges in the recent times (Shah 2020a).

2. Mechanisms of Accountability

The judiciary in India ensures accountability of the executive branch in several ways, ranging from the separation of power, the rule of law, judicial review, writs, and judicial activism, among others.

2.1. Judicial Review

India has adopted the system of judicial review primarily from the experiences of the US. The Supreme Court of India has the power to review the enactments of the parliament and state legislatures.

Further, state actions must meet the parameters of the rule of law, which makes the higher courts more powerful and grants an instrument of judicial review. The various provisions of the judicial review system have been granted by the Constitution in various articles, including Article 13, 32, 131-136, 143, 226, 145, 246, 254, 251 and 372 (Rana and Kamath 2022). The power of judicial review is incorporated in Articles 226 and 227 of the Constitution insofar as the High Courts are concerned. To the extent that the Supreme Court is concerned, Articles 32 and 136 allow the apex court to review key aspects of state actions. However, there are exceptions to the application of judicial review. While judicial review can be conducted on state and central existing laws and the ordinances of constitutional and executive amendments, the same does not apply to the laws incorporated in the Ninth Schedule of the Constitution.

In terms of practice or actual enforcement, the judicial records have been mixed. In the initial decades of constitutional governance, the higher courts, particularly the Supreme Court, adopted a cautionary approach. The Supreme Court mostly took a pro-legislature stance, as is reflected in rulings such as A.K. Gopalan's judgment (Supreme Court of India 1950). However, it did not take long for the Supreme Court justices to make a U-turn in subsequent cases. Soon, several cases involving the right to property created space for the judiciary to be at loggerheads with the executive and legislature. The struggle between the two wings of government continued on other issues, such as the power of amending the Constitution. During this period, the parliament sought to introduce socialist/welfarist policies, which often came into conflict with fundamental rights. Between 1950 and 1975, the Supreme Court declared hundreds of Union and State laws and executive actions, in whole or in part, to be unconstitutional.

During the national emergency (1975-77), the judiciary faced heavy pressure to toe the executive lines. It was under severe pressure from the executive branch and was coerced to deliver several judgments which were considered violative of the basic human rights of Indian citizens. In a shocking letdown, the Supreme Court even supported the suspension of the right to life by the executive branch. After taking flak, the judiciary soon realized its mistakes and loss of reputation. In the next decade, the 1980s, Indian courts began to make vigorous efforts to restore their images through a series of historic pro-poor judgments.

2.2. Safeguarding the Fundamental Rights

Higher courts act as custodians of Fundamental Rights (a set of basic rights similar to the US Bill of Rights guaranteed to all citizens) by protecting them from executive arbitrariness (Singh 2022). In enforcing this, the Supreme Court acts as a Constitutional Court. On numerous occasions, the higher courts have taken *suo motu* cognizance of violations of fundamental rights. Article 32 of the Constitution, which is a fundamental right, allows the higher courts to issue writs in cases of executive excesses or infringement of personal liberties. These writs are Habeas Corpus, Mandamus, Prohibition, Certiorari, and Quo Warranto. Although remedies under this are related to violations of fundamental rights only, over the years, the higher courts have consistently tried to expand the scope and application of these rights (protect individuals/groups against state excesses) through an expansive interpretation of the constitution (Sahoo 2022).

2.3. Judicial Activism

As stated above, in the last few decades, particularly after the national emergency in 1975 (which allowed the executive to suspend the right to life and the judiciary condoned the same¹), the judiciary took a series of proactive steps to reinvent itself to salvage its lost reputation. It did this by gradually expanding its powers vis-à-vis legislative and executive branches by creative interpretation of different provisions of the fundamental rights. With the defeat of Indira Gandhi's government and the new Janata Government taking power in 1977, the situation became quite favorable for the judiciary to correct past mistakes and regain the ground that it had ceded to a strong executive over the years. The judiciary tried to undo the damage by adopting an activist course by delivering a series of significant judgments that put numerous checks on state excesses.

The most immediate response from the judiciary was to quickly undo the damage it had done in the *Habeas Corpus* case known as *ADM Jabalpur* (which had suspended the right to life during the national emergency in 1975-1977). In the *Maneka Gandhi vs. Union of India* case, the judiciary dramatically expanded the scope of Article 21 by linking it to the grounds of procedural and substantive fairness (Supreme Court of India 1978). Further, the court opened a new dimension of the right to life and personal liberty when it established that Article 21 was both a guarantee against executive action unsupported by law and a restriction on lawmaking. The Supreme Court also struck down the key provisions of the Forty-Second Amendment that had kept judicial review out of the ambit of constitutional amendments in *Minerva Mills* (Supreme Court of India 1980). However, these judgments were just the beginning of a new era as the judiciary was recovering from the shock of its national emergency policy blunders. Consistently, the judiciary ushered an era of judicial activism in the subsequent decades by creative use of public interest litigation (PIL) which greatly expanded fundamental rights. By actively promoting PIL, the higher judiciary was able to check executive excesses in many areas (Baxi 1985).

2.4. Public Interest Litigation and Restoration of Judicial Supremacy

The judiciary's PIL journey commenced with the historic *S.P. Gupta* judgment in 1981 (Supreme Court of India 1981). Justice P.N. Bhagwati, who delivered the landmark judgment, relaxed the *locus standi* in public interest litigations. This judgment significantly opened spaces for public-spirited citizens – those wanting to take up the causes of the poor and oppressed populations and those wishing to enforce the performance of public duties. The higher judiciary engineered further innovation in public interest matters by granting interim reliefs to the victims of state abuses apart from awarding compensation and supervising their enforcement processes. The higher judiciary's strong promotion of PILs encouraged scores of public-spirited citizens, human rights lawyers, and civil society organizations to take up the cases of helpless individuals and groups. Thus, PIL allowed the higher courts to imaginatively interpret and expand fundamental rights to include many unarticulated rights, such as the right to live with human dignity, the right to a healthy environment, the right to livelihood,

¹ The National Emergency in 1975 and the supersession of judges which led to rapid politicization judiciary, actively contributed to judicial surrender to the executive in the controversial *ADM Jabalpur vs. Shivkant Shukla* that backed government's act of suspending right to life under Article 21 of the Fundamental Rights. The SC overturned the decisions of several High Courts that had declared suspension of *habeas corpus* illegal and took a stand that supported government's claims.

the right to education, etc. Such an interventionist path acted to curb state excesses in many domains while simultaneously accelerating the legitimacy of the judiciary. Of course, the courts overstepped the executive and legislative spheres on multiple occasions. A plethora of literature has documented the benefits or damages that such judicial moves may have brought in (Dave 2020). Overall, such a course helped the judiciary to restore its position in the architecture of separation of powers.

The Collegium System and the Re-assertion of Judicial Supremacy

To further accelerate checks on executive interference, the higher judiciary in India has also put its stamp on the crucial selection of judges. Judicial appointments, which used to be the executive's domain, had become a major area of contention among judges. In order to gain control over appointments and insulate itself from executive interference, the apex court delivered several verdicts, known as Three Judges Cases, that redefined the appointment process for judges at the higher judiciary. One such judgment was the *S.P. Gupta* case in 1981, which emerged after the President of India bypassed advice from the Chief Justice of India (CJI) and listened to the Chief Justice of the Delhi High Court instead. This judgment was critiqued because it failed to recognize the independence of the CJI. Then came the *Second Judges Case* in 1993, based on a public interest litigation about whether the CJI's opinions on the appointments of judges hold any priority. This landmark judgment held that the CJI's views would have primacy in appointments. The Third Judges Case, which was about the question of whether the consultation of the president should only be limited to the CJI or should involve other judges, came up in 1998 (Lodha 2015). The Court held that this should lead to the creation of a collegium system where other judges are actively consulted regarding the appointments of judges.

The collegium system was strongly contested by the National Democratic Alliance (NDA) government headed by Narendra Modi. The NDA government passed legislation in 2015 to set up the National Judicial Appointments Commission (NJAC) to make judicial appointments a collective affair rather than judges appointing themselves. The judiciary took a strong objection to this move by the new government. Soon, a five-member Supreme Court Constitution Bench ruled the new legislation as void (Anand 2015). Thus, the judiciary stubbornly resisted executive interference in the sphere it thought was its exclusive domain. This also helped the courts (notwithstanding the Modi government's recent vociferous attempts to weaken the collegium system) to act as a check on the executive without any major institutional hurdles from the former (Suresh 2023).

3. Understanding the Judiciary's Weakness as an Institution of Accountability

The judiciary, which reached the peak of its power and authority in the 1990s and 2000s by acting as a major restraint on executive excesses, has taken an opposite turn in the last few years. There is considerable erosion in judicial power and authority, particularly with the emergence of a powerful executive led by the Bharatiya Janata Party (BJP) (Shah 2020b). It may be reiterated that the judicial power flourished under successive coalition governments at the federal level, which was often characterized by an 'unstable' and 'weak' executive. However, the BJP government broke that continuum when it secured a full political majority in back-to-back general elections in 2014.

3.1. Sliding to Become an ‘Executive Court’

Since the arrival of a powerful government led by Narendra Modi, a populist leader with centralizing tendencies, the executive branch has used all levers of state powers to pressure and control key democratic institutions, including the judiciary (Vaishnav 2021). Although the Supreme Court stood up to executive interference, such as in the case of the National Judicial Appointments Commission brought out by the government to dilute judicial power over the appointments, that was an exception. This is because the central government, particularly the Law Ministry, has deployed administrative actions and other tools to delay or even nullify (using official procedures/delay) certain appointments made by the collegium comprising of senior justices, and the Supreme Court has not shown the needed courage and leadership to stop growing interferences into judicial autonomy (Dhawan and Jain 2019). Aside from this, in many instances in recent times, the executive can be found interfering and using transfer options against individual judges who have spoken out or delivered judgments against the government (Venkatesan 2023).

Beyond the judicial appointments, a powerful executive has been able to get individual judges (using post-retirement incentives or coercive tactics) to support its policies (or look the other way), even when they violate constitutional principles. Recently, an investigative report by *Indian Express* found that of the ten recent judgments of the Supreme Court on free speech, as many as six cases went in favor of the state (Vishwanath 2020). Furthermore, in the four cases that went in favor of the petitioner, the government either supported the petitioner or had no objection at all. Thus, the once “assertive” judiciary speaks “the language of executive and has become indistinguishable from the executive.” (Bhatia 2020) Through its judgments and orders, the judiciary, far from failing to act as a check on an unbridled executive power, has become a *facilitator* of it. This trend is getting even worse at the level of lower courts, which handles most cases involving police/state excesses (Sumeda 2022).

3.2. Failure to Act as Constitutional Court

The higher judiciary, which in the previous decades made so many landmark judgments that led to the dramatic expansion of civil liberties and protection of the constitution, is today struggling (in the face of a strong and interventionist executive) to pursue cases that can uphold constitutional rights and values. The courts are largely toeing the executive lines and failing in their constitutional duties, and checking state excesses can be found in its failures to uphold fundamental rights in a staggering number of cases since 2014.

In scores of recent cases involving serious legal and constitutional questions and state excesses, such as the abrogation of Article 370, which axed the statehood and special provisions according to India’s only Muslim majority state (Jammu and Kashmir), the constitutional validity of the discriminatory Citizenship (Amendment) Act (CAA), issues of lack of transparency in new political funding law (electoral bonds) and scores of habeas corpus petitions involving illegal detention of activists, democracy defenders, and political dissidents, the Supreme Court has delayed or sided with the executive branch (Mahajan 2020; Narla and Rajagopalan 2020). A weak and inconsistent higher judiciary has largely helped and emboldened an already powerful executive to relentlessly attack and weaken key constitutional principles and values. Notably, by failing on issues of Article 370 regarding citizenship law, the judiciary is increasingly ceasing as a counter-majoritarian court (Shah 2020a).

3.3. Corruption and Lack of Access to Justice Tarnishing the Judicial Legitimacy

What is accelerating the erosion of judicial legitimacy is the widespread corruption and inaccessibility of justice to common citizens. Once viewed above corruption, the judicial branch is news for corruption and favoritism. According to Transparency International judicial corruption survey, some 77% of Indians believe the judiciary to be corrupt.² Nearly INR 3600 crores (US\$ 300 million) goes into bribing lawyers and judges to get justice and avoid long dragging of cases and frequent adjournments. Several sensational cases of corruption and misuse of official positions by some judges have grabbed the attention of the press and the public in recent years, thereby sully the judiciary's image.

However, a major concern is the issue of access to justice. For the average citizens, especially the vast poor and oppressed populations, access to justice remains a distant dream. Many special schemes, such as Lok Adalat and free legal aid, have remained symbolic in nature (Sahoo 2021). According to many reports and studies, the justice delivery system in India remains cumbersome, time and money-consuming for most citizens, let alone the poor (Law Commission of India 1999; Department of Administrative Reforms & Public Grievances 2008).

4. Conclusion

Among the vital institutions that have shaped 75 years of India's fascinating democratic journey, the judiciary occupies the prime place. For most part of its existence since 1947, it has done very well to safeguard individual liberties and protect fundamental rights. Besides, the courts have done well to address the rights of marginalized and dispossessed populations and have served as an essential check against executive excesses. However, over the last nine years and under a government with an overall political majority, the courts have experienced tremendous pressure to call the executive's bidding. Of course, this is not to deny the positive contribution of many individual judges standing up to an interventionist executive which is hell-bent on using every possible tool to bring pressure. The Supreme Court, on several important occasions, has shown strong determination and common purpose to restrain the executive branch on matters related to Habeas Corpus/personal liberty (Shah 2020a). Of late, there are signals that the judiciary, particularly the higher courts, is slowly recognizing the slide and damage to its reputation. Lately, several high courts have made steady efforts to help revive public faith in the judicial system.

Yet, as mentioned in the previous sections, notwithstanding some valiant efforts by the judiciary, the executive branch has considerably succeeded in harming personal liberties and attacking dissent and freedom of expression. Scores of people arrested under all kinds of trumpeted charges and denied bail for a long time are testimonies to the executive branch having the upper hand over the judiciary. As has been consistently brought out by many international democracy reports and watchdogs, India is witnessing significant erosion of judicial freedom and constitutionalism, impacting core aspects of democracy, the rule of law, and human rights (Freedom House 2023). ■

² See the press report here: <https://www.hindustantimes.com/india/77-per-cent-believe-indian-judiciary-is-corrupt-survey/story-uAiGMs9kWfP9iqFnUsFqpL.html> (accessed July 23, 2013)

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