

## *Declaration*

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I, Ragini Narain hereby declare that this Doctoral thesis entitled “**Accountability of the Judges in India: A Juridical Study**” has been prepared entirely by me on the basis of original research. Information derived from the works of others has been duly acknowledged.

I further declare that no part of this thesis has been published or submitted to any other institution for any other purpose.

Date:  
Place:

**(Ragini Narain)**  
Research Scholar  
Dept. of Human Rights  
School for Legal Studies  
Babasaheb Bhimrao Ambedkar  
University  
Lucknow



# *Acknowledgement*

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Date:  
Place:

(Ragini Narain)  
Research Scholar  
NET (Law)  
Dept. of Human Rights  
School for Legal Studies  
Babasaheb Bhimrao Ambedkar  
University Lucknow

## *Preface*

---

The rule of law ensures that all persons are treated equal and consistently according to known principles and laws. It also requires the separation of governmental powers and an independent judiciary to provide check and balance on governmental power, to ensure that no branch of the government gains absolute power in order to subvert the rule of law. The judiciary of India is one of the three important pillars of our democracy governed by the rule of law. The legislature, executive and the judiciary are all creatures of our constitution. Our Constitution contains checks and balances which require all the three wings to work harmoniously. The judiciary plays a dominant role to provide rule of law which is so essential for strengthening the foundations of democracy.

The accountability is the sine qua non of democracy. Transparency facilitates accountability. No public institution or public functionary is exempt from accountability although the manner of enforcing accountability may vary depending upon the nature of the office and the functions discharged by the office holder. Judicial selection must account for and balance the competing goals of judicial independence and judicial accountability.

It is generally accepted that the judicial independence is essential to the rule of law and, therefore, essential to democratic government is well recognized. Efforts proceed worldwide to promote judicial independence in developing democracies. Judicial independence is a common and frequently debated subject which means independence from the executive and legislature, but not independence from accountability. It is a fundamental principle that every institution must be accountable to an authority which is independent of that institution. Judiciary acts as a guardian of the constitution, and protector of the rule of law in country. In spite of this, sordid saga of the cases of bribe and corruption is creating lack of accountability in the judicial institution. The researcher would like to focus attention towards judicial accountability. It is the backbone of our judiciary which leads to justice-socially and economically as well as politically in India.

## CASE TABLES

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1. ADM Jabalpur v. Shukla, AIR 1976 SC 1207.
2. A.K. Gopalan v. State of Madras AIR 1950 SC 27.
3. Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India AIR 1981 SC 298.
4. All India Judges' Association and others v. Union of India and others 1992 AIR 165; 1991 SCR Supl. (2) 206.
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8. Baradakant Mishra v. Registrar of Orissa 1974 1 SCC 374.
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13. Chief Settlement Commissioner v. Om Prakash AIR 1969 SC 33.
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18. Golak Nath I.C. v. Punjab AIR 1967 SC 1643.
19. Haradhan Saha v. State of West Bengal AIR 1974 SC 2154.
20. Indira Nehru Gandhi v. Raj Narain 1975 Supp SCC 1: AIR 1975 SC 2299.
21. In Re Vinay Chandra Misra, (1995)2 SCC 584.
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23. Keshvananda Bharti v. State of Kerala AIR 1973 SC 1461.
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27. Lily Thomas v. Speaker, Lok Sabha (1993) 4 SCC 23.
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29. Maneka Gandhi v. Union of India 1978 1 SCC 248.
30. Minerva Mills v. Union of India AIR 1980 SC 1789.
31. Mumbai Kamgar Sabha v. Abdul Thai AIR 1976 SC 1455.
32. Municipal Council of Ratlam v. Vardhichand AIR 1980 SC 1622 Cri. L.J. 1075.
33. Sarojini Ramaswamy v. Union of India (1992) 4 SCC 506.
34. Sheela Barse v. State of Maharashtra 1983 2SCC 96: AIR 1983 SC 378.
35. S.G. Jaisinghani v. Union of India and others AIR 1967 SC 1427.
36. S.P. Gupta v. Union of India AIR 1982 SC 149.
37. S.P. Sampath Kumar v. Union of India 1987 1 SCC 124.
38. Som Raj v. State of Haryana 1990 2 SCC 653.
39. State of H.P. v. Parent of a student of medical college, AIR 1985 SC 910 (914).
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42. Supreme Court Advocates -on- Record Association v. Union of India AIR 1994 SC 268.
43. Sub- Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699.
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## ABBREVIATION

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AC	Appeal Cases
AIC	All India Cases
AIHC	All India High Court Cases
AIR	All India Reporter
ALJ	Allahabad Law Journal
Am. Indian L. Rev.	American Indian Law Review
AWC	Allahabad Weekly Cases
All ER	All England Law Report
CCR (SC)	Current Criminal Reports (SC)
CIJL	Centre for Independence of Judges and Lawyers
CriLJ	Criminal Law Journal
CRA	Constitutional Reform Act 2005
Colum. L. Rev	Columbia Law Review
EHRH	Essex Human Rights Review
ELT	Excise Law Times
HC	High Court
JAB	Judicial Appointments Board
JAC	Judicial Appointment Commission
JT	Judgment Today Supplement
LW	Law Weekly
Luck L T	Lucknow Law Times
MPC	Madhya Pradesh Cases
NJAC	National Judicial Appointment Commission
PIL	Public Interest Litigation
RTI	Right to Information Act
SC	Supreme Court
SCC	Supreme Court Cases
SCC (Supp)	Supreme Court Cases (Supp)
SCR	Supreme Court Reports
Or. L. Rev.	Oregon Law Review
WLR	The Weekly Law Reports

# Contents

<b>CHAPTER NO.</b>	<b>TITLE</b>	<b>PAGE NOS.</b>
	Declaration	i
	Certificate	ii
	Acknowledgement	iii-v
	Preface	vii
	Case Table	ix
	List of Abbreviation	xi
<b>1</b>	<b>INTRODUCTORY</b>	<b>1-23</b>
1	Introduction	1
1.1	Meaning of Accountability	2
1.2	What is Judicial Accountability?	3
1.2.1	Concept of Judicial Accountability	4
1.2.2	Objects of Judicial Accountability	5
1.2.3	Lack of Judicial Accountability in India	6
1.3	Code of Conduct	8
1.4	Rule of law and Judicial Accountability	10
1.5	Recent Legislative Efforts to Make Judiciary Accountable	11
1.5.1	Judicial Standards and Accountability Bill 2010	11
1.5.1.1	Scrutiny Panels	12
1.5.1.2	Oversight Committee	12
1.5.1.3	Investigation Committee	12
1.5.1.4	Analysis of the Bill	13
1.5.2	National Judicial Appointment Commission Bill, 2014	13
1.6	Right to Information Act and Judicial Accountability	15
1.7	Transparency International's Global Corruption Barometer 2013 Report	16
1.8	Objectives of the Study	17

1.9	Hypothesis	17
1.10	Research Methodology	18
1.11	Review of Literature	18
1.12	Scheme of Chapters	21
<hr/>		
<b>2</b>	<b>HISTORICAL BACKGROUND OF JUDICIAL ACCOUNTABILITY IN INDIA</b>	<b>25-71</b>
<hr/>		
2	Introduction	25
2.1	Judicial Accountability in India Before Republic of India	27
2.1.1	Ancient Period	27
2.1.1.1	Justice during Pre-Mughal period	27
2.1.1.1.1	Status of Judiciary	28
2.1.1.1.2	Hierarchy of courts	28
2.1.1.1.3	Delegation of judicial power by the King	29
2.1.1.1.4	Judges and their qualification	30
2.1.1.1.5	Rule of law	31
2.1.1.2	Justice during Mughal Period	32
2.1.2	Medieval Period	33
2.1.3	Pre Independence Period	35
2.1.3.1	Ministry of Law and Justice	35
2.1.3.2	Movement for Separation of Judicial and Executive Functions in British Period	37
2.1.3.3	Background of the Constituent Assembly	38
2.2	Judicial Accountability in India after Democracy	39
2.2.1	Efforts to Make Judiciary Accountable	40
2.2.1.1	Constitutional Provision	40
2.2.1.1.1	Misbehaviour & Incapacity	41
2.2.1.1.2	First Impeachment of Judge Case	42
2.2.1.1.3	Facts of the Case	43
2.2.1.1.4	Recommendation by the different Law Commissions	44
2.2.1.1.5	121st Report on a new forum for judicial Appointment in 1987	45
2.2.1.1.6	214th Report of Law Commission of India	48

2.2.1.1.7	230th Report of the Law Commission of India	48
2.2.1.2	Statutory Provision	48
2.2.1.2.1	The Government of India Act, 1935.	49
2.2.1.2.2	The Judge's Enquiry Act, 1968.	50
2.2.1.2.3	Judges Inquiry Bill, 2005.	51
2.2.1.2.3.1	Criticism of Judges Inquiry Bill, 2005	53
2.2.1.2.4	Judges (Declaration of Assets and Liabilities) Bill, 2009.	54
2.2.1.2.5	Judges (Inquiry) Bill, 2006	55
2.2.1.2.5.1	Judges (Inquiry) Bill, 2006: Key Issues and Analysis	58
2.2.1.2.5.2	Criticism of the Bill	59
2.2.1.2.6	Judicial Standard and Accountability Bill, 2010	59
2.2.1.2.6.1	Significant Points of the Bill	61
2.2.1.2.6.2	Figure 1: Procedure of investigation into a complaint against a High Court or Supreme Court judge.	65
2.2.1.2.7	National Judicial Appointment Commission Bill, 2014.	65
2.2.1.2.7.1	Establishment and composition of Commission	66
2.2.1.2.7.2	Functions of Commission	66
2.2.1.2.7.3	Reference to Commission for filling up of vacancies	67
2.2.1.2.7.4	Procedure for short listing of candidates	67
2.2.1.3	Judicial Perspective	68
2.2.1.3.1	Cases regarding the procedure of appointment in India	68
<hr/>		
<b>3</b>	<b>JUDICIAL ACCOUNTABILITY: A SURVEY OF POSITION IN OTHER COUNTRIES</b>	<b>73-103</b>
<hr/>		
3.	Introduction	73
3.1	Judicial Accountability in United Kingdom	74
3.1.1	Judicial Appointments Commission of United Kingdom	74
3.1.1.1	Selection to Supreme Court	76

3.1.2	Judicial Accountability and Independence in United Kingdom	78
3.1.2.1	Comments	79
3.2	Judicial Accountability in United States of America	80
3.2.1	System of Judicial Appointment in United States of America (USA)	80
3.2.2	Judicial Elections	81
3.2.3	The Method of Removing and Disciplining Judges in USA	82
3.3	Judicial Accountability in Canada	83
3.3.1	Judicial Appointments in Canada	83
3.3.2	Judicial Accountability and Judicial Independence in Canada	84
3.3.3	The Judges are Held Accountable and by whom	85
3.4	Judicial Accountability in India	86
3.4.1	Procedure for the Appointment of Judges in India	86
3.4.1.1	Appointment of Chief Justice of India	88
3.4.1.1.1	Collegium System of Appointing Judges	89
3.4.1.2	The Method of Appointment of High Courts Judges	91
3.4.2	Judicial Accountability and Judicial Independence in India in India	92
3.4.2.1	Confrontation between the Executive and Judiciary	93
3.4.2.2	Supersession of three senior-most Judges	94
3.4.2.3	The Direction is changed by the Supreme Court	94
3.4.2.4	Period of Emergency and the Independence of Judiciary	95
3.4.3	Removal of Judges in India	96
3.5	Legislative Efforts to Make Judiciary Accountable in India	96
3.5.1	Restatement of Values of Judicial Life: Code of Conduct.	96
3.5.2	Judges (Inquiry) Act, 1968	97

3.5.3	Judicial Standards and Accountability Bill, 2010	99
	National Judicial Appointment Commission Bill, 2014	101
<b>4</b>	<b>JUDICIARY, RULE OF LAW AND DEMOCRACY: A CONCEPTUAL FRAMEWORK</b>	<b>105-140</b>
4.	Introduction	105
4.1	Concept of Rule of Law	106
4.1.1	Constitutional Provisions	109
4.1.2	Indian Democracy and Rule of Law	110
4.1.3	Rule of Law and Case law	114
4.2	Rule of Law and Separation of Powers	119
4.2.1	Montesquieu's Doctrine	121
4.2.2	Principles of Checks and Balances	122
4.2.3	Separation of Powers and Indian Constitution	123
4.2.4	Constitutional Status of Separation of Powers in other Countries	124
4.2.4.1	Constitutional Status of Separation of Powers in United Kingdom	124
4.2.4.2	Constitutional Status of Separation of Powers in USA	125
4.2.4.3	Doctrine of Separation of Powers in France	127
4.2.4.4	Separation of Powers in India	128
4.2.4	Debates of Constituent Assembly on Separation of Powers in India	131
4.2.5	Importance of the Doctrine of Separation of powers	133
4.3	Rule of Law and Judicial Review	135
4.4	Rule of law and Accountability of the Indian Judiciary	138
<b>5</b>	<b>JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY</b>	<b>141-186</b>
5	Introduction	141
5.1	Meaning of Independence of Judiciary	143
5.1.1	Need for the Independence of the Judiciary	147

5.1.2	Relationship between Judicial Accountability and Independence	148
5.1.2.1	Independence and Impartiality	148
5.2	Concept of Independent Judiciary: A Constitutional Framework	150
5.3	Separation of Powers - A Basic Rule for the Independence of the Judiciary	154
5.4	Doctrine of Separation of Powers in UK, USA and France	156
5.4.1	United Kingdom	156
5.4.2	U.S.A	157
5.4.3	France	159
5.4.4	India	160
5.5	Constitutional Provisions for Maintaining Judicial Independence	165
5.6	Basic Principles on the Independence of the Judiciary	166
5.6.1	Independence of the judiciary	168
5.6.2	Freedom of expression and association	169
5.6.3	Qualifications, selection and training	169
5.6.4	Conditions of service and tenure	169
5.6.5	Professional secrecy and immunity	170
5.6.6	Discipline, suspension and removal	170
5.7	International documents on judicial independence	170
5.7.1	The United Nations Basic Principles on the Independence of the Judiciary	171
5.7.2	Syracuse Draft Principle on Independence of the Judiciary	171
5.7.3	International Bar Association Minimum Standards of Judicial Independence	171
5.7.4	Montreal Universal Declaration on the Independence of Justice	171
5.7.5	Singhvi Draft Universal Declaration of Justice	172
5.7.6	Universal Charter of the Judge by the International Association of Judges	172

5.7.7	Beijing Statements of the independence of the judiciary	172
5.7.8	Mount. Scopus International Standards emphasized the importance of maintaining and securing judicial independence.	172
5.7.8.1	Independence of the Judiciary	172
5.7.8.2	The Judiciary and the Executive	172
5.7.8.3	The Judiciary and the Legislature	173
5.8	Tension between Judicial Accountability and Judicial Independence	175
5.9	Juristic View In Regard to Judicial Independence	182
5.10	Role of Right to Information (RTI) Act in the Independence of the Judiciary	183
<hr/>		
<b>6</b>	<b>JUDICIAL APPOINTMENTS IN INDIA</b>	<b>187-229</b>
<hr/>		
6	Introduction	187
6.1	Judicial Appointment: Historical background	188
6.2	Procedure for the appointment of the Judges in India: Constitutional Provisions	189
6.2.1	Significance of word “consultation” under Articles 124 and 217	196
6.2.2	Two important cases related to appointment of Supreme Court and High Court Judges	198
6.2.3	The procedure of the appointment in Subordinate Judiciary	203
6.2.3.1	The Controversies	203
6.3	Past proposals for reforms in the process of appointment of judges in India- since 1945	206
6.3.1	Recommendations of Sapru Committee	206
6.3.2	Recommendations of the High Powered Committee appointed by the Constituent Assembly	206
6.3.3	Shri B.N. Rao’s Suggestions	207
6.3.4	Federal Court’s Recommendation	207
6.3.5	Basis adopted in articles 124 and 217	207
6.3.6	Fourteenth Report of the Law Commission of	207

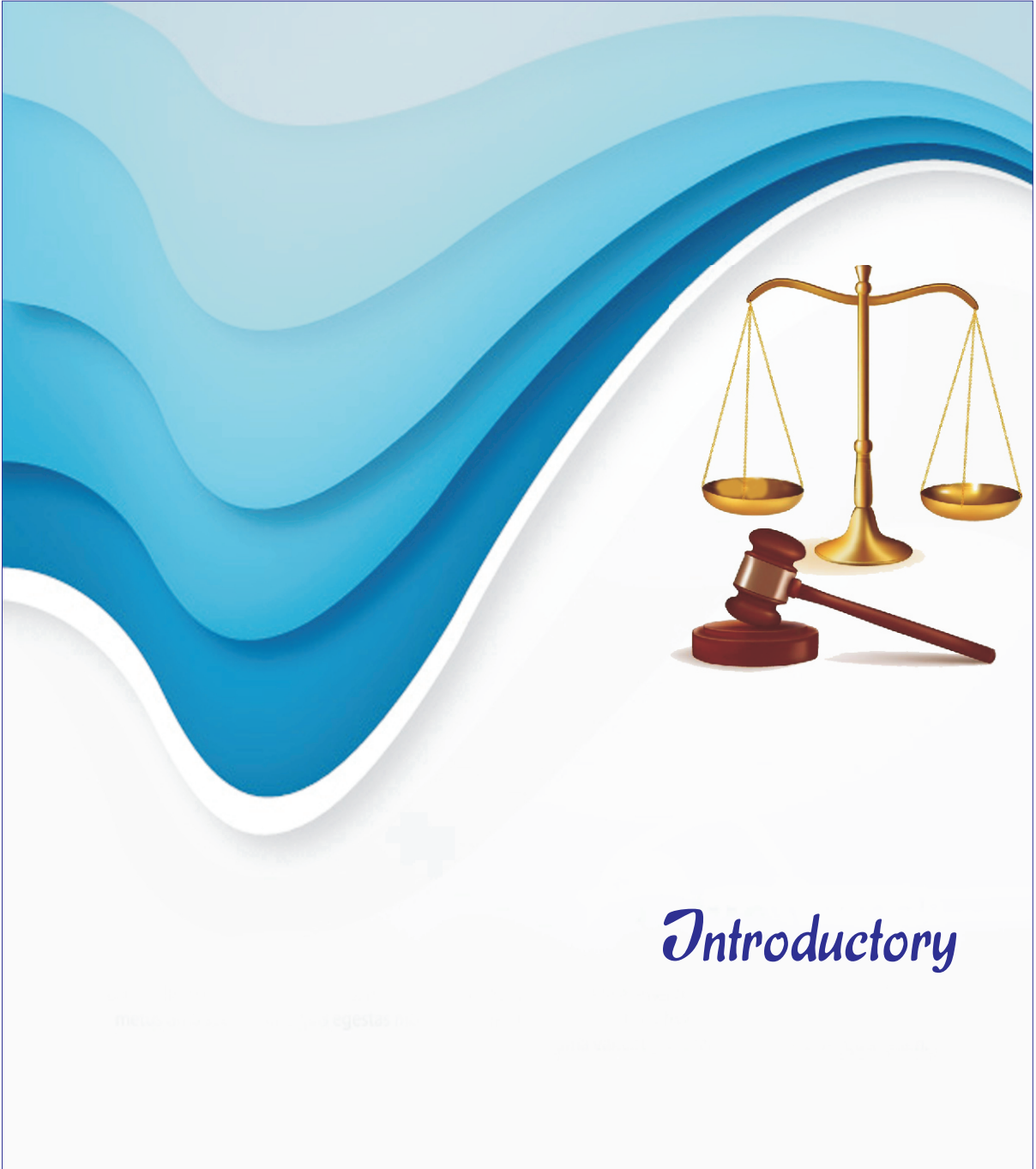
	India	
6.3.7	Supreme Court's observation in Shamsher Singh's Case	208
6.3.8	80th Report of the Law Commission of India	209
6.3.9	79th Report of the Law Commission of India	210
6.3.10	Bar Council of India's suggestions for Collegium	210
6.3.11	121st Report of Law Commission of India for Constitution of a National Judicial Service Commission	211
6.3.12	Judicial Appointments: Views of Arrears Committee	212
6.4	Cases regarding appointment of judges in India	214
6.5	Lack of Transparency in Appointment system of judges in India	216
6.5.1	Suppression of Judges	219
6.5.2	Transfer of Judges	220
6.6	Judicial Review in Judicial appointments in India	222
6.7	Legislative efforts to bring transparency in appointment system of the Judges	223
6.7.1	National Judicial Commission	223
6.7.2	Judicial Standard and Accountability Bill, 2010	224
	National Judicial Appointment Commission Bill, 2014	224
6.7.2.1	Key Points of National Judicial Appointment Commission Bill, 2014	225
6.7.2.1.1	Procedure for Selection of Supreme Court judges	226
6.7.3.1.1.1	Chief Justice of India	226
6.7.3.1.1.2	Supreme Court Judges	226
6.7.3.1.2	Procedure for Selection of High Courts judges	227
6.7.3.1.2.1	Appointment of other High Courts Judges	227
6.7.3.1.3	Transfer of Chief Justices and High Court judges	227
6.7.3.1.4	Reference to Commission for filling up of	228

---

<b>7</b>	<b>CORRUPTION IN JUDICIARY</b>	<b>231-269</b>
7	Introduction	231
7.1	What is Corruption?	232
7.2	Kinds of Corruption	234
7.2.1	Administrative Corruption	234
7.2.2	Political Corruption	234
7.3	Causes of corruption	234
7.4	Nature of Corruption in India	235
7.4.1	Corruption in the Legislative Branch	236
7.4.2	Corruption in the Executive	237
7.4.3	Corruption in Judiciary of India	237
7.4.4	Causes of Corruption in Court	243
7.4.4.1	Delay in justice	243
7.4.4.2	Inaccessibility	243
7.4.4.3	Misuse of power	243
7.4.4.4	A difficult impeachment process	244
7.4.4.5	Why People Pay Bribes	245
7.5	Some Instances of Corruption in Indian Judiciary since Independence : 1947 – 2012	247
7.5.1	Some Recent Examples of Corrupt Judges	249
7.6	Legislative Efforts to Combat Corruption in Judiciary	251
7.6.1	Prevention of Corruption Act, 1988 (POCA)	251
7.6.2	Restatement of Values of Judicial Life: Code of Conduct	251
7.6.3	Judges (Inquiry) Act, 1968	252
7.6.4	Constitution (98th Amendment) Bill: National Judicial Commission	255
7.6.5	Judicial Standards and Accountability Bill, 2010	255
7.6.5.1	Need for a Statutory Mechanism	256
7.6.5.2	Appraisal of the Bill	257
7.6.5.2.1	Scrutiny Panels	257
7.6.5.2.2	Oversight committee	258

7.6.5.2.3	Investigation Committee	258
7.6.5.3	Analysis of the Bill	258
1	National Judicial Appointment Commission Bill, 2014	259
7.6.6	Right to Information Act	260
7.6.7	Key Points of Contempt of Courts (Amendment) Act, 2006	261
7.6.8	The Role of Media	261
7.7	Lokpal and Lokayuktas Act, 2013	263
7.8	Role of Civil Society in judicial Accountability	265
7.9	Media & NGOs Role in making judiciary Accountable	265
7.10	Role of Private Arbitration	266
7.11	Law Commission Report No. 230, August 2009	266
7.12	International Standards and Norms on Accountability	267
7.13.1	UN Convention against Corruption, 2003	267
7.13.2	Basic Principles on the Independence of the Judiciary, 1985	267
7.13.3	UN Guidelines on the Role of Prosecutors, 1990	267
7.13.4	UN Codes of Conduct for Law Enforcement Officials, 1979	267
7.13.5	Judicial Integrity Group	267
7.13.6	The New Delhi Code of Minimum Standards of Judicial Independence 1982	268
7.13.7	Mount Scopus International Standards 2008	268
<hr/>		
<b>8</b>	<b>JUDICIAL ACTIVISM AND JUDICIAL ACCOUNTABILITY</b>	<b>271-316</b>
<hr/>		
8	Introduction	271
8.1	Meaning and Concept of Judicial Activism in India	272
8.2	Development of Judicial Activism in India	273
8.3	Judicial Review & Judicial Activism	279
8.3.1	Judicial Review as a part of the Basic Structure	281

8.3.2	Expansion of Judicial Review through Judicial Activism	283
8.3.3	Limitation on the Power of Judicial Review	284
8.4	Public Interest Litigation	287
8.4.1	Meaning of Public Interest Litigation	287
	Evolution of Public Interest Litigation in India	288
8.4.2	Objectives of Public Interest Litigation	288
8.4.3	Role of Press in the Development of Public Interest Litigation in India	289
8.4.4	Changes in foundation	290
8.4.5	Public Interest Litigation in India : A Need of Society	291
8.4.5.1	Public Interest Litigation: An Innovative Step towards Judicial Activism	291
8.4.5.2	Guidelines laid down by Judiciary in some leading Cases of Public Interest Litigation	292
8.5	New intervention in the terrain of Judicial Activism	298
8.6	Judicial Overreach	302
8.6.1	Judicial Restraint: Need of the Hour	308
8.7	Accountability of the Judges in India	309
8.8	Judicial Activism In Judicial Appointment	310
8.8.1	First Judge Cases	311
8.8.2	Second Judge Cases	312
8.8.3	Third Judge Cases	313
8.8.4	Judicial Appointments: Effect of the Second and third judges cases	315
8.8.5	Comments regarding these decisions	315
<b>9 CONCLUSION &amp; SUGGESTIONS</b>		<b>317-333</b>
<b>ANNEXURE</b>		
1	Judicial standard and accountability bill, 2010	1-34
2	The constitution (one hundred and twenty-first amendment) bill, 2014	1-6
<b>BIBLIOGRAPHY</b>		<b>i-xi</b>



*Introductory*

### INTRODUCTORY

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#### 1. Introduction

Every state has a basic structure which consists of three main parts that is legislature, executive and the judiciary. These three are specialized in performing specific functions through supreme power to show precise and good piece of work like essential functions of rule-making and rule application etc. The main reason of this formulation among these three structures or organs is separation of powers which ultimately brings accountability in their work. This keeps the government entertained and this way rights and liberties are safeguarded. This is based on the saying that “power corrupts man and absolute power corrupt absolutely”.

India is the largest democratic country but full of corruption in its governmental system. On this note, the Secretary General of the United Nations, Mr. Kofi Anan stated that “corruption is an insidious plague that has a wide range of corrosive effect on society or country. It undermines democracy and the rule of law , leads to violation of human rights, distorts market, erode the quality of life and it allows organized crime, terrorism and other threats to human security to flourish”.

However, the corruption charges on the judges have attracted the attention of the public and raised the question ‘who is judging the judge’ after popping up the example of Calcutta High Court judge Soumitra Sen as being guilty of misappropriating large amount of money and Karnataka High Court Chief Justice P.D. Dinakaran alleged to be involved in case of corruption and land grabbing or encroachment of land.

Judiciary acts as a guardian of the constitution, and protector of the rule of law in country. In spite of this, such cases of bribe and corruption are creating lack of accountability in the judicial institution. Supreme Court of

India have always tried to uphold the independence of judiciary and held that the independence of the judiciary is a basic feature of the Constitution. The independence of judiciary is important to maintain the smooth functioning of the constitution and for preservation of a democratic society based on the rule of law. The importance of the independence of the judiciary has been accepted by the courts by making it as the basic feature of the constitution. But it does not mean that the judiciary is out of the scope of accountability. The researcher would like to focus attention towards judicial accountability. It is the backbone of our judiciary which leads to justice- socially and economically as well as politically in India.

### **1.1. Meaning of Accountability**

The word ‘accountability’ is defined in Oxford dictionary and the meaning is that ‘responsible for your own decisions or actions and expected to explain them when you are asked’. Simply, it means that one who will be held responsible for his work or duty or action or decision and even would be expected to give the explanation about his action that has been performed by him. Accountability is a Latin word and this word didn’t appear in English until 13th century.

‘Accountability’ has several meaning in ethics and governance. It is often equalized with the responsibility and severability, blame worthiness, liability and, in other terms, with the expectation of giving account of the work done. So far as the governance is concerned the accountability means discussion related to problems in public sector, non-profit sector and in private sector. Accountability is the acknowledgement and assumption of responsibility for actions, production, decisions and policies including the administration, governance and implementation so far as the leadership is concerned. Accountability means proper accounting eventually of misconduct. Accountability exists in accounting practices and in the absence of accounting there can be no accountability.

## 1.2. What is Judicial Accountability?

The word ‘accountability’ and the word ‘judicial’ should be read together to form a meaning of judicial accountability. Judicial accountability expects immunity of judges from internal infirmities with total independence. Judicial accountability must be in consonance with the Article 235 of the Constitution of India which empowers the higher judiciary to control subordinate judiciary. India is a democratic country where judges are treated as a “God” in the judicial system. This implies that everything in terms of decisions depends upon the judges in our system of justice. This factor ultimately creates upside down condition in judicial system such as guidelines inside the judges by the matter of fact that judges are also a human being and greed is a human nature, beside this sometimes political pressure to change the decision as well as life threatening danger on them by the outlaw peoples or person to change the decision save their lives either take bribes.

Such environment creates serious situation as it is hard to keep our eyes closed and remain blind folded person from what is happening? Delay in dispensing of justice and increasing corruption in the judiciary made us to realize that this is all happening because of lack of judicial accountability towards the judicial system, towards the government as well as towards the citizens of India. This is all because justice has supreme place in our democratic system. So the judges may use these powers for their benefit. They can enjoy benefits like:

1. By terrorizing anyone on the basis of contempt of court, who would criticize the court.
2. Judges are immune from the word “why” as we citizens of India don’t have any right to ask any questions against their decisions.

Indian judiciary exercising democratic power enjoys independence of high order. But for keeping the faith of the people in judiciary, the independence of the judiciary should not become dangerous and undemocratic. The absence of constitutional discipline with rules of good

conduct and accountability make the judiciary arrogant. Former Chief Justice S.H. Kapadia of the Supreme Court has once expressed his view in a conference that judges should not enter into merits of a government policy. They are not expected to interfere in subjectively evaluate the policy of government. They should also be within their constitutional limits. Justice D.A. Desai, Chennappa Reddy, S. Venkataramaiah of the Supreme Court have also expressed their views that the judges should also be accountable for their actions like others sections of the society are accountable. According to them, judges should also follow some code of conduct which may be called ethics for judges<sup>1</sup>.

Justice V.R. Krishna Iyer in his one article stated that “our founding fathers have laid down for us a constitutional jurisprudence of judicial power, but the integral component of judicial accountability has not been designed with a sense of principled pragmatism. As a result the escalating misconduct of judges has often gone unpunished. Barring the extreme measure of impeachment, the law is silent, so much so that one might well say that the accountability of the judiciary is the vanishing point of jurisprudence. This void, unless competently covered by well thought-out legislation, is bound to undermine the democratic credibility of the judiciary. The place of justice is a hallowed place; and therefore, not only the bench, but the foot-pace and precincts thereof, ought to be preserved without scandal and corruption<sup>2</sup>”.

### **1.2.1. Concept of Judicial Accountability**

Judicial accountability is as an old concept as the independence of the judiciary. Independence and impartiality of the judges have always been considered to be the essential qualities of a judge. The founders of the Constitution of India kept provisions in the Third Schedule of the Constitution for the accountability of the judges. The Third Schedule imposes a duty on the

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<sup>1</sup> The Hindu, Thursday, August 16, 2012.

<sup>2</sup> Justice V.R. Krishna Iyer “Judicial Accountability to the Community – A Democratic Necessity” in Lal Bhure Dr., *Judicial Activism and Accountability*, (2004) Siddharth Publication, New Delhi. p. 27-128.

judges to preserve sovereignty and integrity keeping in view the nature of the function of the judges, it was not thought desirable to make judges directly accountable to the people for their actions.

The quality of the judgments, disposal of arrears, delay in decisions, complicated judicial proceedings, inequalities and equalities in accessing of justice and good governance are the subject that are covered in the term 'accountability'. Judicial accountability includes the balance of power in regard to the selection, appointment, and transfer of the judges from higher courts.

Concept of accountability has ancient roots in record keeping activities related to governance and money and land. It first developed in Israel, Babylon, Egypt, and Greece and Rome. Judicial accountability is not defined in the dictionary. It has come recently in force to reach at correct decision.

### **1.2.2. Objects of Judicial Accountability**

Judicial accountability maintains the trust of the people in the judges and the judiciary in the country and also preserves democracy.

Accountability of the judges preserves the rule of law and also promotes it by deterring conduct that compromises integrity, impartiality, and independence of judiciary. The judge who is facing impeachment process in the allegation of taking bribe with impurity, in spite of all, he is employed. Then accountability decreases his literal independence as he is enjoying to make himself dependent on external and internal influences that might interfere with his ability to follow the concept of rule of law.

Judicial accountability promotes the independence and transparency which is very important for judges to adhere to the rule of law. Accountability makes it possible by deterring the bias, nepotism, bribery and so on from judiciary.

Accountability of the judges also promotes institutional responsibility by rendering the judiciary responsive to the needs to the public as it serves as a separate branch of government.

### **1.2.3. Lack of Judicial Accountability in India**

In the absence of accountability, no judge can be held responsible for the decision he makes. Absence of accountability means functioning of judiciary without bridle. The judge shall become unbridled because the process of their dismissal is very tough and in the present democratic set-up the dismissal cannot be passed out at any cost.

There shall be no control over the judges acting in an arbitrary manner. The accountability is the responsibility of the judges himself to see that nobody should indicate that the judges has acted in dispenses of justice in an arbitrary manner. The judges are expected to have self-control over their actions not only in the case of decisions but also in social life also. They are expected to behave like a superman so that nobody pointed out any misconduct on his part. Judges are expected to be blameless. Justice K.B. Asthana, the then Chief Justice of Allahabad once upon a time expressed his views that “judges should lead their life as a hermit”. A person who holds himself bound by ethics, morality, knowledge of law and self-controlled must necessarily be an accountable judge.

Absence of accountability on the part of a judge will lead him to work as a unbridled horse and that will be very harmful for the society. Judges are not appointed on the basis of any All India Services competitions like IAS and IPS. They are not elected by the public as the members of Parliament and assemblies are elected. There is no fixed and transparent criteria for the appointment of the judges. They are picked up from the Bar Association secretly. Public is not given any opportunity to put up their grievances against any advocate proposed to be appointed as a judges. The proposal and recommendation for the appointment of the judges is kept very secret at the level of Supreme Court and High Court. Sometimes unworthy persons have

been appointed. It has been also seen that the Supreme Court collegium has appointed kith and kins of the judges. No criteria of merit has been fixed for the appointment of the judges of higher judiciary. Constitution of India provides that an advocate having practice of 10 years may be appointed as a judge of Supreme Court and High Courts. Their appointment is only made by Chief Justice of India in consultation with the senior four judges that is collegium. It is true that the collegium system has not working well and there is a need of extensive reforms.

The judiciary of India is enjoying absolute power unrivalled by any court in the world. So it is needed that judges of the higher judiciary must be accountable for their decisions and their conduct whether it be for corruption or for the rights of citizens. Unfortunately, neither the Constitution, nor any other law has made any system or institution to examine the conduct of judges or check the complaints against them. The Constitution of India provides that High Court and Supreme Court judges cannot be removed except by impeachment. That process of impeachment needs signatures of 100 MPs of the House of Peoples or 50 MPs of the Council of States for its initiation. If a motion containing charges of serious misconduct with the requisite signatures is submitted, and admitted by the Speaker of the House of People or the Chairperson of the Council of States, an Inquiry Committee of three judges is constituted to hold a trial of the judge.

If a judge is found guilty, the motion is placed before each House of Parliament where it has to be passed by a 2/3 majority of each House. In fact it is hard to remove a judge by the process of impeachment. The judges of India sometimes behave like a trade union. So they do not take kindly to brethren being accused of misconduct. The only impeachment of a judge to have gone so far was that of Justice V. Ramaswami in the early 90's. When the motion was presented, a Judges Inquiry Committee found him guilty of several charges of misconduct. The matter went up for voting to Parliament.

The ruling Congress Party directed all their MPs to abstain from voting. Thus, the motion was passed in the Lok Sabha but it did not get the majority of the total membership of the House and, therefore, failed. The judge remained in office till he retired, but was not assigned any judicial work by the then Chief Justice. A second motion against a judge of the Calcutta High Court was signed and submitted to the Chairman of the Council of States. Allegations and charges against a judge even when supported by documentary evidence, rarely get any coverage in the media because of the widespread fear of contempt of court. The contempt law in India gives power to any judge of the High Court and Supreme Court to charge any one with criminal contempt and send him to jail, on the ground that he/she has “scandalized the court or lowered the authority of the court”. In Arundhati Roy’s case, she was sent to jail merely because she criticized the court in her affidavit.

The Supreme Court of India<sup>3</sup> has drawn a clear line of demarcation between objective and fair critics and of abuses which constitute contempt of Court. Since the foundation of the judiciary is the trust and the confidence of the people about the ability of judiciary to deliver fearless and impartial justice, if the foundation itself is allowed to be shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust for the judicial authority of the court by creating distrust to its working, the credibility of the judicial system gets eroded. The judiciary has also taken care of its officers and at all times serious thought has been bestowed on this aspect.

### **1.3. Code of Conduct**

The Supreme Court of India has adopted the rule of conduct for the judges to make them impartial and transparent in their decisions and judgment. These are given below:

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<sup>3</sup> In Re Vinay Chandra Misra, (1995)2 SCC 584 at 616, para 39.

1. Avoid close association with the advocates, especially who are doing practice in the same court.
2. Do not accept any gifts from anyone except the family members, friends and relatives.
3. A judge should not follow his personal views when he is hearing and deciding the case.
4. A judge should not attend the parties. In this context senior advocate Mr. K.T.S. Tulsi has a view that a conservative judge may believe that the code of conduct forbids him to party. But a judge who is more gregarious in his personal life may have the confidence that he can go to parties without compromising his impartiality.
5. A judge should not be over confident that his opinions are proper to the exclusion of all, else he cannot properly fulfil his role.
6. A judge should maintain a certain degree of aloofness in keeping with the dignity of their office.
7. There must be insulation between the bench and bar.
8. A judge must be aware about his powers and limits which is provided to him by the constitution of India.
9. A judge should not be arrogant in his writings and thinking.
10. He must be a product of his times living in or shaped by a given society in a given area.
11. A judge must recognize his mistakes as once Justice Jackson said in one case<sup>4</sup> that “we are not final because we are infallible, we are infallible only because we are final.”
12. A judge must act in the way of maintaining the public confidence in judiciary.
13. A judge should be honest for their decisions and work. If the judges create new law they should say so. They should not hide behind the rhetoric that judges declare what the law is but do not make it.

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<sup>4</sup> Brown v. Allen 1953 344US 540. (See also: Mona Shukla, Judicial Accountability: Welfare and Globalization (2010).

14. A judge must look for accepted value of society even if they are not his value.

15. Treat both parties before them equally.

#### **1.4. Rule of law and Judicial Accountability**

India is a country whose population consists of different castes, religions and ideological differences. In these circumstances, Indian judges are sometimes not expected to work without fear, favour or prejudice. The result will be dissatisfaction of the public towards the working of the judges. It is because of the absence of accountability that judges may interfere in the policy matters of the government by accepting the public interest litigation. The arbitrary working of the judiciary as a whole may lead to failure of rule of law. Ex. Chief Justice of India, S.H. Kapadia once stated that “we the people”, “rule of law” all these have very wide meanings. They have to be interpreted keeping in mind the checks and balances within the system. Sometimes, these balances are getting disturbed by our judgments and the judges should be very careful when they draft the judgments. If there is judicial overreach the legitimacy of judicial review will be obliterated<sup>5</sup>.”

In the absence of rule of law, the public shall take law in its hand. Nobody will like to take shelter of court. The public shall solve their matter by their own hands without any care as to the law and order. Delay in dispensing of justice has already created lead problem for maintaining the rule of law.

It is often said that that delayed justice means denial of justice. In our life every day we see that crime is increasing day by day. Criminals have no fear in the mind. They know that they can easily take revenge without any fear of punishment from the court. Delay in justice in criminal courts, say for 20 years or 25 years, has created an unfortunate impression in the mind of the public that nobody shall get justice against a hardened criminal. It is because of the delay in justice. Government of India is also not taking steps for

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<sup>5</sup> The Hindu, August 16, 2012. p.9.

increasing the number of courts and judges. The courts are already burdened with the many cases. This over burdens of the cases causes delay in justice. Government is not giving any attention for providing proper amenities and facilities to the courts. Government thinks that the work of the court is an unproductive work.

## **1.5. Recent Legislative Efforts to Make Judiciary Accountable**

### **1.5.1. Judicial Standards and Accountability Bill 2010**

This Bill has been passed by the Lok Sabha. This Bill will replace the Judges Inquiry Act, 1968. The Judicial Standards and Accountability Bill will set judicial standards and make judges accountable for their lapses. It will also mandate that judges of the High Courts and the Supreme Court declare their assets and liabilities, including those of their spouses and dependents. The Union Cabinet has approved the draft Judicial Standards and Accountability Bill, 2010 that provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities.

All these details will be put up on the websites of the Supreme Court and High Courts. It will further require judges not to have close ties with any member of the Bar, especially those who practice in the same court. The proposed oversight committee will be headed by a former Chief Justice of India and include the attorney general, a Supreme Court judge, a Chief Justice of a High Court and an eminent person nominated by the President.

The Bill to replace the Judges Inquiry Act retains its basic features, contemplates setting up of a national oversight committee, to be headed by a former Chief Justice of India, with which the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. At present, there is no legal mechanism for dealing with complaints against judges, who are governed by 'Restatement of

Values of Judicial Life,' adopted by the judiciary as a code of conduct without any statutory sanction.

The five-member committee to be appointed by the President will have a serving judge of the Supreme Court and a serving High Court judge, both nominated by the Chief Justice of India, the Attorney General, and an eminent person nominated by the President.

#### **1.5.1.1. Scrutiny Panels**

On receiving a complaint, the committee will forward it to a system of scrutiny panels. In the case of a complaint against a Supreme Court judge, the scrutiny panel will consist of a former Chief Justice of India and two sitting Supreme Court judges, and in the case of a complaint against a High Court judge, the panel will have a former Chief Justice of the High Court and two of its sitting judges. The members of the Supreme Court panel will be nominated by the Chief Justice of India, and that of the High Court panels by the Chief Justice of the High Court concerned. The scrutiny panels will have the powers of a civil court. For instance, they can call for witnesses and evidence. They will be required to give their report within three months to the oversight committee.

#### **1.5.1.2. Oversight Committee**

In the case of a complaint against a Chief Justice, the oversight committee itself will conduct the scrutiny. On receiving the report from the scrutiny panels, the oversight committee will set up a committee to further investigate the case.

#### **1.5.1.3. Investigation Committee**

Like the scrutiny panels, the investigation committee will have the powers of a civil court; it will have the power to frame definite charges. If the charges are not proved, the investigation committee can dismiss the case. Otherwise, it will give a report to the oversight committee, which can issue an advisory or warning or recommend minor punishment if the charges are not

too serious. If the charges are serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal.

The Bill mandates that judges should not have close association with individual members of the Bar and not allow any member of their immediate family to appear before them in courts. Judges should not contest any election to any office of club, society or other association, except those associated with the law or any court. Further, they should not have any bias in judicial work or judgments on the basis of religion, race, caste, sex or place of birth.

#### **1.5.1.4. Analysis of the Bill**

1. The main issue is that whether the balance between independence and accountability is maintained by the proposed mechanism in the Bill. The Oversight Committee has non-judicial members which might impinge on the independence of the judiciary.
2. The Bill makes provision to penalize anyone who breaches the confidentiality of complaints. It is questionable whether a penalty is needed for a frivolous complaint that remains confidential.
3. The Bill does not give attention whether a judge has the right to appeal to the Supreme Court against an order of removal when he is found guilty of 'misbehaviour'.
4. The Scrutiny Panel will have the judges from the same High Court. This is different from the in-house procedure of the Supreme Court.
5. The Oversight Committee has non-judicial members. The procedure of the Committee is not an in-house procedure of the judiciary. It is not clear whether the power of the Oversight Committee to impose minor measures is constitutionally valid.

#### **1.5.2. National Judicial Appointment Commission Bill, 2014**

National Judicial Appointment Commission Bill has been passed by the both Houses of the Parliament. On this occasion Law Minister Ravi Shankar Prasad said that "the government respects the independence of the

judiciary and there is no question of going back to the pre-1993 position where executive had the primacy in appointment of judges".

Parliament has passed the Constitutional 121th Amendment Bill by full majority formulating a base of as to the appointment of judges of High Courts and Supreme Court. The proposed amendment envisages a procedure for the appointment of the judges through commission. This Bill shall now be sent to the states for their approval and on getting approval the majority of the states, the Bill shall be put up before the President for his signature; thus the proposed Bill shall become a part of the Constitution of India. The proposed amendment shall be incorporated as Article 124(a), 124(b) and 124(c) of the Constitution of India. The name of the commission is National Judicial Appointment Commission. The Commission shall consist of six members headed by the Chief Justice of India with two other judges of the Supreme Court as members of the Commission. Law Minister shall also be one of the members of the commission. There shall be two more members of distinguished personalities appointed by the Prime minister with the consultation with the Chief Justice of India.

There is also a provision that two dissenting opinions shall be considered and in such cases that person shall not be appointed as a judge in whose favour two members do not agree.

Thus, the appointment has been made by the full majority of the commission. The President may agree or not agree with the recommendation of the commission. He may send back the name of the recommendies to the commission for reconsideration. However, the President shall be bound to sign on the recommendation of the commission if the commission detoes the same names. As soon as the President puts his signature the appointment of judge shall become final.

In the opinion of the Bar Council of India "the Bill is an attempt to change the basic structure of the Constitution, and hence it will adversely affect the independence of the judiciary. It is trying to usurp the judicial

appointment powers and vest them with the executive<sup>6</sup>.” Former Chief Justice of India R M Lodha chose not to comment on the government’s National Judicial Appointment Commission Bill, 2014 that proposes to scrap the collegium system for judges’ appointment. But he said that judiciary’s “inherent strength” was capable of warding off attempts to tinker with its independence.

### **1.6. Right to Information Act and Judicial Accountability**

The Right to Information Act, 2005 may be a best tool for an accountable and transparent judiciary by checking the power. It is believed that transparency or openness is an accepted principle of democracy and good governance. A distinguished American judge Louis Brandeis once also stated that “sunlight is the best disinfectant and electricity is the best policeman”.

The public power is vested in “we the people of India” and the exercise of the power must be subject to legitimate scrutiny by the people who are the source of that power. The public of India have a participatory role in a republican democracy as they are “the keepers of the Constitution”. In such circumstances there is no justification for such any amendment to the RTI Act being proposed which seeks to unreasonably and unconstitutionally restrict the people right to know what their public servants are doing on their behalf.

The reaction of the judiciary, as far as the application of the Act on itself is concerned, strongly recommending that it should be left out of its ambit, seems preposterous. If the amendments suggested by Supreme Court are enacted by Parliament, they will strike at the roots of the safeguards contained in the Act, all public authorities including courts should be subject to the jurisdiction of an independent appellate body<sup>7</sup>.

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<sup>6</sup> Judicial Appointments Bill may be junked by Supreme Court, fears govthttp://timesofindia.indiatimes.com/india/Judicial-Appointments-Bill-may-be-junked-by-Supreme-Court-fears-govt/articleshow/39851357.cms [Accessed on 12th August 2014 at 6:00 PM].  
<sup>7</sup>http://www.thehindu.com/opinion/lead/justice-in-judicial-appointments/article5587974.ece[Access on 12th July 2013 at 4:00 PM].

This Act may be a step towards enforcing the accountability of the judiciary directly through the people of India while an effective and specific Act is not made by the Parliament in this regard. Once Justice Krishna Iyer said that “there is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made, and a sort of anarchy prevails.

### **1.7. Transparency International’s Global Corruption Barometer 2013 Report**

The report of Transparency International’s Global Corruption Barometer 2013 says that 45 percent of surveyed households in India considered judiciary to be ‘corrupt’ or ‘extremely corrupt’ and 36 percent of households who had contact with the judiciary in 2012 reported to have paid a bribe. Something as simple as enforcing a commercial contract is a nightmare for companies. It requires them to undergo an average of 46 administrative procedures, takes an average of 1420 days and costs more than 39 percent of the actual claim. If the people of India starts losing their trust in the judicial process, they resort to extra-judicial means of grievance redressal. This explains the rise of khap panchayats in Haryana and kangaroo courts like the one in West Bengal which ordered the gruesome gang rape of a woman recently. In the words of Justice Brandeis, if we want the public to respect law, we must first make law respectable. The judiciary needs to understand that there is a limit to what we will do to protect judicial independence and the limit is well on this side of judicial accountability<sup>8</sup>.

Justice K. Ramaswamy once said that<sup>9</sup> “the bad behaviour of one judge has a rippling effect on the reputation of judiciary as a whole. When the edifice of judiciary is built heavily on public confidence and respect, the damage by an obstinate judge would rip apart the entire judicial structure built in the constitution. Bad conduct or bad behaviour of a judge, therefore, needs

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<sup>8</sup><http://www.firstpost.com/india/judicial-accountability-who-will-judge-the-judges-in-india-1405511.html>[ Accessed on 23rd March 2014 at 6:07 PM]

<sup>9</sup> C. Ravichandran Iyer vs Justice A.M. Bhattacharjee (1995) 5 SCC 447 at 473 para 21.

correction to prevent erosion of public confidence on the efficacy of judicial office held by the obstinate judge.” Therefore, the urgent need to make the judges' appointments system is to have more transparency and fairness. So there should be a healthy balance between the executive and judiciary,"

Independence of the judiciary plays importance role in upholding the pillars of the democratic system hence ensuring a free society. Whenever there is a mention of the independence of the judiciary, there is always a concern about the latent dangers to the judicial independence and there arises the need of judicial accountability. In this regard, the recommendations of the Law Commission for the inclusion of a whistleblower provision, aimed at protecting those making complaints against judges, in a draft bill dealing with the removal of judges of the Supreme Court and High Courts.

### **1.8. Objectives of the Study**

1. To evaluate the issue of judicial accountability in a democratic set up informed by rule of law and separations of powers.
2. To appreciate the reasons for delay in imparting justice.
3. To evaluate the constitutional and legislative mechanism related to the issue of judicial accountability.
4. To find out the efficacy of measure to check corruption among judges and to suggest an appropriate mechanism, if required.
5. To discuss the condition of services of judges and their impact on judge's functions.
6. To place the much talked about controversy regarding judiciary vs legislature and executive in proper perspective.

### **1.9. Hypothesis**

1. There is a lack of transparency in appointment of judges.
2. There is a lack of an independent credible institution which could entertain complaints against judge, investigate them and take action against errant judges.
3. There is inordinate delay in disposal of the cases.

4. There is a lack judicial objectivity, fairness and therefore, democracy is not functioning properly.
5. There is a lack of effective disciplinary mechanism as well as machinery for taking action against the judges.
6. The problem of corruption in the system exacerbated has been (make worse) by a total lack of accountability of the higher judiciary.
7. The law of contempt is just one of the shields used by the judges in order to silence criticism and muzzle dissent.
8. The service conditions of the judges are not good.
9. The political executive tries to interfere into the functioning of the courts thereby affecting the independence of judiciary.

#### **1.10. Research Methodology**

1. The proposed study would be based mainly on descriptive, analytical and doctrinal methods. Besides these methods, some other methods will also be applied according to the need of the study.
2. All the primary as well as secondary documentary sources will be utilized to make the study up-to-date, orderly and scientific. Various reports, books, articles, journals, judicial decision, website, international, constitutional norms and national measures will be taken as important research tools.
3. The hypotheses will be evaluated on the basis of provisions and policies made by the government. A critical analysis would do to evaluate the recent government policies in context to accountability of the judiciary. The research will be pursued by consulting various institutional libraries.

#### **1.11. Review of Literature**

Thesis writing cannot be possible without consulting literature available on the topic under study. Before starting up the work on the problem the present study aims to review the existing literature on the subject. The review of the existing literature would provide clarity of concept,

understanding of different aspects, and would help in identifying problem zones and formulating research methodology.

**S. P. Sathe's "Judicial Activism in India Transgressing Borders and Enforcing Limits" (2003)** discusses about the judicial review and its role in democracy. His book is an important contribution to the debate on the role of courts and the ramifications thereof. He has updated all the important judicial pronouncements in recent times which highlight the fact that the Supreme Court of India has continued to play the role of a positivist court. Important decisions have been critically analyzed by Prof. Sathe on issues of Secularism.

**Dr. G.B. Reddy's Judicial Activism in India (2012)** analyzes the judicial activism of the Supreme Court of India in the post 1980 era particularly. It gives a lucid analysis of the concept of judicial activism, reasons therefor and the manifestations thereof.

**Nilanjana Jain's "Judicial Activism in India - With Special Reference to the Quest for Social Justice" (2013)** discusses that the judiciary of India has been an effective and useful check on the lapses and omissions of the executive and therefore judicial activism has been acclaimed as a praise-worthy panacea for ready and quick justice to the common man and has transformed the courts from legal forums into the instruments of social justice.

**Devyani Srivastava's "The State, Democracy and Anti-Terror Laws in India" (2007)**- the author not only brings out the inefficiency of legal determination in a democracy to account for the establishment of inevitability of exception but also rightly questions the apparent dichotomy between law and violence.

**Venkat Iyer's "Citizens' Rights And The Rule Of Law: Problems And Prospects Essays In Memory Of Justice J.C. Shah" (2008)**- the author discusses about the Justice J.C. Shah, former Chief Justice of India who

delivered many keynote judgments which helped to develop the law in our fledgling democracy.

The review of literature has convinced this researcher that her research work will be charting a different path for study in her thesis.

## 1.12. Scheme of Chapters

The work has divided in to ninth chapters. Chapter 1<sup>st</sup> explores the meaning and concept and object of the accountability of judiciary, and its need in the maintaining rule of law. This chapter also throws light on the problems regarding making judiciary accountable. It also discusses the legislative efforts for making the judges accountable for their work.

The object of chapter 2<sup>nd</sup> is to trace the judicial system of our country which is the oldest judicial system in the world. Rule of law and accountability were also present in ancient India. The King was subject to the law of his state. The judges were independent and the subject of governed by law. In the ancient India, there were highest standard of any notion of antiquity as regards the ability, learning, integrity, impartiality and independence of the judiciary.

The object of chapter 3<sup>rd</sup> is to examine the methods of judicial accountability in other countries like United Kingdom, United State of America, and Canada. If judges are unaccountable to the public, they can become the arbitrary. The chapter describes process of achieving accountability through several methods of appointment of judges and their removal. The more important fact is that the judges should be accountable to the law for the ensuring of judicial accountability.

Chapter 4<sup>th</sup> tells us about the importance of rule of law and also discuss that rule of law is one of the essentials component of a good democracy or any form of government. This object of this chapter is to find out the components of the rule of law are and how we assure that the rule of law continues. How can we maintain the rule of law in society? How can we lead judiciary emerging into the democratic arena to maintain the rule of law and then protect and preserve the role of judiciary in Indian democracy and in maintaining the rule of law?

The object of chapter 5<sup>th</sup> to give an overview of the issues surrounding judicial independence and judicial accountability is on the basis of analysis

with reference to Indian Constitution. The some questions to be dealt in this chapter also - Is Indian judiciary independent? Is the Independence of judiciary protected by the provisions under constitution of India? What is the meaning of Independence of judiciary and to what its extent? How the Independence of judiciary in India is working successfully or facing problems?

Chapter 6<sup>th</sup> throws light on the constitutional framework of appointment of judges in higher judiciary of India. The method of appointment of the judges in India is an important aspect of judicial independence. In fact, the procedure of appointment of judges in the higher judiciary has been a subject of intense conflict between the judiciary and the executive. Much of the conflict has stemmed from the need to preserve judicial independence. The appointment procedure in India consists of a 'consultative process' between the executive and judiciary and after enforcement of the Constitution this practice has been followed with some controversial episodes for more than four decades.

Chapter 7<sup>th</sup> many facets of corruption in the judicial systems and how this decreases the value of independence of the judiciary and the effect of prevention of corruption laws on judiciary and the interpretation given by judiciary to these laws. It further discusses about the constitutional and statutory provisions which give immunity to judges. It will also examines the efforts made by the legislature to prevent the flow of corruption in judiciary. This chapter examines the issue that whether the existing prevention of corruption law is sufficient to curb this abuse in judiciary or a fresh legislation is needed.

Chapter 8<sup>th</sup> discusses the nature of judicial activism. This issue has been a matter of disputed that judicial activism is now a central feature of every political system that vests adjudicatory power in a free and independent judiciary. The scope of judicial activism varies with the width of the power conferred on the courts. Where the courts have the power of judicial review,

there is greater scope for judicial activism, and this scope increases considerably where the power of judicial review extends not only over executive action, as in but also over legislative action.

The last chapter which is 9<sup>th</sup> chapter of this work is an outcome of the observation and incorporates some suggestions to make judiciary of India accountable and more transparent.



*Historical Background Of  
Judicial Accountability  
In India*

## CHAPTER-2

# HISTORICAL BACKGROUND OF JUDICIAL ACCOUNTABILITY IN INDIA

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### 2. Introduction

It is understood that the judicial system of our country is the oldest judicial system in the world. However, our ancient judicial system has been described by Henry Meyne as an apparatus of cruel absurdities. An Anglo-Indian jurist has called the ancient Indian judicial system as oriental habits of life, from the arrival of Britishers in India, adapted the European Institutions to oriental life of habits. They made definite law supreme among peoples<sup>1</sup>. Alan Gladhill, a retired member of the Indian Civil Service, said that there was death of legal principles, when the Britishers seized power in India<sup>2</sup>. But this is not true. The observation of the Britishers about the legal system of India may be due to their ignorance or imperialist self- interest or contempt for Indian culture or civilization. The British jurists, historians and thinkers of the imperialism misrepresented a false idea about the Indian ancient judiciary.

To know the true picture of the legal system in India, we should go to original texts. Actually matters were decided by a bench of several judges. To decide the matter without fear and favour was the fundamental duty of the court.<sup>3</sup> The Indian jurisprudence was based on the rule of law. The King was subject to the law of his estate. The breach of the law subjected to forfeiture of the kingship. And the judges were independent and the subject of governed by law. In the ancient India, there were highest standard of any notion of antiquity as regards the ability, learning, integrity, impartiality and independence of the judiciary. The ancient standards are not overlooked even today. Indian judiciary consisted of hierarchy of judges with Chief Justice

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<sup>1</sup> Cowell, 'History of the Constitution of the Courts and Legislative Authorities in India', (1872), p.3.

<sup>2</sup> Alan Gledhill, 'The Republic of India,' p.147.

<sup>3</sup>Judicial-System-in-Ancient-India <http://www.scribd.com/doc/46155828/10/Part-A-Judicial-System-in-Ancient-India> [Access on 1st Nov 2012 at 11:20 PM].

(Praadvivaka). Higher courts were given the power to review the decision of the lower courts. Rules of evidence and procedure were followed. No criminal was punished unless offence was proved against him. In the civil matter, the same procedure was adopted as it is prevalent today. The principle of res-judicata that is prang-nyaya was also prevalent in Indian jurisprudence.

As mentioned above that judicial accountability is not a new concept. It has been always a prevalent in ancient India and always facet of judicial independence. Many committees have been set up for the judicial accountability. But they have failed in their aim. Judicial Standard and Accountability Bill 2010 has been passed by Lok Sabha for doing inquiry against corrupt judges. Law Minister Salman Khurshid said the Bill seeks to set up a mechanism to enquire into complaints against judges of the Supreme Court or High Courts. It was aimed at striking a “balance” between maximising judicial independence and laying down accountability at the same time for members of the higher judiciary<sup>4</sup>.

Constitutionalism is not enhanced by hostility directed against the judiciary which plays such an important role in maintaining and protecting the rule of law. Even, there should be no difficulty in accepting the principle that in society which is based on the rule of law and democratic principles of governance, every government institution, is accountable to the people, therefore, judiciary must be accountable for maintaining the faith of the people in judiciary<sup>5</sup>.

In fact, judicial accountability is not a new concept and it has been continuing from ancient India. For the purpose of evaluating the accountability in ancient India we can divide the judicial system into two parts:

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<sup>4</sup> Lok Sabha passes Judicial accountability Bill <http://www.thehindu.com/news/national/lok-sabha-passes-judicial-accountability-bill/article3263673.ece> [Access on 20th March 2013 at 12:00PM].

<sup>5</sup> See Cyrus Das, *Judges and Judicial Accountability*, (2004).

## **2.1. Judicial Accountability in India Before Republic of India**

### **2.1.1. Ancient Period**

#### **2.1.1.1. Justice during Pre-Mughal period**

##### **2.1.1.1.1. Status of Judiciary**

##### **2.1.1.1.2. Hierarchy of courts**

##### **2.1.1.1.3. Delegation of judicial power by the King**

##### **2.1.1.1.4. Judges and their qualification**

##### **2.1.1.1.5. Rule of law**

### **2.1.1.2. Justice during Mughal Period**

### **2.1.2. Medieval Period**

### **2.1.3. Pre Independence Period**

#### **2.1.3.1. Ministry of Law and Justice**

#### **2.1.3.2. Movement for Separation of Judicial and Executive Functions in British Period**

#### **2.1.3.3. Background of the Constituent Assembly**

## **2.2. Judicial Accountability in India after Democracy**

### **2.2.1. Efforts to Make Judiciary Accountable**

#### **2.2.1.1. Constitutional Provision**

#### **2.2.1.2. Statutory Provision**

#### **2.2.1.3. Judicial Perspective**

### **2.1.1. Ancient Period**

The comprehensive study of Indian legal history tells us about the historical background of judicial accountability in Hindu and Muslim periods.

#### **2.1.1.1. Justice during Pre-Mughal Period**

In Pre-Mughal era the various sources of law were present to make judges or king answerable for their duties. These were Shrutis, Smritis, Puranas, Dharmasutras, Dharmashastras, etc<sup>6</sup>. The Arthashastra and

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<sup>6</sup> Dr Paras Diwan and Peeyushi Diwan, "Modern Hindu Law" (2007), p. 27, ALA, Faridabad (Haryana).

Manusmriti were influential treatises in India, texts that were considered authoritative legal guidance<sup>7</sup>.

#### **2.1.1.1.1. Status of Judiciary**

The political structure in the Vedic Period consisted of kingdoms, each tribe forming a separate kingdom. The basic unit of political organization was the Kula (family). A number of Kulas formed a Grama (village), Gramani being the head. A group of gramas formed a vis (clan) and a number of vis formed the Jana (tribe). The leader was Rajan (the Vedic King). The king (Raja) was the supreme head of the legislative, executive and judiciary branches. The members of the council of minister could give advice to the king, but final decisions were left to the king. The ministers and other officials were directly appointed by the king. The Sabha and the Samithi were responsible for the administration of justice at the village level<sup>8</sup>.

Kautilya, the Prime Minister of the first Maurya Emperor (322-298 B.C.), had divided the estate into administrative units called Sthaniya, Drona Mukha, Khrvatica and Sangrahana (the ancient equivalents of the modern districts, tehsils and Parganas). Manu, Yajnvalky, Katyayana, Brihaspati and others great Indian jurists described in details the ancient judicial system<sup>9</sup>.

#### **2.1.1.1.2. Hierarchy of courts**

Brihaspati shows that there was hierarchy of courts in India beginning with the family courts and ending with the king, the lowest was the family arbitrator. The next higher court was that of a judge. The Chief Justice was known to be as Praadavivaka or adhyaksha. The king was at the top of the court. Vachaspati Misra had stated that the King was administering justice in person strictly according to law under the guidance of learned judges<sup>10</sup>. In

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<sup>7</sup> Encyclopaedia of Asian History, volume 2, p.411.

<sup>8</sup> Judicial-System-in-Ancient-India <http://www.scribd.com/doc/46155828/10/Part-A-Judicial-System-in-Ancient-India> [Access on 1st Nov2012 at 11:20 PM]

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

Indian Jurisprudence, to dispense justice among the people and awarding the punishments was the main primary attributes of sovereignty.

King was fountain source of justice. The King was to conduct strictly on judicial principles. King was required to decide cases in open court and in the court- room also. The dress and the demeanour of the King were such as not to fear the litigants. The King was required to take the oath of impartiality and decide cases without any fear, favour or prejudice. Katyayana has written that the King was required to enter the court- room with modest dress. He was to seat facing east with an attentive mind to hear the disputes of the litigants. He was to act under the guidance of his Chief Justice (Praadvivaka), ministers and the Brahmana members of his council. A King who dispenses justice in regardness with the law was supposed to reside in heaven<sup>11</sup>.

Narada has also expressed the procedure of justice in the likeway as Katyayana. Narada put his view that a judge was required to be impartial to all his subjects. He was also to take oath of son of Vivasan. Vivasan means oath of impartiality. Yama, the god of death was the son of Vivasan. Yama was also impartial to all its being. The King was required to give justice without any fear or favour. The judges were there to check the King from doing wrong<sup>12</sup>.

The judge was to give his opinion according to law on failure of the King to give justice in violation of a law. The judge was to advise him in simple and sweet language. The judge was supposed to be guilty if he failed to give proper advice to his King<sup>13</sup>.

#### **2.1.1.1.3. Delegation of judicial power by the King**

The King had numerous job, he was therefore, compelled to delegate his judicial power to some professional judges. Due to the pressure of work, the king was not able to hear the cases in person. The King therefore,

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<sup>11</sup> Sanskrit Slok, Judicial-System-in-Ancient-India <http://www.scribd.com/doc/46155828/10/Part-A-Judicial-System-in-Ancient-India> [Access on 1st Nov2012 at 11:20 PM]

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

appointed a judge that is Brahmin learned it in Vedas to give justice to his subjects<sup>14</sup>.

#### **2.1.1.1.4. Judges and their qualification**

The king would appoint honourable men as members of the court of justice whose integrity had been tested and tried and who were able to bear the burden of the administration of justice; they were also be expected to be well versed in the sacred laws as well as rules of the jurisprudence and were noble and impartial towards friends or foes. The king being the fountainhead of justice had to depend upon these judges and it was in his interest to ensure that there were reliable and worthy men on those position<sup>15</sup>.

The qualification of the judges were to be prescribed at high level as Katyayana said that a judges must be austere and impartial in temperament, steadfast, God-fearing, duty bound, free from anger , leading a good life and belong to a good family<sup>16</sup>. The foremost quality of the judge was the integrity, impartiality and free from bias and attachment. The concept of integrity was given a very wide meaning. Katyayana adds a few more criteria to indicate the suitability of a person to be appointed as a judge<sup>17</sup>:

- i. A judge should not be cruel, he should be sweet tempered, clever and energetic but not greedy;
- ii. A judge should not confine his study to a single branch of learning but should know many sastras.

Brihaspati expressed that a judge was decide to cases without any consideration of personal gain or a bias. There was open trial<sup>18</sup>. The judges were not allowed to talk the parties privately so long as the cases were pending in their court. Personal attachment and meeting with the litigant privately was termed to be corruption<sup>19</sup>.

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<sup>14</sup> Ibid.

<sup>15</sup> B.R. Agarwala, 'Our Judiciary' (1993) p.7

<sup>16</sup> Supra Note. 11

<sup>17</sup> Supra Note. 15.

<sup>18</sup> Supra Note. 11

<sup>19</sup> Ibid.

Brihaspati has written that a corrupt judge was to be banished from the realm. A corrupt judge, a false witness, and a murderer of a Brahmin were put in the same classes of criminals as a corrupt judge was classified<sup>20</sup>.

Vishnu stated that the property of a corrupt judge was to be confiscated. Meeting with a litigant in privately was supposed to be judicial misconduct. A judge or Chief Justice who privately had talks with a party before his case was decided to be punished like a corrupt judge<sup>21</sup>.

#### **2.1.1.1.5. Rule of law**

The principle of rule of law was present in the ancient India. Ancient Indian texts speak a lot about it. It is stated in Mahabharata that a king shall be executed like a mad dog if he fails to protect his subject.<sup>22</sup> The people of the nation were authorized to execute a King who did not protect his subjects and deprived of their property and assets. The King who takes no advice for guidance from everyone was also to meet the same fate<sup>23</sup>.

The provisions show that sovereignty was based on implied social compact. The King forfeited his kingship in case of violation of social compacts. Kautilya described the duties of the king in the Arth- Shastra in the following words: "In the happiness of his subjects lies the King's happiness; in their welfare his welfare; whatever pleases him he shall not consider as good, but whether pleases his people he shall consider too good<sup>24</sup>."

The principle of justice as enunciated by Kautilya was prevalent at the time of Ramayana. Rama, the king of Ayodhya, was compelled to banish his queen because his subjects disapproved of his taking back of his wife from the house of her abductor Ravana. There is a story in Mahabharata also that a common fisherman denied to married his daughter to the King of Hastinapur unless he accepted the condition of his daughter that his daughter's sons and

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<sup>20</sup> Ibid.

<sup>21</sup> Supra Note.11.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

not the heir apparent from a former queen would succeed to the throne. Prince Dev Vrata had renounced the throne and took oath that he would remain lifelong unmarried is one of the most moving episodes of Mahabharata. The significance of this episode is that even the sovereign is not above the law<sup>25</sup>. The King of Hastinapur could not compel the lowest subject of his estate to give his daughter to marriage to him without fulfilling his terms. It shows that the Kings in ancient India were not “oriental despots”. They were not at liberty to do whatever they liked<sup>26</sup>.

#### **2.1.1.2. Justice during Mughal Period**

The ideal of justice under Islam was one of the highest in the middle ages. The administration of justice was regarded by the Muslim kings as a religious duty. Sources of Islamic Law are divided into Primary and Secondary Sources<sup>27</sup>. Quran is the first and the most important source of Islamic law<sup>28</sup>. It is believed to be the direct words of God as revealed to Muhammad through angel Gabriel in Mecca and Medina. Muslim jurists agree that the Quran in its entirety is not a legal code. Sunna is the traditions or known practices of Prophet Muhammad, recorded in the Hadith literature. Quran justifies the use of Sunna as a source of law. Ijma and Qiyas are the secondary sources of Islamic law. Under the Mughal Empire the country had an efficient system of government with the result that the system of justice took shape. The unit of judicial administration was Qazi<sup>29</sup>.

During the Mughal period the judicial system was modelled after that of the Caliphates of Baghdad and Egypt and it was almost the same as was laid down by Muslim jurists and established in northern India by the Sultan of Delhi. The king was the centre- his being the Supreme Court- irrespective of whether he was in the capital or away, or in camp. He was the pivot around whom everything revolved, and had original jurisdiction in all matters;

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Prof. R.K. Sinha, “The Muslim law” CLA Allahabad (2006) p. 26.

<sup>28</sup> Ibid. p. 28.

<sup>29</sup> Ibid.

appeals could be made to him. As in the story about the Jahangir, anyone could come and ring the bell and if the king thought fit, he would dispense justice then and there was no further appeal. The Mughal emperor, like his counterpart in Turkey and Persia, was fountainhead of justice and followed the imperial tradition that the king in person should try cases in open court<sup>30</sup>.

The rule during Akbar's regime was that the judges must try to find out the facts of a case by every possible means. Statements of witnesses alone were not regarded as sufficient. Judges were expected to make through interrogation of the parties concerned and were further expected to give considerable thought to the case before pronouncing any judgement. In order to achieve the goal of impartial justice, the judges were directed to be guided by the spirit of the law, render expeditious justice and pursue of policy of reformation rather than retaliation. Jahangir (Akbar's son) became famous for the rendition of justice<sup>31</sup>.

### **2.1.2. Medieval Period**

The Charter of 1600 established the English East India Company in India. As per the Charter of 1661 the English and the Indians residing under the Company came under its jurisdiction. From the period ranging from 1661 till 1726, laws of equity and justice in conformity with the laws in England were followed. There was no codified law. In Calcutta, the judicial system was based on the Company's authority as a Zamindar. This continued till the Charter of 1726 was passed before Madras attained the position of a Presidency in 1665 it had two courts namely, the Chansahlory Court and the Court of the Agent and Council. By the Charter of 1668 the Company was conferred powers to make laws for the island of Bombay<sup>32</sup>. On the other hand, in Bombay till 1726 judicial systems were not stable and kept changing. Earlier there were courts like the Court of Judicature (1672) which dealt with

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<sup>30</sup> Supra note. 15. at p. 19-20.

<sup>31</sup> Ibid. p. 25.

<sup>32</sup> Rakshika Chaddha Evolution of Law: "A Short History of Indian Legal Theory" <http://www.legalindia.in/evolution-of-law-%E2%80%9Ca-short-history-of-indian-theory%E2%80%9D>.

civil and criminal cases and matters of probates and testaments, and a Court of Conscience to decide petty cases. There was a system of appeals as well. In Madras the appeals from the Mayor's Court were filed to the Governor and Council. On the other hand, Bombay had Deputy-Governor and Council as its appellate Court. In Bombay this system elapsed due to lack of independence of the judiciary<sup>33</sup>.

In the following judicial system of Bombay an admiralty court was established with a Judge-Advocate as its head. This court apart from its existing powers enjoyed civil and criminal jurisdiction. Later a court of Judicature was established under this system after which the Admiralty Court lost its ground. The Admiralty court in Madras also became irregular by this time. Another system came about in 1718 in Bombay and this gave representation to the Indians as well by appointing four Indian judges, known as Black Justices, in the court<sup>34</sup>.

A parallel system of judiciary was running in the mofussil areas. The Company attained the Diwani of Bengal, Bihar, and Orissa in 1765. As per the plan of 1772 under Warren Hastings, the Courts of Original Jurisdiction were Mofussil Faujdari Adalat, the court of criminal jurisdiction; Mofussil Diwani Adalat, the court of civil jurisdiction and Small Cause Adalat. Under the Appellate Courts we had Sadar Nizami Adalat, the criminal court of appeals; Sadar Diwani Adalat, civil court of appeals<sup>35</sup>.

The Collectors started monopolizing the trade in the districts putting the end to this system and giving rise to a new plan of 1774. Under this system, Diwan or Amil, acted as the judge of the Mofussil Diwani Adalat. The Mofussil areas of Bengal, Bihar and Orissa were divided into six districts with a Provincial Council in each district acting as the Appellate Court<sup>36</sup>. The Council started creating difficulties and monopolizing trade within its

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Jois M. Rama. "Legal and Constitutional History of India" p.125.

<sup>36</sup> Ibid.

jurisdiction. This led to an end of this plan as well and a new plan of 1780 was formulated.

The Governor General Lord Cornwallis (1786-1793) introduced changes in the judicial system in 1787, 1790, and 1793. He had thoroughly reorganized the civil and criminal judicial system in India in Bengal, Bihar, and Orissa. He for the first time introduced the principle of administration according to law. In 1787 he merged the revenue collection and power to try the revenue disputes in the same hands of the magistrate who formed the Mal Adalat. Appeals from the Mal Adalat had to go to the Governor General<sup>37</sup>.

### **2.1.3. Pre Independence Period**

With the advent of the British colonial administration, India witnessed a judicial system introduced on the basis of Anglo-Saxon jurisprudence. The Royal Charter of Charles II of the year 1661 gave the Governor and Council the power to adjudicate both civil and criminal cases according to the laws of England. However, the Regulating Act of 1773 established for the first time the Supreme Court of India in Calcutta, consisting of the Chief Justice and three judges (later reduced to two) appointed by the Crown acting as King's court and not East India Company's court. Later, Supreme Courts were established in Madras and Bombay. The Court held jurisdiction over "His Majesty's subjects". In this period, the judicial system had two distinct systems of courts, the English system of Royal Courts, which followed the English law and procedure in the presidencies and the Indian system of Adalat/Sadr courts, which followed the Regulation laws and Personal laws in the provinces<sup>38</sup>.

Under the High Courts Act of 1861, these two systems were merged, replacing the Supreme Courts and the native courts (Sadr Dewani Adalat and Sadr Nizamat Adalat) in the presidency towns of Calcutta, Bombay and

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<sup>37</sup> Id. at p. 126.

<sup>38</sup> Courts in India: Need to Strengthen Access to Justice and Judicial Accountability, [http://socialissuesindia.files.wordpress.com/2012/03/judicial\\_accountability\\_in\\_india.pdf](http://socialissuesindia.files.wordpress.com/2012/03/judicial_accountability_in_india.pdf) [Access on 23rd Feb 2013 at 3:03PM].

Madras with High Courts. However, the highest court of appeal was the Judicial Committee of the Privy Council. The British made efforts to develop the Indian legal system as a unified court system. Indians had neither laws nor courts of their own, and both the courts and laws had been designed to meet the needs of the colonial power<sup>39</sup>.

The Government of India Act of 1935 (section 200) set up the Federal Court of India to act as an intermediate appellant between High Courts and the Privy Council in regard to matters involving the interpretation of the Government of India Act. It was not to ‘pronounce any judgment other than a declaratory judgment’ which meant that it could declare what the law was but did not have authority to exact compliance with its decisions. The Federal Court’s power of ‘judicial review’ was largely a paper work and therefore a body with very limited power. Despite the restrictions placed on it, the Federal Court continued to function till 26th January 1950, when independent India’s Constitution came into force. In the meantime, the Constituent Assembly became busy drafting the basic framework of the legal system and judiciary<sup>40</sup>.

#### **2.1.3.1. Ministry of Law and Justice**

Ministry of Law and Justice is the oldest limb of the Government of India dating back to the nineteenth century when the Charter Act 1833 was enacted by the British Parliament. For the first time, the Act vested legislative power in a single authority, namely the Governor General in Council. By virtue of this authority and the authority vested under him under Section 22 of the Indian Councils Act, 1861 the Governor General in Council enacted laws for the country from 1834 to 1920. After the commencement of the Government of India Act 1919 the legislative power was exercised by the Indian legislature constituted there under<sup>41</sup>.

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<sup>39</sup> Ibid.

<sup>40</sup> Supra note. 38.

<sup>41</sup> Ibid.

The Government of India Act, 1919 was followed by the Government of India Act 1935. With the passing of the Indian Independence Act 1947 India became a Dominion and the Dominion Legislature made laws from 1947 to 1949 under the provisions of section 100 of the Government of India Act 1935 as adapted by the India (Provisional Constitution) Order 1947. Under the Constitution of India which came into force on the 26th January 1950 the legislative power is vested in Parliament<sup>42</sup>.

### **2.1.3.2. Movement for Separation of Judicial and Executive Functions in British Period**

The legal system introduced by the British was based less on theoretical reasonableness than on its suitability to local conditions and temperaments. It was necessarily imperfect, and with the awakening of national consciousness there was a steady demand for removal of its more glaring defects. Since the foundation of the Indian National Congress in 1885 there was no matter which received a more general support or more consistent attention than the question of the separation of executive and judicial functions. The culmination of this came in 1899 when, in a memorial addressed to the Secretary of State for India, ten high judicial authorities set forth eight objections which are summarized as follows<sup>43</sup>.

- i. That the combination of judicial with executive duties in the same officers violates the first principles of equity;
- ii. That while a judicial authority ought to be thoroughly impartial, and ought to approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of the district;

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<sup>42</sup> Ibid.

<sup>43</sup> Supra note. 15. p. 47-49.

- iii. That executive officers in India, being responsible for a large amount of miscellaneous business, did not have sufficient time to satisfactorily dispose of judicial work in addition to their existing work;
- iv. That being keenly interested in carrying out particular executive measures, executive officers are likely to come into conflict with individuals, and therefore it is inexpedient that they should also be invested with judicial powers;
- v. That under the existing system collector magistrates do, in fact, neglect judicial for executive work;
- vi. That appeals from revenue assessments are apt to be futile when they are heard by revenue officers;
- vii. That great inconvenience, expense and suffering are imposed on suitors required to follow the camp of a judicial officer who, in the discharge of his executive duties, is making a tour in his district; and
- viii. That the existing system not only involve all whom it concerns in hardships and inconvenience, but also by associating the judicial tribunals with the
- ix. Work of the police and detectives, and by diminishing the safeguards afforded by the rules of evidence, produce actual miscarriages of justice and creates, though justice be done, opportunities of suspicion, distrust and discontent which are greatly to be deplored.

### **2.1.3.3. Background of the Constituent Assembly**

The members of the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. They wanted to insulate the courts from attempted coercion from forces within and outside the government. Sapru Committee Report on judiciary and the Constituent Assembly's ad hoc committee on the Supreme Court report formed the bulk of the guidelines for judiciary. A.K. Ayyar, K. Santhanam, M.A. Ayyangar, Tej Bahadur Sapru,

B.N. Rau, K.M. Munshi, Saadulla and B.R. Ambedkar played important roles in shaping the judicial system of India<sup>44</sup>.

The unitary judicial system seems to have been accepted with the least resistance. The Supreme Court was to have a special, countrywide responsibility for the protection of individual rights. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as “one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the criminal law, essential to maintain the unity of the country<sup>45</sup>.”

## **2.2. Judicial Accountability in India after Democracy**

The Indian Constituent Assembly passed the Abolition of Privy Council Jurisdiction Act in 1949 to abolish the jurisdiction of the Privy Council in respect of appeals from India and also to provide for pending appeals.

The present day judicial system in India is quite complicated. It consists of a Supreme Court at its top, High Courts in the middle and the Subordinate Courts at the bottom. Nyaya Panchayats are the judicial component of the Panchayat system and are the lowest ring of our judiciary. Their composition and power differs from State to State. They have jurisdiction over petty civil and criminal cases.

The societies in the beginning were rudimentary and so were the laws of the societies. Laws have grown with the growth of society. This establishes a relationship between law and society, where law is an instrument of social change, and as Pound would put it law must be stable, but it must not stand still. To comprehend, understand, and appreciate the present legal system adequately, it is necessary to acquire a back-ground knowledge of the course of growth and development of the legal history.

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<sup>44</sup> Supra note. 38.

<sup>45</sup> Ibid.

A peculiar feature of the legal development in India was that for long the government endeavoured to create a system of courts without ever attempting to develop a body of law. Conscious efforts to remove these defects were made by developing a coherent body of law. But the coherent system of law was developed only after the process of codification. Law then became more territorial and resulted in the abridgment of the differences of law between the resulted in the application of uniform law throughout the country. The independence of the judiciary is fairly well assured by the constitution itself and adequate precautions have been taken to help the judiciary to discharge their functions effectively.

### **2.2.1. Efforts to Make Judiciary Accountable**

The framers of our Constitution have embodied some provisions to make judiciary accountable. In Indian perspective it will be germane to discuss judicial accountability on following points:

#### **2.2.1.1. Constitutional Provision**

#### **2.2.1.2. Statutory Provision**

#### **2.2.1.3. Judicial Perspective**

#### **2.2.1.1. Constitutional Provisions**

Administration of justice is one of the most important functions of the state<sup>46</sup>. The Constitution of India provides a procedure under Article 124(4) read with proviso (b) to Article 124(2)<sup>47</sup> and proviso (b) to Article 217(1)<sup>48</sup>,

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<sup>46</sup> S.D. Sharma, Administration of Justice in India, Harman Publishing House, (1988), p.170.

<sup>47</sup> Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that--

(a) a Judge may, by writing under his hand addressed to the President, resign his office

(b) a Judge may be removed from his office in the manner provided in clause (4).

<sup>48</sup> Appointment and conditions of the office of a Judge of a High Court

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years Provided that

for the removal of the judges of Supreme Court and High Court including Chief Justice of India for the proved misbehaviour or incapacity.

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 misbehaviour or incapacity.

Further our Constitution made it clear 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 Article 124 (4). 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. Application of certain provisions relating to Supreme Court to High Courts The provisions of clauses ( 4 ) and ( 5 ) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

#### **2.2.1.1.1. Misbehaviour & Incapacity**

Misbehaviour or incapacity has not been defined in our Constitution. Even then misbehaviour or incapacity may be drawn from day to day activities, judgments and behaviour as to the procedure they follow. It includes their practice of taking bribe for giving their decisions. Biased opinion may also be listed in the misbehaviour. Incapacity means becoming disabled by physical or mental appearance. He may not be in position to discharge his duty according to law. He may also deviate from his constitutional duties that he takes oath to preserve protect and according to Constitution.

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(a) a Judge may, by writing under his hand addressed to the President, resign his office; (b) 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.

His act of biased opinion may also be ground for his removal. Constitution of India does not provide any other punishment except removal of judges. It has been seen that in some countries minor punishment are also provided. For instance, minor punishment may include depriving a judge of its judicial working. He may be deprived of all facilities and immunities as are available to a judge.

#### **2.2.1.1.2. First Impeachment of Judge Case**

The first case<sup>49</sup> that came before the Parliament related to the inquiry against Justice V. Ramaswami former judge of the Supreme Court. The impeachment motion was placed for debate and voting on 10 May 1993<sup>50</sup>. Well known lawyer and a Congress politician Kapil Sibal was his defence lawyer. On May 11, 1993, 205 Lok Sabha members belonging to the Congress and its allies sabotaged the impeachment motion against Justice V. Ramaswami of the Supreme Court by abdicating their constitutional duty for or against and thus defeating the motion by ensuring that it did not receive the support of an absolute majority of the total membership of the House. Each one of the 196 MPs who voted, all belonging to the Opposition parties, voted for the removal of the judge<sup>51</sup>.

Speaker of the House appointed Justice P.V. Sawant Committee on 12<sup>th</sup> March 1991. The committee gave its report on 20<sup>th</sup> July 1992. The committee held some charges proved against Justice Ramaswami. However, before any action of the report of the committee, the ninth Lok Sabha was dissolved. The motion for removal of Ramaswami lapsed. This plea of lapse was rejected by Supreme Court. Therefore, the motion for removal of Justice Ramaswami came again before Parliament for discussion and voting. The motion however, could not muster requisite majority. It therefore failed. The

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<sup>49</sup> Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699.

<sup>50</sup> "Advocate recounts first ever impeachment proceedings in Parliament", Times of India. 20 Aug 2011.

<sup>51</sup> First Impeachment of Judge case- Justice V. Ramaswami <http://www.gyancentral.com/forum/law-preparation/legal-aptitude-preparation/7055-first-impeachment-judge-case-justice-v-ramaswami.html> [Access on 2nd Jan 2013 at 4:00PM].

failure of Judges Inquiry Act, 1968, has been raised question about the tough procedure of impeachment.

### **2.2.1.1.3. Facts of the Case**

Justice V. Ramaswami was appointed Chief Justice of the Punjab and Haryana High Court on November 12, 1987 and continued as such till October 8, 1989 when he was elevated to the Supreme Court. In April/May 1990, reports appeared in the press about the huge and extraordinary nature of the expenditure incurred by Ramaswami for his official residence when he was Chief Justice at Chandigarh and the audit objections thereto. This is greatly disturbed members of the Bar and MPs, who voiced their concern to the then Chief Justice of India, Justice Sabyasachi Mukherjee<sup>52</sup>.

After deep consideration of the matter, on July 20, 1990, the Chief Justice announced in open court that he had advised Ramaswami to "desist from discharging judicial functions so long as the investigations continued and until his name was cleared in this aspect." Ramaswami went on leave and remained on leave for the next five months. Thereafter, the Chief Justice constituted a committee consisting of Justices B. C. Ray, Jagannath Shetty and M. N. Venkatachaliah of the Supreme Court seeking their advice on the question "whether the involvement of Justice V. Ramaswami in certain proceedings in relation to certain administrative decisions and certain other administrative acts and omissions as Chief Justice of Punjab and Haryana High Court would render it embarrassing for him to function as a judge of the Supreme Court of India<sup>53</sup>."

This committee submitted its report on November 8, 1991 to Chief Justice Ranganath Mishra, who succeeded Sabyasachi Mukherjee on his demise. It said that only if an inference of moral turpitude became inescapable could the judge be considered disentitled from discharging judicial functions. The committee further advised the Chief Justice "to consider whether such

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<sup>52</sup> Supra note. 50.

<sup>53</sup> Ibid.

unseemly controversy could be put to rest by requesting Justice Ramaswami to make good the value of these items (which were allegedly misappropriated by him) without prejudice to his stand and contentions in the matter<sup>54</sup>."

On this report, Ranganath Mishra ended the five-month leave of Ramaswami who resumed work in December 1990. Soon thereafter, however, further articles and reports appeared in the press, detailing the various acts of financial malfeasance and outright misappropriation of goods from his official residence by Ramaswami. This led to an unprecedented resolution by the Supreme Court Bar Association on February 1, 1991, calling for the impeachment of Ramaswami and calling upon the Chief Justice not to assign him any judicial work. On February 27, 1991, 108 members of the Lok Sabha belonging to the Bharatiya Janata Party, the National Front and the Left parties submitted a notice of motion to the Speaker calling for the removal of Ramaswamy<sup>55</sup>.

#### **2.2.1.1.4. Recommendation by the different Law Commissions**

The 14th Report on the Reform of Judicial Administration submitted in 1958 stated "the Constitution of the Supreme Court must command the confidence not only the people... What perhaps is still more to be regretted is the executive influence exerted from the highest quarters, has been responsible for some appointment to the bench. It goes to similarly on the appointment of the High Court judges. The Report grudgingly accepted not only that "the best talent among the judges of the High Courts has not always found its way to the Supreme Court. But also that there is exists a "well-founded and acute public dissatisfaction at these appointments<sup>56</sup>."

Former Supreme Court judge, Justice VR Krishna Iyer, in a critical appraisal of judicial appointments this day wrote, "A national commission of the appointment of judges with transparency, similar to the one now England

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid

<sup>56</sup> First Law Commission under the Chairmanship of M.C. Setalvad, 14<sup>th</sup> Report, vol. (1).

is also needed<sup>57</sup>.” The committee of judicial accountability , highlighting the need for a National Judicial Appointment Commission , in a statement regarding the proposed elevation of justice C.K. Prasad, noted that ,” The Committee strongly feels that responsible member of a bar of the concerned High Court should be consulted before the collegiums makes any recommendation to the Government<sup>58</sup>.

#### **2.2.1.1.5. 121st Report on a new forum for judicial Appointment in 1987**

The Report suggested the establishment of a body called the “National Judicial Service Commission”. A participatory model has a great chance of acceptability because deliberation among participants to some extent provides a shield against arbitrary action<sup>59</sup>. Again in 1990 The Constitution (67th) Amendment Bill came into light of discussion. This Bill proposed for the creation of a National Judicial Commission .This amendment Bill o the Constitution<sup>60</sup> provided for the setting up of a high powered body known as the National Judicial Commission regarding the appointment of the Supreme Court and High Court judges as well as transfer of the High Court judges. The Bill, however, lapsed. But placing complete onus on the judiciary was not within the scheme of the Constitution either.

On 7th May 1997 a 16 point code of conduct, for ensuring proper conduct among members of the Higher Judiciary was adopted by the Judges of the Supreme Court and the High Courts, with the Gujarat High Court as the sole dissenter, reportedly. The 16 point code which the judges prefer to describe as “The Restatement of Values of Judicial Life” is believed to have become effective since then. It was drafted by a Committee of five Judges was headed by Justice Dr. A.S. Anand, as he then was. The other members

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<sup>57</sup> V.R. Krishna Iyer, “Time for Change” (2011) [www.flonet.com](http://www.flonet.com) [Accessed on 1<sup>st</sup> April 2013 at 5:08 PM]

<sup>58</sup> Judicial Reform, Committee on judicial accountability, statement (2010), [www.judicialreforms.org](http://www.judicialreforms.org), [Accessed on 7th April 2012 at 11:00 P.M.]

<sup>59</sup> Eleventh Law Commission under the chairmanship of D.A. Desai, 121st Report, Para 7.4, p. 41.

<sup>60</sup> Moved by the Union Law Minister, Dinesh Goswami (1990).

were Justice S.P. Barucha, Justice K.S. Paripoornan, Justice M. Srinivasan and Justice D.P. Mohapatra. The 16 point code stipulates<sup>61</sup>:

- Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a judge of the Supreme Court or a High Courts, whether in official or personal capacity, which erodes the credibility of this perception, has to be avoided.
- A judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.
- Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.
- A judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.
- No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the judge actually resides or other facilities for professional work.
- A judge should practise a degree of aloofness consistent with the dignity of his office.
- A judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
- A judge shall not enter into public debate or express his views in public on Political matters or on matters that are pending or are likely to arise for judicial Determination.

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<sup>61</sup> Restatement of values of Judicial life

[http://judicialreforms.org/files/restatement\\_of\\_values\\_jud\\_life.pdf](http://judicialreforms.org/files/restatement_of_values_jud_life.pdf) [Accessed on 22nd March 2013 at 4:23 AM]

- A judge is expected to let his judgments speak for themselves; he shall not give interview to the media.
- A judge shall not accept gifts or hospitality except from his family, close relations and friends.
- A judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.
- A judge shall not speculate in shares, stocks or the like.
- A judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).
- A judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.
- A judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.
- Every judge must at all-time be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

These are only the “Restatement of the Values of Judicial Life” and are not meant to be exhaustive but illustrative of what is expected of a judge.

In the year 2003 The Constitution (98th) Amendment Bill also recommended for National Judicial Commission. This Bill sought to create a National Judicial Commission which would make recommendations for the appointment of judges belonging to a higher judicial organ. Such an institutionalized mechanism would minimize any possibility of discord between the judiciary and the executive. Introduced by the then Union law

Minister, Arun Jaitley,<sup>62</sup> it also provided for the drawing up of a code of ethics.

#### **2.2.1.1.6. 214<sup>th</sup> Report of Law Commission of India**

The commission deliberated judicial jugglery in the second and third judges case, where in the Supreme Court has usurped the power of appointment of judges in the higher judiciary from executive to itself, by evolving consultative mechanism, with the primacy of the opinion of the Chief justice of India. The commission vehemently suggested that “urgent and immediate review of the appointment procedure either through review petition or appropriate legislation<sup>63</sup>”.

#### **2.2.1.1.7. 230<sup>th</sup> Report of the Law Commission of India**

The commission expressed apprehension regarding appointment of a person as a judge in the High Court if he has had standing as a lawyer in the same court. It stated that “As a matter of practice, a person, who has worked as a District Judge or has practised in the High Court in a State, is appointed as a judge of the High Court in the same State. Often we hear complaints about ‘Uncle Judges’. If a person has practised in a High Court, say, for 20-25 years and is appointed a judge in the same High Court, overnight change is not possible. He has his colleague advocates both senior and junior as well as his kith and kin, who had been practising with him. Even wards of some District Judges, elevated to a High Court, are in practice in the same High Court. There are occasions, when advocate judges either settle their scores with the advocates, who have practised with them, or have soft corner for them. In any case, this affects their impartiality and justice is the loser<sup>64</sup>.”

#### **2.2.1.2. Statutory Provisions**

The need for judicial accountability has been felt since the time of inception of the judiciary. It is the counter balance to judicial independence.

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<sup>62</sup> NDA Government introduced the Bill in the year 1999.

<sup>63</sup> 214<sup>th</sup> Report of Law Commission (2008) p. 59.

<sup>64</sup> 18<sup>th</sup> Law Commission under the Chairmanship of Hon’ble Dr. Justice AR. Lakshmanan, 230<sup>th</sup> Report of the Law Commission (2009). p.09.

However, it was not until recent times that the need for a legislation to govern judicial accountability was emphasized on. With the changing scenarios, and legislations which dealt with various aspect of judicial accountability have undergone metamorphosis. The various legislations that the parliament introduced to adopt judicial accountability as an established law are enumerated below.

**2.2.1.2.1.** The Government of India Act, 1935.

**2.2.1.2.2.** The Judge's Enquiry Act, 1968.

There are some proposals which remained on table of the Houses for making judges accountable:

**2.2.1.2.3.** Judges Inquiry Bill, 2005.

**2.2.1.2.4.** Judges (Declaration of Assets and Liabilities) Bill, 2009.

**2.2.1.2.5.** Judicial Standard and Accountability Bill 2010 (It has been passed by Lok Sabha but still pending in Rajya Sabha.

**2.2.1.2.6.** National Judicial Appointment Commission Bill, 2014.

National Judicial Appointment Commission Bill 2014 has been passed by the both Houses of the Parliament. This Bill shall now be sent to the states for their approval and on getting approval the majority of the states the Bill shall be put before the President for his signature thus the proposed Bill shall become a part of India.

**2.2.1.2.1. Government of India Act 1935.**

This Act, which was the basis for the present Constitution of India, apart from defining High Courts, also indicated the procedure of removing a judge from office on grounds of "misbehaviour or of infirmity of the mind or body"<sup>65</sup>. The Judicial Committee of the Privy Council would look into matter of His Majesty would refer a case of any such judge to them for removal .On such a recommendation from the judicial committee, the Governor of the state would remove such judge from service.

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<sup>65</sup> The Government of India Act 1935, Section 220(2).

Before the Government of India Act 1935, the High Court Act, 1861 and section 4 and 105 of the Government of India Act, 1915 made provision for the judges of High Courts in India to hold office during the pleasure of her or his majesty. The good behaviour are restricted to judicial service whereas all government servants including those belonging to the permanent civil service held office during pleasure of crown<sup>66</sup>. The fundamental deference between holding during pleasure and good behaviour is that a person holding office can be removed without any reason for his removal being attributed a person holding office during good behaviour can only be removed in case any misconduct, in the opinion of court justice would justify his removal.

The drafting of the Indian Constitution, adopted similar provision for the Constitution for the Constitution of India which are now enshrined in Article 124 and Article 217. They provide for the appointment of judges by the president of India with consultation of Chief Justice of India and removal of judges in case where they were incapable of performing their judicial obligation by an impeachment procedure before the Parliament. The procedure established in the Constitution involves an address by each house of the Parliament supported by a majority of not less than two third of the members of that house present and voting being presented to the President, who then issues the order of removal of judges.

#### **2.2.1.2.2. Judge's Inquiry Act, 1968**

The Judge's Inquiry Act, which is the extent legislation till date, is a novel statute in the Indian democracy which attempted to make the judges of the Supreme Court and High Courts accountable for their action and their behaviour. This act is applicable in case where a judge is found to be misbehaving or showing incapacity to continue in office. A motion has to be introduced in the parliament with the accent of 100 votes in Lok Sabha or 50 votes in the Rajya Sabha<sup>67</sup>. On acceptance of the motion by either the Speaker or the Chairman, as the case may be, the complaint against the judge

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<sup>66</sup> Supreme Court Act, Sec.11 (2) (1981), Administrative Jurisdiction Act (UK) Sec. 6(1976).

<sup>67</sup> Judge's Inquiry Act, section 3(1)1968.

of the judges is handed over for investigation to a committee comprising one judge of the Supreme Court and the High Court each and eminent jurist who would then assess the complaint in its entirety<sup>68</sup>.

If the committee finds that the judges are indeed incapable of performing his judicial duties, it suggests his impeachment under Article 124 or 217. However, the mechanism under the Judge's Inquiry Act is one that can only be followed if serious allegations are levelled against the judge. In case there are minor allegation that do not warrant the impeachment of the judge, the Parliament would be left helpless as they can neither punish the judge with other measure nor impeach him for small offence. Hence, the Act fails to serve the intention of upholding judicial accountability in quite a few circumstances<sup>69</sup>.

#### **2.2.1.2.3. Judges Inquiry Bill, 2005.**

The increasing corruption and delay in justice over the years cast grave doubts on the integrity of the judiciary and the Judge's Inquiry Act 1968 was sought to be replaced. The Judges Inquiry Bill, 2005 was a result of deliberation on the above issues among the legislators. The Bill differed from its predecessor in considerable ways such as the method by which a complaint could be made and the establishment of a security panel. The highlight of the Bill was that it opens to floodgates by allowing complaints to file against judges by any citizen. The complaints would be examined by the National Judicial Council, also setup under the Bill, which would pass on the complaint to the investigation or the Inquiry Committee. If the complaint levelled against the judge comprised valid allegations, then the council would be setup by a statutory power which Parliament had granted to a Central Government under the Judges Protection Act, 1985.

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<sup>68</sup> Id. sec. 3(2).

<sup>69</sup> Prashant Bhushan, "A Historic Non-Impeachment"1993, available at [www.judicialraforms.org](http://www.judicialraforms.org) [Access on Dec12, 2012.]

The Law Commission, in its 195th report, made the following observations<sup>70</sup>:

- i. The Bill proposed to set up a National Judicial Council. This was a positive step to ensure the independence of judiciary<sup>71</sup>.
- ii. The Commission suggested that the Chief Justice of India not be included in the ambit of the complaint procedure. This would only hamper the smooth functioning of the entire nation's judiciary<sup>72</sup>.
- iii. The Commission however decided in favour of continuing of complaint filed against the Supreme Court judge who was later elevated to the office of the Chief Justice of India<sup>73</sup>.
- iv. The Commission suggested that the complaint procedure and reference procedure be properly defined and distinguished from each other to avoid equivocal interpretation<sup>74</sup>.
- v. The Commission also clarified, that the procedures of investigation of the complaint or reference by the Judicial Council under the Bill, are constitutionally valid<sup>75</sup>.

Subsequent to the 195th Law Commission Report, a Standing Committee of the Parliament was appointed to look into the efficacy of the Bill. However, views of the Standing Committee were quite contrary to that of the Law Commission. The Committee emphasised on the three issues and advised the Government to reconsider the provisions related to them. These three issues were:

1. Infringement of exclusive right of the Parliament under Article 124.
2. The composition of the National Judicial Council.
3. Allowing any person to make a complaint against a member of the Higher Judiciary<sup>76</sup>.

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<sup>70</sup> 195th Law Commission, Report on Judges Enquiry Bill, p. 341(2005).

<sup>71</sup> Judges Inquiry Bill, clause 3(1) (2005).

<sup>72</sup> Ibid, sec 3(2). p. 365-366.

<sup>73</sup> Ibid. p. 368.

<sup>74</sup> Ibid. p. 367

<sup>75</sup> Ibid.

<sup>76</sup> Parliament Standing Committee, 21st Report on the Judges Inquiry Bill. (2006) p. 19.

The Committee strongly voiced concerns against the circumventing procedure that was laid down the Bill with respect to the impeachment or punishment of judges. It stated the powers of such punishment have been vested with the parliament for a reason and delegation of power was not right. The committee stressed that the Constitutional organs were created in a way to have checks and balances over each other and to introduce a new player in the field would just create more problems than render an effective solution. The Committee also observed that such an open system may lead to a situation where loosing advocates and litigants might prefer lodging complaints against the judges, or this route may be utilised for intimidating the judges trying a particular case thus eroding the independence of judiciary<sup>77</sup>. Even though the Bill has provisions for penalty and punishment for false and frivolous complaints, still the committee felt that there should not be an easy channel of filing complaints directly to the National Judicial Council<sup>78</sup>.

#### **2.2.1.2.3.1. Criticism of Judges Inquiry Bill, 2005**

One of the serious omissions in the Bill was the absence of power to impose ‘minor measure’ under the complaint procedure’ where the judges charges which have been proved, do not warrant removal but amount to ‘deviant or bad behaviour’ which warrant only ‘minor measure’. In such cases, in United Kingdom, Canada and Germany, the judicial council or similar bodies have been empowered to impose a variety of ‘minor measure’ such as:

(1). Issuing advisories (2). Request for retirement, (3). Stoppage of assignment of judicial work for a limited time, (4). Warning and (5). Censure or admonition (Public or Private). ‘Minor measure’ were also advocated in the report of 2001 by the National Commission for the review of the Constitution

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<sup>77</sup> Supra note. 66.

<sup>78</sup> Ibid.

of India headed by former Chief Justice of India Justice M.N. Venkatachaliah<sup>79</sup>.

The United States Act of 1939 was replaced by United States Act of 1980 and this was again replaced by the United States Act of 2002. The 1980 and 2002 statutes of United State contain express provisions for imposing 'minor measure'. So far as removal is concerned, the judicial council for the circuit and the judicial conference of United States may only make recommendations. The United Kingdom Act of 2005 and the Canadian Bye laws issued under the Canadian Act of 1985 and the German Constitution also provide for imposing 'minor measure'<sup>80</sup>.The Bill however, after much deliberation and discussion, lapsed.

#### **2.2.1.2.4. Judges (Declaration of Assets and Liabilities) Bill, 2009**

A practiced and perfect method to weed out corruption in the world has been to follow the money trail. If there has indeed been a case of corruption in any organ, Governmental or Non-governmental, there will be a paper trail which will lead to the money. With right to information law coming into effect with full force, all wings of the Government came under the scanner with respect to discloser of their assets.

At such time, the campaign of judicial accountability and judicial reforms issued and open letter to all High Courts and Supreme Courts to open declare their assets, reasoning that such a move by the judges would be reciprocated by a similar emulation by various other public servants however , this was welcomed only by very few judges.

Subsequently the government introduced the Judges (Declaration of Assets and Liabilities) Bill, 2009. The Bill in principle was ensuring that the judges of both the High Courts and the Supreme Court knew that they were also watched by the democracy. The judges were requiring submitting a list of

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<sup>79</sup> Mona Shukla, 'Judicial Accountability', (2010), Regal Publication, New Delhi, p. 58.

<sup>80</sup> Id. at p. 59.

their assets and liabilities including that of their dependent children with prescribed date<sup>81</sup>.

Any misrepresentation in the declaration would amount to misconduct and the said judge would be dealt with as per law in force<sup>82</sup>. Despite such stringent provision, the entire principle of the Bill was lost when a new clause, section 6, was added to the Bill which stated that:

Notwithstanding anything contained in any other law for the time being enforce, the declaration made by the judge to the complaint authority shall not to made public or disclosed, and shall not be called for or put into question by any citizen, court or authority, and save as provided in subsection (2), no judge subjected to any enquiry or query in relation to the contents of declarations by any person<sup>83</sup>.”

This Bill was never introduced in the Parliament for deliberation and discussion since the house was divided over issue. Thereafter, another controversy emerged with the Supreme Court deciding that the office of the Chief Justice of India was not subject to Right to Information Act and had full immunity. The provision of the Bill 2009, except clause 6, has been incorporated in the Judicial Standard and Accountability Bill 2010.

#### **2.2.1.2.5. Judges (Inquiry) Bill, 2006**

The Bill was introduced in the Lok Sabha on December 2006. The Standing Committee on Personnel, Public Grievances, Law and Justice presented its report to Rajya Sabha on August 2007<sup>84</sup>.

The Judges (Inquiry) Bill, 2006 purports to seeks to establish a National Judicial Council to conduct inquiries into allegation of incapacity or misbehaviour of a judge of Supreme Court and High Court and to regulate such procedure for such investigation, inquiry, proof and for imposing minor

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<sup>81</sup> Judges (Declaration of Assets and Liabilities) Bill, clause 3 (2), (3) and (4) 2009.

<sup>82</sup> Ibid. clause 5.

<sup>83</sup> Ibid. clause 6.

<sup>84</sup> Judges Inquiry Bill, 2006.

measures and for the presentation of an address by Parliament to the President.

Chapter 1 of this Bill is preliminary and section 1 says that this Act may be called the Judges (Inquiry) Bill, 2006. Section 2 deals with definition of chairman, code of conduct, committee, complaint procedure, council, incapacity, investigation, inquiry, judges, misbehaviour, prescribed, reference, procedure and speaker.

Chapter 2 is regarding machinery for preliminary investigations and inquiry. Section 3 deals with establishment of National Judicial Council.

National Judicial Council (NJC) consist of the Chief Justice of India, two Supreme Court judges, and two High Courts Chief Justices to investigate High Courts judges or the Chief Justice of India and four Supreme Court judges to investigate Supreme Court judges. Section 5 deals with the functions of National Judicial Council, which is to investigate and inquire into any matter involving arising from, or connected with any allegation of misbehaviour or incapacity against a judge of the Supreme Court and High Court.

Chapter 3 deals with the complaint procedure. Section 8 of the bill says that any person can make a complaint in writing involving any allegation of misbehaviour or incapacity in respect of a judges to the council. Provided that no complaint can be entertained which is filed before the commencement of this Act. If complaint is found frivolous or vexations or not made in good faith, he would be liable to be punished under section 26 of this bill. Section 9 deals with verification and preliminary investigation of complaints by council. If after preliminary investigation, the council is satisfied that the complaint is frivolous it would dismiss the complaint after recording its reason and communicate same to the complaint.

Chapter 4 says that if notice is given of a motion for presenting an address to the President praying for removal of a judge on the ground of misbehaviour or incapacity:

- a. In the case of a notice given in the House of the People by not less than 100 members of that House.
- b. In case of a notice given in the council of the state, than the speaker or as the case may be the chairman may after consulting such person, as he thinks fit and after considering such materials, if any as may be available to him, either admit the motion or refuse to admit the same.

If the motion referred to in sub section (1) is admitted, the speaker or the chairman shall refer the motion to the council. After this, under section 12 it is for the council to frame charges against the judges. These charges were to be communicated to judge and he would be given opportunity of presenting W.S. of defence.

Chapter 5 deals with the medical examination of the judge.

Chapter 6 deals with procedure for inquiry, i.e. inquiry to be in camera, submission of inquiry report within six months of the receipt of the complaint. According to section 10 of the central government may if requested by the council, appoint an advocate to conduct the case against the judge.

Chapter 7 procedure after conclusion of inquiry if no charges is proved then the complaint shall be dismissed and in case it have been proved and the council is of opinion that the charges proved do not warrant removal of the judge, it may impose all or any of the following measures:

- i. Issuing advisors;
- ii. Issuing warnings;
- iii. Withdrawal of judicial work for limited time including cases already designed;
- iv. Requested that the judge may voluntary retrieve;
- v. Censure or admonition.

Chapter 8 deals with offences and penalties. Clause1 provides that any person who intentionally offers any insult, or causes any interruption, to the council while the council or any of its members is making verification or

conducting any preliminary investigation or inquiry under this act shall be punished with simple imprisonment for a term 6 months, or with fine or both.

Chapter 9 deals with miscellaneous provision. In this section 30 provides for appeal provision to judge. So, finally in section 38 it is mentioned that by this act, the Judges (Inquiry) Act 1968 is hereby repealed.

Judges (Inquiry) Bill, 2006 is based on the premises that judicial independence is one of the basic fundamental of the constitution. Judicial independence and judicial accountability are inseparable. Thus, there is an urgent need of a legislation for establishing a National Judicial Council to look into the allegations of misbehaviour or incapacity of a judge of Supreme Court or of High Court, as the case may be, and to regulate the procedure for such investigation, inquiry and proof in a complaint procedure in addition to the earlier “reference procedure” as contained in Judges (Inquiry) Act, 1968. In a complaint procedure, a complaint can be made by any person to the judicial council against judges of Supreme Court and judges of High Court. This bill also seeks to empower the National Judicial Council for imposing minor measure also<sup>85</sup>.

#### **2.2.1.2.5.1. Judges (Inquiry) Bill, 2006: Key Issues and Analysis**

There are a number of conceptual issues in the bill that need to be addressed. These are following<sup>86</sup>:

- i. Who should be judging the misbehaviour or incapacity of judges;
- ii. Whether an impeachment by Parliament of a judge should be open to appeal;
- iii. What should be the procedure of making complaint against judges and;
- iv. The constitutional validity of the bill.

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<sup>85</sup> Supra note. 79. at p. 64-65.

<sup>86</sup> Ibid.

#### **2.2.1.2.5.2. Criticism of the Bill**

1. The National Judicial Council will be so much flooded that judges will have to abandon their normal judicial work and devote full time to the disposal of complaints<sup>87</sup>.
2. Only judges should become members of the National Judicial Council sitting on the complaint against the judge<sup>88</sup>.
3. The complaint procedure ridicules the reference procedure where a single person would be equated to 100 or 50 MP's in the Lok Sabha and the Rajya Sabha respectively<sup>89</sup>.
4. If the bill is passed, it would allow the entry of politics into the appointment, removal and transfer of judges. This would invariably affect the justice delivery system<sup>90</sup>.
5. If there is an appeal against impeachment, then the very purpose of the bill would be defeated<sup>91</sup>.
6. There are already certain measures like compulsory leave, transfer, withdrawal of work, etc. to ensure discipline among judges. There is a proposal to change the name from "minor measures" to "appropriate measures"<sup>92</sup>.

#### **2.2.1.2.6. Judicial Standard and Accountability Bill, 2010**

On the failure of the Judges Inquiry Bill 2006, no future efforts were made to revise the 1968 Act on Judge's Enquiry which was extremely inadequate for the extent scenario. The Parliament, noticing the declining confidence of people in the organs the Government introduced the Judicial Standard and Accountability Bill 2010. This Bill aimed at filling in gap that had been created with the passing of time since 1968 when the first act was passed. The Bill still awaits the parliament. The Bill of 2010 incorporates

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<sup>87</sup> Ram Jethmalani, a senior advocate and member of parliamentary standing committee on Law and Justice on Tuesday 28th August, 2007. See Also Mona Shukla, *Judicial Accountability: Welfare and Globalization 2010*, Regal Publication, New Delhi, p- 66.

<sup>88</sup> Supra note. 85. p. 66.

<sup>89</sup> Ibid.

<sup>90</sup> Id. at p. 67.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

various changes that were suggested to the 2005 Bill by the 195th Law Commission. An additional positive feature about the Bill of 2010 is that it has clearly defined what the ideal behaviour for a judge ought to be. The Bill extensively talks about the duties and obligations that a judge owes to the judiciary, the legal profession, to the country<sup>93</sup>. The Bill also adopts the restatement of values of judicial life<sup>94</sup>.

The recent years have witnessed a serious debate about the working of our judiciary. The serious charges of corruption, acquisition of assets disproportionate to known sources of income have been levelled against some judges. These kinds of charges raising questions about the integrity and impartiality of our judiciary system obviously damage the pious image of judiciary in the eye of people of India. In fact, judiciary is not only the last bastion for the citizen against state excess, arbitrary behaviour and apathy but also the ultimate guarantor and upholder of the Constitution and democracy<sup>95</sup>.

The Judicial Standards and Accountability Bill will set judicial standards and make judges accountable for their lapses. It will also mandate that judges of the high courts and the Supreme Court declare their assets and liabilities, including those of their spouses and dependants. The Union Cabinet has approved the draft Judicial Standards and Accountability Bill, 2010 that provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities. All these details will be put up on the websites of the Supreme Court and high courts. It will further require judges not to have close ties with any member of the Bar, especially those who practise in the same court.

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<sup>93</sup> Rajya Sabha Debates 3, (2009).

<sup>94</sup> Campaign for Judicial Accountability and Judicial Reforms, Restatement of Value of Judicial Life, (1997).

<sup>95</sup> T. Padma, 'Judicial Standard and Accountability Bill, 2010- A Critique', Supreme Court Journal (2012) p. 8.

The enactment of the Bill will address the growing concerns regarding the need to ensure greater accountability of the higher judiciary by bringing in more transparency, and will further strengthen the credibility and independence of the judiciary, Information and Broadcasting Minister Ambika Soni told reporters after a meeting of the Union Cabinet. The proposed oversight committee will be headed by a former Chief Justice of India and include the attorney general, a Supreme Court judge, a Chief Justice of a High Court and an eminent person nominated by the President<sup>96</sup>.

#### **2.2.1.2.6.1. Significant Points of the Bill**

1. The Bill lays down standards of conduct for the members of the higher judiciary and requires judges to practise universally accepted values of judicial life<sup>97</sup>.
2. Certain activities of judges are prohibited and restrained keeping in view the code of conduct required to be maintained by them, which are mentioned under below<sup>98</sup>:
  - i. No judge shall contest the election to any office of a club, society or other association or hold such elective office except in a society or association connected with law or any court;
  - ii. No judge shall have close association with individual members of the Bar, particularly with those who practice in the same court in which he is a judge;
  - iii. No judge shall permit any member of his family (including spouse, son, daughter, son-in-law or daughter-in-law or any other close relative), who is a member of the Bar, to appear before him or associated in any manner with a cause to be dealt with by him;
  - iv. No judge shall permit any member of his family, who is a member of the Bar, to use the residence in which the judge actually resides or use other facilities provided to the judge, for professional work of such manner;

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<sup>96</sup> Ibid.

<sup>97</sup> Clause3(1) and Schedule of The Judicial Standards and Accountability Bill, 2010.

<sup>98</sup> Ibid. Clause3(2)

- v. No judge shall hear and decide a matter in which a member of his family, or a close relative or a friend is concerned;
  - vi. No judge shall give interview, to the media in relation to of his judgement delivered, or order made, or direction issued, by him, in any case adjudicated by him;
  - vii. No judge shall accept gifts or hospitality except from his relative;
  - viii. No judge shall hear and decide a matter in which a company or society or trust in which he holds or any member of his family holds shares or interest, unless he has disclosed his such holding or interest, and no objection to his hearing and deciding the matter is raised;
  - ix. No judge shall speculate in securities or including in insider trading in securities;
  - x. No judge shall engage, directly or indirectly in trade or business, either himself or in association with any other person;
  - xi. No judge shall hold membership in any organization that practices invidious discrimination on basis of religion or race or caste or sex or place of birth;
  - xii. No judge shall have bias in his judicial work or judgments on basis of religion or race or caste or sex or place of birth;
3. The Bill seeks to make it mandatory for judges to declare their assets and liabilities as well as those of his/her spouse and dependent children. Such declaration has to take place within 30 days of the judge taking his oath to enter his office. Every judge will also have to file an annual report of his assets and liabilities. The assets and liabilities of the judge will be displayed on the website of the court to which he belongs<sup>99</sup>.
4. Authorities under this Bill: The Bill establishes the National Judicial Oversight Committee, the Complaints Scrutiny Panel and an Investigation committee.

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<sup>99</sup> Ibid. Clause (04).

National Judicial Oversight Committee: It will consist of a retired Chief Justice of India as the Chairperson, a judge of the Supreme Court, a Chief Justice of the High Court, the Attorney General for India, and an eminent person appointed by the President. The Oversight Committee shall have supervisory powers regarding investigation into complaints against judges, and also the power to impose minor measures<sup>100</sup>.

Scrutiny Panel: will be constituted in the Supreme Court and every High Court. It shall consist of a former Chief Justice and two sitting judges of that Court. The Panel shall conduct an initial investigation into the merits of a complaint made against a judge. It shall also have the power to report frivolous or vexatious complaints. Persons making or vexatious complaints can be penalized by rigorous imprisonment of up to five years and fine of up to five lakh rupees<sup>101</sup>.

Investigation Committee: will be set up by Oversight Committee to enquire into complaints. The investigation committee will be set up if the Scrutiny Panel recommends that an inquiry should be carried out to investigate a complaint. The Bill does not specify the qualifications of members of the investigation committee, but leaves this to the discretion of the Oversight Committee<sup>102</sup>.

5. The Bill empowers any person making an allegation of misbehaviour or incapacity in respect of a judge may file a complaint in this regard to the Oversight Committee<sup>103</sup>.
6. Under this Bill a motion for removal of a judge on grounds of misbehaviour can also be moved in Parliament. Such a motion will be referred for further enquiry to the Oversight Committee.
7. Under this Bill complaints and inquiries against judges will be confidential and frivolous complaints will be penalised.

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<sup>100</sup> Chapter VI (A) of the Judicial Standards and Accountability Bill, 2010.

<sup>101</sup> Ibid. Chapter V.

<sup>102</sup> Ibid. Chapter VI (B)

<sup>103</sup> Clause 07 of the Judicial Standards and Accountability Bill, 2010

8. Under this Bill the Oversight Committee may issue advisories or warnings to judges, and also recommend their removal to the President.

In a 1993 judgement, the Supreme Court has held that a judge can seek ‘judicial review’ against an order of the President removing him<sup>104</sup>. The Bill does not mention of whether a judge who has been removed from the office has a right to appeal to the Supreme Court.

Therefore, according to this judgement, a judge will have the right to appeal to the Supreme Court to review the order of removal passed by Parliament. The Standing Committee had stated that there should not be any provision for appeal as the finality of a Presidential order should not be challenged<sup>105</sup>.

Law Minister Salman Khurshid said that the Bill seeks to set up a mechanism to enquire into complaints against judges of the Supreme Court or High Courts. It was aimed at striking a “balance” between maximising judicial independence and laying down accountability at the same time for members of the higher judiciary<sup>106</sup>.

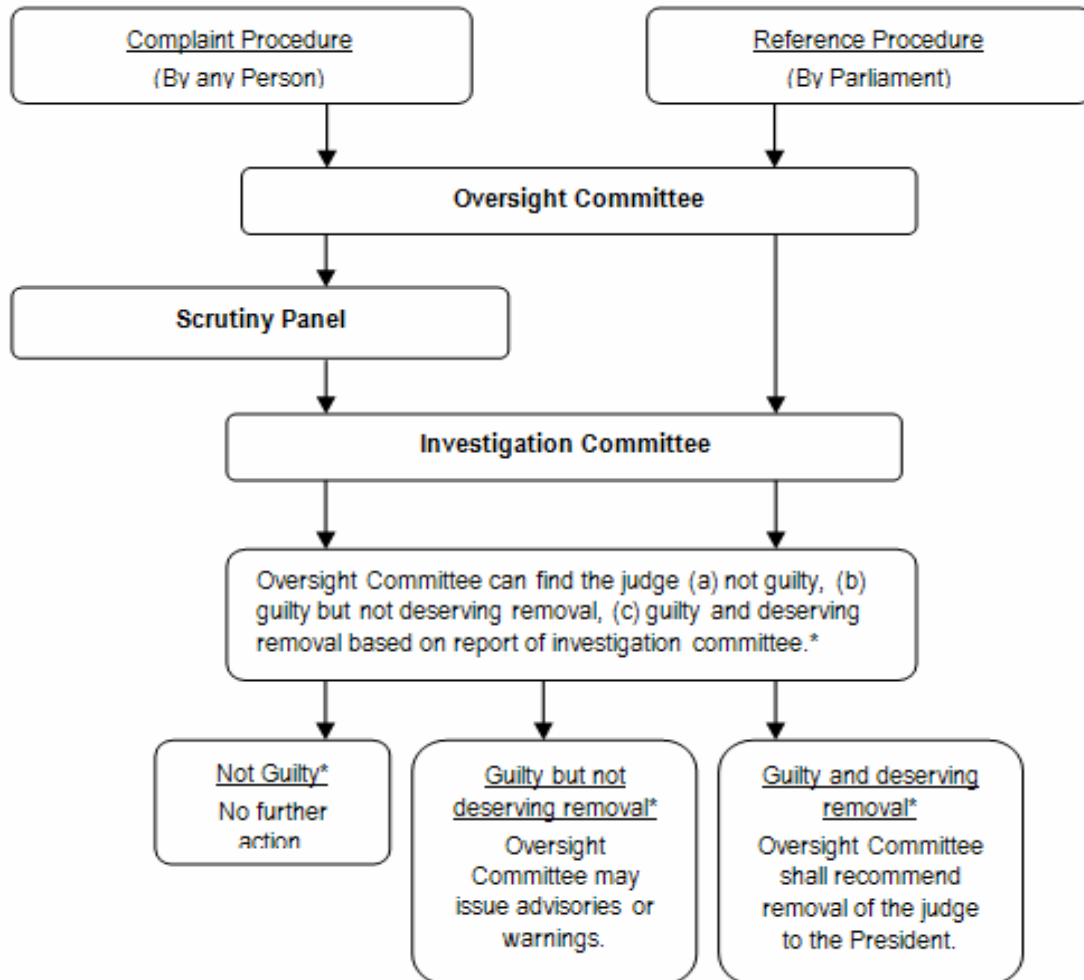
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<sup>104</sup> Sarojini Ramaswamy v. Union of India (1992) 4 SCC 506 (Para 78).

<sup>105</sup> Legislative Brief The Judicial Standards and Accountability Bill, 2010, <http://www.prindia.org/uploads/media/Judicial%20Standard/Final%20Brief%20for%20printing%20%20Judicial%20Standards%20and%20Accountability%20Bill%202010.pdf> [Accessed on 22nd March 2013 at 4:08 PM].

<sup>106</sup> The Hindu, 31st March 2012.

2.2.1.2.6.2. **Figure 1: Procedure of Investigation into a Complaint against a High Court or Supreme Court Judge.**



2.2.1.2.7. **Judicial Appointments Commission Bill, 2014**

The Judicial Appointments Commission Bill, 2013 was introduced in the Rajya Sabha on August 24, 2013 by the Minister of Law and Justice, Mr. Kapil Sibal. The Bill has been introduced in conjunction with the Constitutional (One Hundred and Twentieth Amendment) Bill, 2013, which inserts Article 124A, providing for the setting up of a Judicial Appointments Commission.<sup>107</sup> This Bill has been passed by both Houses of Parliament. This Bill shall now be sent to the states for their approval and on getting approval

<sup>107</sup> Parivarthan, <http://iksa.in/india-ink/judicial-appointments-commission-bill-2013-summary/696/> [Access on 16th APRIL 2014 at 12:36P.M.]

the majority of the states the Bill shall be put before the President for his signature thus the proposed Bill shall become a part of India.

1. The Bill provides for the composition, functions and procedure of the National Judicial Appointments Commission. The Commission is sought to be established for the purpose of recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court, and Chief Justice and other Judges of High Courts.
2. The Bill seeks to enable equal participation of Judiciary and Executive, ensure that the appointments to the higher judiciary are more participatory, transparent and objective.

**2.2.1.2.7.1. Establishment and Composition of Commission**

1. The Commission shall be chaired by the Chief Justice of India and shall comprise of two other senior most judges of the Supreme Court, the Union Minister for Law and Justice and two eminent persons to be nominated by the collegium.
2. The collegium comprises the Prime Minister, the Chief Justice of India and Leader of Opposition of the Lok Sabha. The eminent members will retain membership for a three year period and are not eligible for re nomination.
3. The Secretary to the Government of India in the Department of Justice shall be the convener of the Commission.

**2.2.1.2.7.2. Functions of Commission**

1. The Commission seeks to perform functions that relate to appointment, transfer and quality of candidates.
2. Those include (i) recommending persons for appointment as Chief Justice of India; judges of the Supreme Court, Chief Justices of High Courts and other judges of High Courts; (ii) recommending of transfer of Chief Justices of High Courts and the judges of High Courts, from one High Court to any other High Court; (iii) ensuring that the person recommended is of ability, integrity and standing in the legal profession. The procedure for recommendation with respect to

appointment of High Court judges includes eliciting views of the Governor, Chief Minister and Chief Justice of High Court of the concerned state, in writing. This shall be in accordance with procedure specified by regulations made by the Commission.

**2.2.1.2.7.3. Reference to Commission for filling up of Vacancies**

1. Upon the arising of a vacancy in the High Courts and Supreme Court, references to the Commission shall be made by the Central Government.
2. Intimation of existing vacancies shall be made within a period of three months from the date of coming into force of this Act.
3. In the case of vacancy due to the completion of term, reference shall be made two months prior to the date of occurrence of vacancy.
4. In the case of vacancy due to the death, resignation, reference shall be made within a period of two months from the date of occurrence of vacancy.

**2.2.1.2.7.4. Procedure for Short Listing of Candidates**

1. Process for selection shall be initiated by the Convener, by inviting recommendations from the Chief Justices of High Courts, the Central Government and the State Governments, for candidates fulfilling eligibility criteria.
2. The Commission may make regulations to specify the procedure for short listing of candidates for considering their appointment as Judges to the High Court and Supreme Court.

### **2.2.1.3. Judicial perspective**

According to Article 124 of the Constitution of India, as stated earlier, judges are appointed by the President of India after consultation with the Chief Justice of India and “such of the judges of the Supreme Court and to the High Court’s in the states as the President may deem necessary”. The “consultation” mandate by Article 124 has been subjected to different interpretation of judiciary.

#### **2.2.1.3.1. Cases regarding the Procedure of Appointment in India**

In **S.P. Gupta v. Union of India**<sup>108</sup> the Supreme Court held that the ultimate power of appointment vested in the Central Government. The court specifically stated that while appointing a judge of High Court under Article 217, the opinion of none of the Constitutional functionaries “was entitled to primacy<sup>109</sup>”. The Central Government was to form its own opinion regarding the appointment of any person as a judge after giving due weight to the opinion of constitutional functionaries. While appointing a judge of the Supreme Court under Article 124, the court stated that opinion of the Chief Justice of India was not binding on the Central Government. In 1991 the judgment of **Subhash Sharma v. Union of India**<sup>110</sup>, a three judge Bench expressed the view with regards the word ‘Consultation ‘in Art 124(2) that “the constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence.”<sup>111</sup> The bench suggested that this question be considered by a larger bench.

The Supreme Court referred to the interpretation of the term “consultation in **Union of India v. Sankal Chand Sheth**<sup>112</sup> in which Supreme Court had held that “consultation under Article 222 did not amount to concurrence of the opinion of the Chief Justice of India .The Court also stated

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<sup>108</sup> AIR 1982 SC 149.

<sup>109</sup> Judicial Accountability: An Evolving paradigm, NLIU, special issue Vol. 2 (2). p.11

<sup>110</sup> AIR 1991 SC 631,641.

<sup>111</sup> Ibid. p.640.

<sup>112</sup> AIR 1977 SC 2328.

that Article 222(1) was worded in similar terms to Article 124(2) and 217(1). However the view of the Supreme Court regarding the primacy of the opinion of the executive in matters of appointment of judges was rendered incorrect by it in subsequent decision in **Supreme Court Advocates -on- Record Association v. Union of India**<sup>113</sup>.

The court reasoned that the accountability of the executive in matter of appointment of the judges was a myth whereas the Chief Justice of India and Chief Justice of the High Court, being subject to scrutiny of the bar, would have to face consequences for any improper appointment and were thus accountable for their opinions<sup>114</sup>. Moreover the judiciary was the best suited to assess the candidates<sup>115</sup>. There for the court held that it was the view of judiciary “symbolised by the view of Chief Justice of the India” which is to be given primacy in the matter of appointments.<sup>116</sup> Thus, while appointing a judge of the Supreme Court, the Chief Justice of India was required to form his opinion only after having considered the views of two senior most judges of the Supreme Court<sup>117</sup>.

Supreme Court stated that the appointment of judges was a “participatory consultative process” and the “Constitution purpose would be best served if the decision is made by consensus without the need of giving primacy” to the opinion of any of consultees<sup>118</sup>. The Supreme Court also laid down guide lines that were to be followed during the appointing process. The size of collegium for the appointment of the judges of the Supreme Court was altered to constitute the Chief Justice of India and the four senior most judges of the Supreme Court in Re: Presidential Reference (referred to as the “third judge’s case”)<sup>119</sup>.

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<sup>113</sup> AIR 1994 SC 268.

<sup>114</sup> Ibid. p. 431.

<sup>115</sup> Id. at p. 433.

<sup>116</sup> Id. at p. 434.

<sup>117</sup> Id. at p. 436.

<sup>118</sup> Supra note. 110. p. 442.

<sup>119</sup> AIR 1999 SC at p. 16.

Article 222 of the Indian Constitution empowers the President to transfer a judge from one High Court to another after consulting the Chief Justice of India. In **Sankal Chand Seth's Case**<sup>120</sup> the Supreme Court held that a judges could be transferred under Article 222 only in public interest and there was no requirement of the consent of judges being transferred. Krishna Iyer, J. specially stated that “highest consultation functionaries”, i.e. the president and Chief justice of India have accountability to the nation in such manner<sup>121</sup>. This decision though upheld in the **First Judge case**<sup>122</sup>, was rendered incorrect in the **Second Judges case**<sup>123</sup>, wherein Supreme Court stated that the view of judiciary “symbolised by the view of Chief justice of India” would have primacy in matter of transfer of a judges of the High Courts.

The Supreme Court in the Third judges Cases, added the Chief Justice of the High Court to which a judge was being transferred to the constitutional functionaries required to be consulted by the Chief Justice of India. All these views the Court said that it should be considered by Chief justice of India and four senior most judges of the Supreme Court<sup>124</sup>. The “public interest” requirement was also upheld by the court in **K. Ashok Reddy v. Government of India**<sup>125</sup>.

The Supreme Court stated that the exercise of power of transfer under Article 222 of the constitution is to sub serve a public purpose. Recently doubts have been cast on the validity of the First, Second and Third Judges Case. The Law Commission, in its 214th Report, stated that the Supreme Court has virtually re-written Article 124(2) and Article 217 by these three judgments. It is also stated that the Constitution did not provide for the

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<sup>120</sup> AIR 1977 SC 2328.

<sup>121</sup> Ibid.

<sup>122</sup> AIR 1982 SC 149.

<sup>123</sup> AIR 1994 SC 268.

<sup>124</sup> Supra note. 116.

<sup>125</sup> AIR 1994 SC 1207.

existence of a “Collegium” since no limit of the number of the judges that can be consulted is mentioned within the constitution<sup>126</sup>.

J.S. Varma, J. himself, who wrote the majority decision of the Second Judges Case<sup>127</sup>, has stated that the working of the judgment has given rise to certain question and therefore “some rethinking is necessary”. The concerns mentioned above have been brought forth under a public interest litigation filed by Suraz India Trust where questions such as the constitutional validity of the “Collegium System” have been raised. The petition has been referred for consideration by a larger bench in lieu of a constitutional importance of the issue.

It may be said that the judicial system of our country was the oldest judicial system in the world. Rule of law and accountability were also present in ancient India. The King was subject to the law of his state. The judges were independent and the subject of governed by law. In the ancient India, there were highest standard of any notion of antiquity as regards the ability, learning, integrity, impartiality and independence of the judiciary. Law in the country is now mostly codified and is uniform throughout the country and the objective is now to update reform and bring the law in conformity with the new social conditions prevailing in the country. The Indian legal system provides all the machinery for the expansion and preservation of the law.

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<sup>126</sup> Ibid. at p. 12.

<sup>127</sup> Supra note. 123.



*Judicial Accountability :  
A Survey Of Position  
In Other Countries*

### JUDICIAL ACCOUNTABILITY: A SURVEY OF POSITION IN OTHER COUNTRIES

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#### 3. Introduction

Judiciary of India is an independent organ of the state. It is strongest than many judiciaries of other countries. The Indian judiciary acts like a guardian of the constitution. It also plays a vital role in preserving the democracy and maintaining the rule of law in country. But despite all of these qualities, the judiciary of India has become engulfed in corruption and other evils. Corruption is spreading in judiciary because it is accountable to none and the process of the removal of corrupt judges is very tough. The judges are using their power arbitrarily in the shadow of tough procedure of impeachment and Contempt of Court Act. Appointment of the judges in India has been a matter of debate and controversy because this criteria is not fair and transparent.

But in other countries, like United Kingdom, United States of America and Canada, the appointment and selection of the judges is based on merit through fair and open competition. There is no political interference is present in judiciary. We can say that their appointment and selection method of the judges are fair and transparent and their judges are come in the scope of accountability that is essential for maintaining the rule of law in country. Indian judiciary must be the subject to accountability like others organs. Judicial independence does not mean that the judiciary is excluded from the scope of accountability.

In United Kingdom, the judiciary is accountable, but in a different manner. The reason for this difference is a fundamental feature of their system going to the very heart of our democracy. The difference stems from the need

to ensure that judges are impartial and independent of central and local government and from pressures from the media.

The extent to which the judiciary in England and Wales are accountable, how they are accountable, and why there is a need for judges to be completely independent from companies, and pressure groups while exercising their judicial functions. That need is also reflected in the constitutions of all democratic countries<sup>1</sup>.

Government and other powerful groups, are difficult questions<sup>2</sup>. In this chapter, it is attempted to describe the appointment method and accountability of the judges in some developed countries like United Kingdom, United States of America and Canada.

### **3.1. JUDICIAL ACCOUNTABILITY IN UNITED KINGDOM**

In the U.K. the power of the judiciary is not as great as it is in our constitutional scheme. In the U.K., Parliament is supreme but in our country the Constitution is supreme.

#### **3.1.1. Judicial Appointments Commission of United Kingdom**

Judicial Appointment Commission (JAC) is an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. The selection of candidates for judicial office are based on the merit, through fair and open competition, from the widest range of eligible candidates<sup>3</sup>.

Judicial appointment Commission in United Kingdom was set up on 3 April 2006 for maintaining judicial independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord

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<sup>1</sup>Judicial accountability and independence in UK, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/> [Access on 24th May 2013 at 2:09 P.M.]

<sup>2</sup> Ibid.

<sup>3</sup> About the JAC, <http://jac.judiciary.gov.uk/about-jac/about-jac.htm>. [Access on 2nd Jan 2013 at 3:18 PM]

Chancellor. One reason to establish this commission was also that to make the appointments process clear and more accountable. The major changes was brought about by the Constitutional Reform Act (CRA) 2005, which also reformed the office of Lord Chancellor and established the Lord Chief Justice as head of the judiciary of England and Wales<sup>4</sup>.

The Judicial Appointment Commission is an executive non-departmental public body and it has been sponsored by the Ministry of Justice. The aims and objectives of Judicial Appointment Commission are agreed with the Lord Chancellor<sup>5</sup>.

The appointment of the judges in the higher judiciary of United Kingdom are made by the independent Judicial Appointments Commission on basis of recommendations. Regional representation in appointments is ensured. The appointment procedures are transparent. There is no predominance either of the judiciary or of the executive. There is no 'collegium syndrome', much less any 'kin syndrome'. There is no any political highhandedness. The Judicial Appointment Commission is an independent body which is given the task of selecting candidates for judicial offices in courts and tribunals in England, Wales and also tribunals which have jurisdiction over Scotland and Northern Ireland. There is fair and open competition which ensures assessment of inter se merit. The process of appointment is so lengthy and complex but it is more effective and accountable<sup>6</sup>.

The Constitutional Reform Act 2005 has been amended by the Judicial Appointments Regulations, 2013. Judicial Appointment Commission has 15 members including the Chairman also. Except the three judicial members of this commission, all members are selected through open competition. Apart from the members from judiciary and legal profession, there are also judicial

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<sup>4</sup> Ibid.

<sup>5</sup> Supra Note. 3.

<sup>6</sup> Kaleeswaram Raj, Justice in Judicial Appointments, <http://www.thehindu.com/opinion/lead/justice-in-judicial-appointments/article5587974.ece> [Access on 25 Jan 2014 at 10:00 PM]

officers who are not legally qualified and also eminent persons from the public<sup>7</sup>.

There is a well-designed and systematic selection process for induction of judges at all tribunals and courts including the High Court. It involves the request for vacancy position, advertisement, receipt of applications, shortlisting, references, candidate selection, panel decision, statutory consultation, checks, decisions on selection, submission of report to the Lord Chancellor and finally the procedure for quality assurance which includes review of the progression of the candidates and observation of the interviews and test results. The statutory consultation is a mandatory requirement and integral part of the selection process. When selection process has become finalized, the Judicial Appointment Commission recommends the name of the candidate to the appropriate authority. Judicial Appointment Commission thus selects the Lord Chief Justice, Heads of Division and the Lord Justice of Appeal<sup>8</sup>.

### **3.1.1.1. Selection to Supreme Court**

The Judicial Appointment Commission on its own cannot select justices for the U.K. Supreme Court, according to the sections 25 to 31 and Schedule 8 of the Constitutional Reforms Act 2005 as amended Sections 50 to 52 of the amended Act, describe the minimum benchmark for appointment as justices of the Supreme Court. Experience at the bar is given due importance. The Lord Chancellor should constitute the Selection Commission by addressing a letter to the President of the Court who chairs the Commission. The President should also nominates a senior judge in the United Kingdom, who should not be, however, a Justice of the Supreme Court<sup>9</sup>.

Thus the system in the U.K. inherently guards against the vices of the collegium system. There is a member of JAC from England and Wales, Judicial Appointments Board (JAB) in Scotland and JAC in Northern Ireland.

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<sup>7</sup> Ibid.

<sup>8</sup> Supra note. 6.

<sup>9</sup> Ibid.

Again, and significantly, at least one of the representatives of such a commission should be a layman. Thus the judicial appointment is no more a matter concerning only lawyers or judges. It is meant for the public, for there is no republic without the public.<sup>10</sup>

In the method of appointment to the United Kingdom Supreme Court also there is a mandatory consultation process with a group that includes senior judges in the Supreme Court to the Chancellors of the High Court and the President of the Family Division. Likewise, there should be consultation with the Lord Chancellor, the First Minister in Scotland, the First Minister in Wales and the Secretary of State for Northern Ireland. Thus regional representation is ensured<sup>11</sup>.

The report should be finally submitted to the Lord Chancellor who should again consult with the judges and politicians who are already consulted by the Commission. Only thereafter the Lord Chancellor can recommend the name of the candidate to the Prime Minister who in turn should advise the Queen to issue formal orders of appointment. Consultation in the U.K. does not mean concurrence by the judges as it occurs in India after the Supreme Court judgments in 2nd Judges' case (1993) and the 3rd Judges' case (1998). And it makes a very big difference<sup>12</sup>.

India has now accepted the need for a Judicial Appointments Commission in principle as evident from the cabinet decision on August 23, 2013 that was followed by introduction of a Bill in that direction. But whether the composition of the Committee, with two "eminent jurists", is vulnerable to political intrusion that could jeopardize the independence of the judiciary, is a fundamental question being widely asked. We should restructure the committee by enhancing its democratic character and by ensuring procedural fairness. The report of United States Institute of Peace on judicial appointments and judicial independence said that judicial council "promises

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

to be a happy medium” between the extremes where neither the judges nor the political heads have the final say. A duly constituted commission is capable of reconciling the need for independence with accountability<sup>13</sup>.

### **3.1.2. Judicial Accountability and Independence in United Kingdom**

Everyone is familiar with media reports of a government minister who is forced to resign or dismissed for behaviour which is or is perceived to be inappropriate or for incompetence in the performance of his or her duties. There are also many press headlines which condemn a judge or magistrate, for example for handing down a “soft” sentence, but there are almost none which announce that the judge in question has resigned or has been dismissed as a result of that criticism.

Many may wonder why steps are not taken to dismiss such judges or to force them to resign. Why is it that judges and magistrates appear to be unaccountable in the face of such criticism? Why is it that the way they are treated appears to be different to the treatment of many others, from government ministers and public officials, to the directors and employees of companies<sup>14</sup>?

The truth is that the judiciary is accountable, but in a different manner. The reason for this difference is a fundamental feature of our constitution going to the very heart of our democracy. The difference stems from the need to ensure that judges are impartial and independent of central and local government and from pressures from the media, companies, and pressure groups while exercising their judicial functions. That need is also reflected in the constitutions of all democratic countries<sup>15</sup>.

The extent to which the judiciary in England and Wales are accountable, how they are accountable, and why there is a need for judges to

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<sup>13</sup> Ibid.

<sup>14</sup> Judicial Accountability and Independence in UK, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/> [Access on 24th May 2013 at 2:09 PM].

<sup>15</sup> Ibid.

be completely independent from Government and other powerful groups, are difficult questions<sup>16</sup>.

In England<sup>17</sup> the most senior appointments were identified as appointment to the court of appeal and above and included appointment as deputy High Court judges. These appointments were not advertised and appointments to such posts were by invitation only. By contrast it was necessary to apply in writing to be considered for appointment for all judicial appointment and including the level of circuit judge vacancies, with the exceptions of recorders who were promoted from assistant recorders. Such posts were advertised. This shows that many judicial appointments, especially the most senior ones, were by invitation only and were certainly made without candidates being interviewed. Even though there was a detailed consultation process before any appointment was made. The consultation process is the most controversial and misunderstood part of the judicial appointment system. Some people criticize the consultation process on the basis that it involves ‘secret sounding’<sup>18</sup>.

### **3.1.2.1. Comments**

1. Lord Chancellor and Lord Advocate both seek clarification of the basis of any opinion adverse to any candidate.
2. It is essential that certain judges and members of the profession be consulted automatically. This does not confine the Lord Chancellor or Lord Advocate to the views of sympathetic referees opinion upon candidates but enables them have access to relevant opinions candidates from a variety of people and thereby evaluate the merits of the various candidates<sup>19</sup>.

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<sup>16</sup> Ibid.

<sup>17</sup> See Andrew Hardie, ‘The Judicial Appointment Process in England and Scotland- Recent Development,’ (cited in Cyrus Das and K. Chandra, judges and Judicial Accountability, Universal Law Publishing, New Delhi)

<sup>18</sup> Mona Shukla, “Judicial Accountability: Welfare and Globalization,” (2010) p. 76.

<sup>19</sup> Ibid. p. 77.

The commission is supported by a small secretariat and will conduct a continuing audit of the procedure for judicial appointments. Commission will attend shifts and interview as observed. The commission will also investigate complaints about the way procedures have been applied in individual's cases, provided the complainer has exhausted the feedback procedure offered by the Lord Chancellor's Department<sup>20</sup>.

### **3.2. JUDICIAL ACCOUNTABILITY IN UNITED STATES OF AMERICA**

#### **3.2.1. System of Judicial Appointment in United States of America (USA)**

In the United States, the judges' terms between elections are usually between 6 and 14 years. Most states use elections, but if a vacancy occurs in between electoral cycles, the Governor will appoint a temporary candidate. Very frequently, this candidate then runs for office, so that in practice if not theory the "pure" electoral system resembles those with only retention elections. No matter how they take initial appointment, the overwhelming number of judges run unopposed and are re-elected more or less automatically. This is because it is difficult for the uninformed public to know much about judicial performance and to distinguish one judge from the other. However, the retention election system does allow for removal of judges who are very bad<sup>21</sup>.

There is a good deal of diversity and states change their systems periodically. Even within an individual state the selection process often differs. For example, in New York judges for the Court of Appeals are selected through a nominating commission, serve for 14 years, and then reapply to the nominating commission to compete with other applicants for nomination by the Governor.<sup>22</sup> For the Appellate Division of the Supreme

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<sup>20</sup> Ibid.

<sup>21</sup> <http://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf> [Access on 12th Dec 2013 at 2:23 PM].

<sup>22</sup> Ibid.

Court, the process is merit selection through a nominating commission with an initial term of office of only five years and a subsequent commission review with recommendation for or against reappointment by the governor. The Supreme Court, on the other hand, sits judges through a partisan election for terms of 14 years, while the county courts use partisan elections for ten-year terms<sup>23</sup>.

There is a small set of empirical literature on the effects of different appointment mechanisms on judicial quality, decision-making and accountability in American states. Some believed that systems with judicial elections would allow more women and minorities to become judges. For the most part, studies do not find systematic differences among judges appointed using various mechanisms. There is some evidence, however, that elected judges become more punitive as reelection approaches. This is probably because crime is an issue of great popular salience<sup>24</sup>.

### **3.2.2. Judicial Elections**

The costs of judicial elections are increasing, and can run several million dollars for a Supreme Court seat in some states. This requires judges to raise money for their campaigns, which can lead to politicization of the judges. The donors can include lawyers who then appear before the successful judges. Interest groups are also increasing their contributions to judicial elections. This has led to concern about politicization. Many states responded to this concern by regulating judicial campaigns through codes of judicial ethics. In most states with judicial elections, candidates were prohibited from making statements on cases or issues likely to come before their courts. But these restrictions were challenged before the United States Supreme Court and declared to be unconstitutional limitations on free speech in 2002<sup>25</sup>.

Judicial elections can also lead to instances in which relatively unqualified persons are able to win election because they have more money or

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

name recognition. In one notable case in Washington State, a small town lawyer with very little experience who shared the same name as a popular judge ran for the State Supreme Court and won. He then won re-election twice. This shows that the public may not pay sufficient attention to judicial elections to make it an effective means of ensuring accountability, except in extreme cases<sup>26</sup>.

In summary, electing judges does allow for some accountability, and was originally designed in the United States to ensure that judges were not simply appointed by elite politicians. But over time it has come to be seen as posing risks of politicization of the judiciary. There is no evidence that it leads to a more diverse judiciary. Nor does it lead to more turnover of judges, because of near-automatic re-election. However, in very high profile cases, recall elections have been successfully utilized to ensure that judges remain accountable to the public<sup>27</sup>.

### **3.2.3. The Method of Removing and Disciplining Judges in USA**

Judicial independence and accountability both are must to maintain discipline and in the matter of the removal the judges who have engaged in misconduct. Two other methods are also seen in constitution for the removal of the judges in which one involving some role for parliament and another involving a civil service model of internal discipline<sup>28</sup>.

In United State, the federal judges can be removed only through an impeachment process, which involves a judicial investigation and then a formal process by the legislature in which one house accuses the judge (“impeaches”) and the other house decides whether or not to remove the judge<sup>29</sup>. Complaints about judges are sent initially to the Chief Judge of circuit, then a special committee of judges, the Judicial Conference of the United States, and finally, if appropriate, to the House for impeachment

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

proceedings. This multi-stage process can lead to “encouraged” retirements before the impeachment process, and hence there have only been a handful of impeachment proceedings in US history<sup>30</sup>.

In the civil law tradition, the discipline procedure involves, initially, allegations of misconduct to the head of the court. In the event of a finding of misconduct, the court will forward allegations to the Ministry of Justice, who further investigates the allegation. The actual process of removal is handled by the judicial council. The grounds for removing the judges vary in different systems. Especially, the method of removal is misbehavior or incapacity. Misbehavior can include commission of a crime, serious or repeated violations of codes of judicial ethics, or corruption. The Constitution of United States allows impeachment for treason, bribery, or serious crimes<sup>31</sup>.

### **3.3. JUDICIAL ACCOUNTABILITY IN CANADA**

#### **3.3.1. Judicial Appointments in Canada**

The appointment of superior court judges made by the federal government after wide consultation with the judiciary, the legal community and the community at large. Candidates must have at least 10 years’ experience as a lawyer and most have been practicing law for far longer. Lawyers submit a written application to a screening committee made up of judges, lawyers, government officials and members of the public. These committees assess the candidates and submit a list of those who are considered qualified to be a judge<sup>32</sup>. The federal minister of justice selects a candidate from the list and recommends the person to the federal cabinet, which makes the final decision. The Prime Minister, however, recommends candidates for Chief Justice of a provincial or territorial superior court and all Supreme Court of Canada appointees. The process is conducted in private but, in 2006, a Parliamentary committee convened the first public hearing to

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> How Superior Court Judges are selected, [http://www.cscjja-acjcs.ca/judges\\_selected-en.asp?l=5](http://www.cscjja-acjcs.ca/judges_selected-en.asp?l=5) [Accessed on 12th May 2013 at 4:00 PM]

question an appointee to the Supreme Court of Canada. The qualifications for appointment to a superior court are has been put in section 3 of the Judges Act<sup>33</sup>.

### **3.3.2. Judicial Accountability Judicial Independence in Canada**

Lord Chief Justice Parker once stated that a judge is not supposed to know anything about the facts of life until they have been presented in evidence and explained to him at least three times<sup>34</sup>.

Tom Hurley, a legal personality who graced Canadian court with Irish-Canadian humanity, and humour from the 1920s to the '50s, once said that no one should be a judge who hasn't been thrown out of a beer parlour. Whether there are many judges who actually meet that criteria, or who would be willing to admit such qualification, there can be little doubt that all practical life experience is useful for a judge. It is an invaluable tool which allows judges to understand the disputes before them, to fashion appropriate remedies and to empathize with the litigants<sup>35</sup>.

The duty of all judges is to set aside their personal issues when they decides cases and to give judgment on an impartial assessment of the evidence and legal authority. The quality of the judge is to set aside his or her own views and to give attention carefully on the objectives of disputes. It has been very important than any personal views the judge may hold on the subject. In fact, this is the need because of the essence of judicial accountability.

Judicial independence does not mean that judges are free to use their power as they want. In fact there are many restraints and limitations which are imposed upon the exercise of judicial power. For example, the greatest

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<sup>33</sup> Ibid.

<sup>34</sup> A Compendium of Law and Judges, chapter 4, p. 8.  
<http://www.courts.gov.bc.ca/LegalCompendium>. [Accessed on 4th June 2013 at 4:12 P.M.]

<sup>35</sup> The Role of Judiciary in Canada, [http://www.cscja-acjcs.ca/judges\\_selected-en.asp?l=5](http://www.cscja-acjcs.ca/judges_selected-en.asp?l=5). [24th June 2013 at 1:12 PM]

limitation is the absolute need that all cases should be decided according to the provisions of law and the evidence.

Judges are not free agents who can decide cases arbitrarily without regard to the evidence and the law. While they may not be accountable to public opinion, they are nonetheless accountable to the public interest for independent decision-making based upon established and discernable principles of law. Performing the task properly depends upon a variety of intangible requirements. Intellectual honesty allows a judge to avoid the temptation of finding an easy answer to a difficult problem. Judicial curiosity, kindled by the creativity of counsel, allows the law to grow and develop. The main aim of the judiciary is to protect the rule of law, the Constitution and the Charter so the judges must be fearless in their resolve to make even the most unpopular decisions according to the law, the evidence and good conscience, regardless of media or public disapproval<sup>36</sup>.

### **3.3.3. Judges are Held Accountable and by Whom**

The judges are accountable for their actions and decisions. Hearings, trials and rulings are open to public scrutiny, so justice is seen to be done and citizens and the media have right to discuss and criticize the work of the courts. A judge's ruling can be the subject of appeal to a higher court. A new trial will be ordered or the decision will be corrected if any error is occurred. When the allegation of misconduct is proved against a judge, it can lead to a judge being subject to remedial measures, and in the case of grave instance, the judge can be removed from office<sup>37</sup>.

The Canadian Judicial Council, a body of Chief Justices and Associate Chief Justices from across the country, investigates complaints about the conduct of superior court judges. If the allegations are well-founded, a hearing is held and the council can express its concerns to the judge shown to have acted in an inappropriate or unethical manner. In cases of serious

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<sup>36</sup>Ibid.

<sup>37</sup>Ibid.

misconduct, the council can recommend that the federal government ask Parliament to remove a judge from office. The council can also investigate a complaint that a judge has failed to carry out his or her duties or is unfit or too ill to remain in office and, again, can recommend the judge's dismissal from the bench. Both the House of Commons and Senate must vote in favour of a motion to remove a judge from office. Since 1867 only five Canadian superior court judges have been recommended for removal and all but one resigned to avoid dismissal<sup>38</sup>.

### **3.4. JUDICIAL ACCOUNTABILITY IN INDIA**

#### **3.4.1. Procedure for the Appointment of Judges in India**

121<sup>st</sup> Report of the Law Commission published in 1986 under the chairmanship of Justice D.A. Desai clearly brings out the fact that the executive always had the last word in the appointment of judges and the Supreme Court and the High Courts have been passive observers with little or no say in the matter. Under the Government of India Act, 1919 as also the Government of India Act, 1935, the appointment of the judges to the Federal Court and the High Courts were in the absolute discretion of the Crown or in other words of the executive with no specific provision for consultation with the Chief Justice in the appointment process. It was felt that the independence of judiciary would be seriously eroded if the appointments to the superior judiciary would be left in the sole discretion of the executive. This is why constitution makers inserted the clause regarding 'consultation' with the Chief Justice of India when the appointment is to the Supreme Court and 'consultation' with the Chief Justice of the High Court concerned as well when it is appointment to the High Courts<sup>39</sup>.

Article 124(2)<sup>40</sup> and 217(1)<sup>41</sup> of Constitution of India provide procedure for appointment of the judges in higher judiciary. Article 124(2)

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<sup>38</sup> Ibid.

<sup>39</sup> Subash C. Kashyap, *The Citizen Under Judicial Reforms: Under Indian Polity*, (2003), p. 154.

<sup>40</sup> Art. 124(2) reads: 'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and

talks about two type of consultation. One being discretionary on the part of the President and the other being mandatory under the proviso. He has a wide range of judges of Supreme Court and High Courts to whom he may consult in this regard. He may consult one or ten or none judges for this purpose. But the proviso makes it mandatory that in the matter of appointment of a judge other than Chief Justice of India, the Chief Justice of India shall always be consulted. Under Article 217(1) the process of ‘consultation’ by the President is mandatory and this clause does not speak of any discretionary consultation<sup>42</sup>. In the Constitution of India, the provision for appointment of judges in the Supreme Court and the High Courts contained in Articles 124 and 217 remains the same as originally enacted but need for urgent change is being debated primarily on account of the manner in which the provision is seen to be worked<sup>43</sup>.

In the first 25 years of the Constitution there was no serious comment made in any responsible quarter on the manner of exercise of the power of appointment. A convention had developed that without express use of such language, the opinion of the Chief Justice of India formed in consultation with the executive was given primacy<sup>44</sup>.

The first matter to come up for adjudication was **Sakal Chand v. Union of India**<sup>45</sup> where the court upheld the transfer of the Chief Justice of the Himachal Pradesh. However, a big controversy arose when, the executive began to claim primacy in the matter of appointments and transfers which led

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of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted...

<sup>41</sup> Art. 217(1) reads: ‘Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.

<sup>42</sup> Under article 217(1) the consultation is mandatory on the part of the President because all the three constitutional functionaries viz. the CJI, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the high court shall always be consulted.

<sup>43</sup> J.S. Verma, *The New Universe of Human Rights*, (2004), Universal Law Publishing New Delhi, p.307-308.

<sup>44</sup> *Ibid.* p. 308.

<sup>45</sup> 1978 (1) SCR 423.

to the First judge case **S.P. Gupta v. Union of India**<sup>46</sup> wherein the Supreme Court itself upheld the executive's claim of primacy. That led to executive's supremacy in the matter of appointment as of right which threatened the independence of judiciary. Dissatisfaction with the working of the process led to the Second Judge Case **SCAOR v. Union of India**<sup>47</sup>, wherein the primacy of the opinion of the judiciary expressed through the Chief Justice of India came to be established emphasizing the role of the executive and the judiciary was participatory, the exercise being joint in which both have a role to play. However, recently some dissatisfaction is surfacing to this view also which led to the **Presidential Reference**<sup>48</sup> which reaffirmed the law laid down in the Second Judge Case. There is disquiet even now and a debate is on for the setting up of a National Judicial Commission. This would require amendment of the relevant provisions in the Constitution.

It is significant that Articles 124 and 217 remain as enacted originally but the perception has been changing depending on the manner in which process has been seen to work from time to time. This kind of variation has occurred only because of the attitudinal differences of the men who have worked these provisions at different times. The point to remember is that these provisions assign a participatory role to both the executive and the judiciary and it was expected that the viewpoints of both would be taken into consideration, any confrontation between them would be avoided and both would discharge their role keeping in view the aim of making the best possible appointments from amongst those available to fill these high offices<sup>49</sup>.

#### **3.4.1.1. Appointment of Chief Justice of India**

Article 124 is silent on the appointment of Chief Justice of India. The seat of Chief Justice of India is filled on conventional practice i.e. the senior

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<sup>46</sup> AIR 1982 SC 149.

<sup>47</sup> AIR 1994 SC 268.

<sup>48</sup> Presidential Reference No 1 of 1998 (1998 (5) Scale 629).

<sup>49</sup> Supra note. 35.

most judge of the apex court would become Chief Justice of India. But in the year 1973 the Government suddenly departed from this established practice when Justice A.N. Ray was appointed Chief Justice of India in preference to his senior colleagues, Justices Shelat, Hedge and Grover. Again in 1977 Government appointed Beg J. as the Chief Justice of India, bypassing Khanna J. who was then senior most judge. But, later on Chandrachud J. (who was the senior most judge) was appointed as CJI and the conventional practice was restored<sup>50</sup>.

Articles 124 and 217 of the constitution of India describe the process of appointment of Supreme Court and High Courts judges. The methods for the appointment of the judges seems to be simple and clear, but in practice the procedure of appointments is very tough and has been the subject of controversy and debate between the executive and judiciary.

#### **3.4.1.1.1. Collegium System of Appointing Judges**

In **S.P. Gupta v. Union of India**<sup>51</sup> the majority held that ‘consultation’ does not mean ‘concurrence’ and ruled further that the concept of primacy of the Chief Justice of India is not really to be found in the Constitution. It was held that proposal for appointment to High Courts can emanate from any of the four constitutional functionaries mentioned in Article 217 and not necessarily from the Chief Justice of the High Courts. This decision had the effect of unsettling the balance till then obtaining between the executive and judiciary in the matter of appointment. The balance tilted in favour of the executive. Not only the office of the Chief Justice of India got diminished in importance, the role of judiciary as a whole in the matter of appointments became less and less. After this judgment, certain appointments were made by the Executive over-ruling the advice of the Chief Justice of India. Naturally, this state of affairs developed its own backlash<sup>52</sup>.

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<sup>50</sup> These two instances witnessed that how the executive dominated in the process of appointment of judges, which was more or less a participatory process with the consultation of judiciary.

<sup>51</sup> AIR 1982 SC 149.

<sup>52</sup> National Commission to Review the Working of the Constitution, <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>. [Access on 24th Oct 2012 at 3:02PM].

In 1993, a nine-Judge Constitution Bench of the Supreme Court in **Supreme Court Advocates-on-Record Association v. Union of India**<sup>53</sup> over-ruled the decision in S.P. Gupta. The nine-Judge Bench (with majority of seven) not only overruled S.P. Gupta's case but also devised a specific procedure for appointment of judges of the Supreme Court in the interest of "protecting the integrity and guarding the independence of the judiciary." For the same reason, the primacy of the Chief Justice of India was held to be essential. It held that the recommendation in that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive<sup>54</sup>. Elaborate reasons were recorded in support of the proposition that selection of judges must be in the hands of the judiciary in this country and how the systems prevailing in other countries are alien to our constitutional system. One of the judges relied upon Article 50 of the Constitution which speaks of separation of judiciary and executive and excluded any executive say in the matter of appointment to safeguard the "cherished concept of independence." It held at the same time that it was open to the executive to ask the Chief Justice of India and his two colleagues to reconsider the matter, if they have any objection to the name recommended but if, on such reconsideration, the Chief Justice of India and his two colleagues reiterated the recommendation, the executive was bound to make the appointment. Reaction to this judicial assertion of power have not been uniform<sup>55</sup>.

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<sup>53</sup> 1993 (4) SCC. 441.

<sup>54</sup> Supra note 15.

<sup>55</sup> Lord Templeman, a member of the Jud. Committee of the House of Lords has this to say with respect to this judgment: " – having regard to the earlier experience in India of attempts by the executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary and having regard to the unfortunate results of the appointment of Supreme Court Judges of the United States by the President subject to approval by Congress, the majority decision of the Supreme Court of India in the Advocates-on-Record case marks a welcome assertion of independence of Judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow with advantage". (See the article 'The Supreme Court and the Constitution' by Lord Templeman – published in 'Supreme but not infallible' on the occasion of the Golden Jubilee Celebrations of the Supreme Court.) There is, of course, the other view voiced by Sir Robin Cooke, former Chief Justice of New Zealand, who has in his two articles "Making the Angels weep" (Law

In short, the power of appointment passed into the hands of judiciary and the role of the executive became merely formal. The 1993 decision was reaffirmed in 1998<sup>56</sup> in a unanimous opinion rendered by a nine-Judge Bench of the Supreme Court on a reference being made by the President under Article 143 of the Constitution. All the basic conclusions of the majority in the 1993 decision were reaffirmed. There was, however, some variation. It was held that the recommendation should be made by the Chief Justice of India and his four senior-most colleagues (instead of the Chief Justice of India and his two senior-most colleagues) and further that judges of then Supreme Court hailing from the High Court to which the proposed name comes from must also be consulted. In fact, the Chief Justice of India and his four senior-most colleagues were generally referred to as the ‘Collegium’ for the purpose of appointment of judges to the Supreme Court. So far as the appointment of the Chief Justice of the Supreme Court of India is concerned, both the 1993 decision and the 1998 opinion lay down that the senior-most judge should always be appointed as the Chief Justice of India<sup>57</sup>.

#### **3.4.1.2. The Method for Appointment of High Courts Judges**

The appointment of the judges of the High Courts is slightly different from the procedure of the appointment of judges of the Supreme Court. Article 217 (1) of Constitution of India says that “every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or

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and Justice Vol. I page 109) and “Where Angels far to tread” (published in “Supreme but not infallible” page 97, Edition 2000) criticized the said two judgments. In the first article he said refereeing to the reasoning of the judgment that “when forgoing reasons are placed alongwith ordinary meaning of Consultation, many lawyers and many ordinary readers would probably not see them as adequate to change the meaning of that word to ‘Concurrence’.” He, however, concluded: “However vulnerable in detail it will surely be always seen as a dramatic event in the international history of jurisprudence.” See Also: National Commission to Review the Working of the Constitution, <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>, [Access on 24th Oct 2012 at 3:02P. M.]

<sup>56</sup> 1998 (7) SCC 739.

<sup>57</sup> Supra note. 44.

acting judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years". It is obvious that the appointment is made by the President after consultation with three authorities, namely, the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. (Of course, in the matter of appointment of Chief Justice, the consultation with the Chief Justice is not required).

The decision of the Supreme Court in **S.P. Gupta**<sup>58</sup> on the meaning of 'consultation' applied equally to this Article. After the decision in S.P. Gupta, the executive made quite a few appointments to the High Courts which gave rise to a good amount of dissatisfaction among the relevant sections including the Bar leading to the nine-Judge Constitution Bench decision of the Supreme Court in 1993 aforementioned. The decision laid down that the recommendation for appointment to the High Court shall be made by the Chief Justice of the concerned High Court in consultation with his two senior-most colleagues. The opinion of the Chief Justice of India was given primacy in the matter and was to prevail over that of the Governor of the State or even that of the High Court, if inconsistent with his view. The President was of course to make the formal appointment just as in the case of a judge of the Supreme Court. This position was affirmed in the **Third Judges case**<sup>59</sup>.

### **3.4.2. Judicial Accountability and Judicial Independence in India**

The concept of judicial accountability in India is understood in two ways. First accountability of the higher judiciary in India for their judgments. Secondly, the chapter examines the institutional method of their appointment, removal and the inhibition to criticism of their work by the law of contempt. Judicial accountability in the first sense was very much in question in the first two decades of the Supreme Court's decisions on property and agrarian and economic reforms and the government's view that the Supreme Court was unsympathetic and at times hostile to its legislations on such matter. However

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<sup>58</sup> 1998 (7) SCC 139.

<sup>59</sup> 1998 (7) SCC 139.

after 1973 there has been no such problem as the judiciary changed its direction<sup>60</sup>.

It concerns now were more for the human rights and civil rights of the citizens and community. So regarding this kind of accountability a balance was drawn between judiciary and legislature. Judiciary of India is the most powerful judiciary in the world so the social perception of it is very high. People have faith in the judiciary and to maintain the trust of the people the judiciary must be the subject of accountability. However, accountability mechanism especially in the disciplining of the higher court's judges and the representative character of the court have not matched with its power and esteem<sup>61</sup>.

The period of Indian judiciary may be divided into some phases. These are explained here:

#### **3.4.2.1. Confrontation between the Executive and Judiciary**

In the year of 1950 and 1973 when the court came into repeated challenges of its authority by the government. In 1967 the Supreme Court held in **Golaknath's case**<sup>62</sup> that the parliament had no power to amend any fundamental rights. In 1970 the Supreme Court has invalidated the Bank Nationalized Act 1969 on an interpretation of the amended Article 31 of the constitution designed purposefully by parliament to avoid the justifiability of the amount of compensation for property acquired by the state<sup>63</sup>.

In 1971 national elections, governments made the courts decision an electoral issue and on the mandate of a sweeping victory, it introduced the amendments to the constitution to reassert parliament right to amend every part of the constitution and to make immune any challenge in court to legislation made in pursuance of the directives of state policy in Article 39 (b) and (c) of the constitution. These constitutional amendments came to be

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<sup>60</sup> Supra note. 18. at p.78.

<sup>61</sup> Ibid. p. 79.

<sup>62</sup> Golak Nath I.C. vs. Punjab AIR 1967 SC 1643.

<sup>63</sup> R. C. Kapoor vs. Union of India 1970 3 SCR 530.

challenged before a bench of 13 judges of the Supreme Court in the famous **Keshvananda Bharti case**<sup>64</sup>. The Supreme Court held that parliament cannot exercise its power to damage or destroy the “basic structure” of the constitution.

#### **3.4.2.2. Supersession of three Senior-Most Judges**

The government superseded the three senior-most judges of the Supreme Court in the appointment of the next Chief Justice A.N. Ray of India<sup>65</sup>. This deviation from the seniority rule in such an appointment is considered as an interference with the independence of the judiciary. The supersession of three senior judges was perceived as an attempt of government to have judges committed to their policies and striking at the independence of the judiciary<sup>66</sup>. The practice of appointment of Chief Justice of India on the basis of seniority was criticized by the Law Commission<sup>67</sup>. The commission was viewed that in the appointment of the Chief Justice of India not only the seniority but the administrative ability should be taken into account<sup>68</sup>. In the **S.C. Advocates on Record Association v. Union of India**<sup>69</sup> the Supreme Court has made it clear that the appointment to the office of the Chief Justice of India should be the senior-most judge of the Supreme Court considered fit to hold the office.

#### **3.4.2.3. The Direction is changed by the Supreme Court**

The Keshvananda case held unanimously that the fundamental rights to property was not basic features of the constitution and in that sense the judiciary conceded that it was for parliament to decide what was the extent of property right in the constitution and to determine the nation’s economic policies without the judiciary sitting in judgment over them. In 1978 parliament amended the constitution to delete the right to property and

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<sup>64</sup> Keshvananda Bharti vs. State of Kerala AIR 1973 SC. 1461.

<sup>65</sup> Prof. Kailash Rai, ‘The Constitution of India’, (2000). p. 366.

<sup>66</sup> Supra note. 18. at p. 81.

<sup>67</sup> Law Commission, XIV Report (1958) I. 39-40.

<sup>68</sup> Supra note. 66.

<sup>69</sup> AIR 1994 SC 268.

compensation from the chapter of fundamental rights and make into a simple right to property, which one could deprive of by the authority of law<sup>70</sup>.

With that the confrontation period, between parliament and judge came to an end has never thereafter reappeared in any serious forum. The change of an unaccountable judiciary unsympathetic to the majoritarian policies is now a matter of the past<sup>71</sup>.

#### **3.4.2.4. Period of Emergency and the Independence of Judiciary**

In the duration of emergency 1975 to 1977, it was the Supreme Court of India, which was perceived to have let down the expectations of the people by holding that the detainee did not have even the common law right of securing from the courts his release from an order which was illegal, arbitrary and without the authority of the law, as during the emergency the right to personal freedom guaranteed by the constitution had been suspended<sup>72</sup>. Justice H.R. Khanna was the only one who dissented in the Supreme Court and he earned the cost of it. Government superseded him as the senior most judges when the office of Chief Justice of India became vacant. This made him to resign<sup>73</sup>.

Many judges who gave decision without fear and favour during emergency were victims of the arbitrary transfers from one High Court to another. Additional judges were appointed by the government to the High Courts pending their confirmation on a vacancy occurring during the emergency. Several additional judges in the High Court were denied confirmation or were given extension for short periods<sup>74</sup>.

The suggestions for a National Judicial Commission has been made by the 80<sup>th</sup> report of the Law Commission of India and 121<sup>th</sup> report of the Law Commission of India. A Constitutional Amendment (67<sup>th</sup> amendment) Bill

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<sup>70</sup> Supra note. 18. at p. 81.

<sup>71</sup> Ibid.

<sup>72</sup> ADM Jabalpur v. Shukla AIR 1976 SC 1207.

<sup>73</sup> Supra note. 18. at p. 82.

<sup>74</sup> Ibid.

1990 was formulated by the Ministry of Law and Justice in 1990 for a National Judicial Commission but the Bill lapsed on the dissolution of the Lok Sabha. The desideratum demands a diamond hard constitutional code covering every dimension of judicial performance<sup>75</sup>.

### **3.4.3. Removal of Judges in India**

Article 124(4) of the constitution of India makes it clear that a judge of the Supreme Court cannot 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 present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Proceedings for impeachment of a judge of the Supreme Court are of judicial nature. Abstention from voting in the House on the motion of impeachment against a judge of the Supreme Court cannot be deemed to be vote in support of the motion<sup>75</sup>.

In the case of 1990s, when the Congress was in power, a motion seeking to impeach Justice V Ramaswami could not be passed by parliament as Congress members of parliament abstained from voting. There have been no other attempts at impeachment in India.<sup>76</sup>

### **3.5. Legislative Efforts to Make Judiciary Accountable in India**

In India, the legislature, has passed many Bills for securing the transparency and accountability in the judiciary by enacting legislations.

#### **3.5.1. Restatement of Values of Judicial Life: Code of Conduct.**

The conference of Chief Justices of all High Courts was held on 3rd and 4th December, 1999, where all the Chief Justices unanimously resolved to adopt the “Restatement of Values of Judicial Life”. This would serve as a guide to be observed by the judges, essentially for an independent, strong and respected judiciary in the impartial administration of justice. Some of codes that must be followed are:

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<sup>75</sup> Justice V.R. Krishna Iyer, “Are Judge a Rare Class above Public Servants,” (2008)

- i. A judges should not conduct election to any office of club, society or other associations
- ii. A judge should not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
- iii. A judge should not speculate in shares, stocks or the like.

### **3.5.2. Judges (Inquiry) Act, 1968**

The legislature exercised its power provided under article 124 (5) and enacted the Judges (Inquiry) Act, 1968 (hereinafter as Judges Act). The object of this Act is to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a High Court.

Section 3 of the Judges Act is relevant for this purpose. It provides procedure for investigation into misbehavior or incapacity of judge by Committee:-

1. If notice is given of a motion for presenting an address to the President praying for the removal of a judge signed,-
  - a. in the case of a notice given in the House of the People, by not less than one hundred members of that House;
  - b. in the case of a notice given in the Council of States, by not less than fifty members of that Council; then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or admit the same.
2. If the motion referred to in sub- section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and constitute, as soon as may be, for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom-

- a. one shall be chosen from among the Chief Justices and other Judges of the Supreme Court;
- b. one shall be chosen from among the Chief Justices of the High Courts; and
- c. one shall be a person who is, in the opinion of the Speaker or , as the case may be, the Chairman, a distinguished jurist:

Provided that where notices of a motion referred to in sub- section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted, unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman.

Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

3. The Committee shall frame definite charges against the Judge on the bases of which the investigation is proposed to be held.
4. Such charges together with a statement of the grounds on which each such charge is based shall be communicated to the judge and he shall be given a reasonable opportunity of presenting a written statement of defense within such time as may be specified in this behalf by the Committee.
5. Where it is alleged that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Committee may arrange for the special examination of the judge by such Medical Board as may be appointed for the purpose by the Speaker or, as the case may be, the Chairman or where the Committee is constituted jointly by the speaker and the Chairman, by both of them, for the purpose and the judge shall submit

himself to such medical examination within the time specified in this behalf by the Committee.

6. The Medical Board shall undertake such medical examination of the judge as may be considered necessary and submit a report to the Committee stating therein whether the incapacity is such as to render the Judge unfit to continue in office.
7. If the judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the Committee stating therein the examination which the judge has refused to undergo, and the Committee may, on receipt of such report, presume that the judge suffers from such physical or mental incapacity as is alleged in the motion referred to in submission (1).
8. The committee may, after considering the written statement of the judge and the medical report, if any, amend the charges framed under sub-section (3) and in such case; the judge shall be given a reasonable opportunity of presenting a fresh written statement of defense.
9. The Central Government may, if required by the Speaker or the Chairman, or both, as the case may be, appoint an advocate to conduct the case against the judge.

But the existing Judges Act is criticized for enhancing the role of the judiciary in investigating charges against officers of the higher judiciary. The Committee has given unfettered power to regulate its process. Subsequently, unsuccessful removal process of Justice V. Ramaswami revealed the flaws of the Act. In one line it can be submitted that this piece of legislation is nothing more than the legislative drafting of the existing constitutional framework for removal of judges.

### **3.5.3. Judicial Standards and Accountability Bill 2010**

This Bill has been passed by the Lok Sabha. This Bill will replace the Judges Inquiry Bill 1968. The Judicial Standards and Accountability Bill will set judicial standards and make judges accountable for their lapses. It will also

mandate that judges of the high courts and the Supreme Court declare their assets and liabilities, including those of their spouses and dependents. The Union Cabinet has approved the draft Judicial Standards and Accountability Bill, 2010 that provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities.

All these details will be put up on the websites of the Supreme Court and high courts. It will further require judges not to have close ties with any member of the Bar, especially those who practice in the same court. The proposed oversight committee will be headed by a former Chief Justice of India and include the attorney general, a Supreme Court judge, a chief justice of a high court and an eminent person nominated by the President.

The Bill to replace the Judges Inquiry Act retains its basic features, contemplates setting up of a national oversight committee, to be headed by a former Chief Justice of India, with which the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. At present, there is no legal mechanism for dealing with complaints against judges, who are governed by 'Restatement of Values of Judicial Life,' adopted by the judiciary as a code of conduct without any statutory sanction.

The five-member committee to be appointed by the President will have a serving judge of the Supreme Court and a serving High Court judge, both nominated by the Chief Justice of India; the Attorney-General; and an eminent person nominated by the President.

On receiving a complaint, the committee will forward it to a system of scrutiny panels. In the case of a complaint against a Supreme Court judge, the scrutiny panel will consist of a former Chief Justice of India and two sitting Supreme Court judges, and in the case of a complaint against a High Court judge, the panel will have a former Chief Justice of the High Court and two of

its sitting judges. The members of the Supreme Court panel will be nominated by the Chief Justice of India, and that of the High Court panels by the Chief Justice of the High Court concerned. The scrutiny panels will have the powers of a civil court. For instance, they can call for witnesses and evidence. They will be required to give their report within three months to the oversight committee.

In the case of a complaint against a Chief Justice, the oversight committee itself will conduct the scrutiny. On receiving the report from the scrutiny panels, the oversight committee will set up a committee to further investigate the case.

Like the scrutiny panels, the investigation committee will have the powers of a civil court; it will have the power to frame definite charges. If the charges are not proved, the investigation committee can dismiss the case. Otherwise, it will give a report to the oversight committee, which can issue an advisory or warning or recommend minor punishment if the charges are not too serious. If the charges are serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal.

The Bill mandates that judges should not have close association with individual members of the Bar and not allow any member of their immediate family to appear before them in courts. Judges should not contest any election to any office of club, society or other association, except those associated with the law or any court. Further, they should not have any bias in judicial work or judgments on the basis of religion, race, caste, sex or place of birth.

### **National Judicial Appointment Commission Bill 2014**

National Judicial Appointment Commission Bill and 121st Amendment Bill 2014 has been passed by the Lok Sabha and Rajya Sabha. This Bill shall now be sent to the states for their approval and on getting approval the majority of the states the Bill shall be put before the President for his signature thus the proposed Bill shall become a part of India. The Lok

Sabha passed the Constitutional Amendment Bill to scrap the collegium system of appointing Supreme Court and High Court judges and cleared the National Judicial Appointments Commission Bill 2014 to regulate the procedure.

Parliament has passed the Constitutional 121th amendment bill by full majority formulating a base of as to the appointment of judges of High Courts and Supreme Court. The proposed amendment envisages a procedure for the appointment of the judges through commission. This proposed amendment shall be incorporated as Article 124(a), 124(b) and 124(c) of the Constitution of India. The name of the commission is National Judicial Appointment Commission. The Commission shall consist of six members headed by the Chief Justice of India with two other judges of the Supreme Court as members of the Commission. Law Minister shall also be one of the member of the commission. There shall be two more members of distinguished personalities appointed by the Prime minister with the consultation with the Chief Justice of India.

There is also a provision that two dissenting opinion shall be considered and in such cases that persons shall not be appointed as a judge in whose favour two members do not agree.

Thus the appointment has been made by the full majority of the commission. The President may agree or not agree with the recommendation of the commission. He may send back the name of the recommendies to the commission for reconsideration. However, the President shall be bound to sign on the recommendation of the commission if the commission detoes the same names. As soon as the President puts his signature the appointment of judges shall become final.

The Bill provides for the procedure to be followed by the National Judicial Appointment Commission for recommending persons for appointment as Chief Justice of India and other judges of the Supreme Court, and Chief Justice and other judges of High Courts.

This Bill will pave the way for scrapping the collegium system of appointing Supreme Court and High Court judges. Hope it would bring more transparency in appointment and transfers of the judges in higher judiciary.



*Judiciary, Rule Of Law And  
Democracy : A Conceptual  
Framework*

## CHAPTER- 4

### JUDICIARY, RULE OF LAW AND DEMOCRACY: A CONCEPTUAL FRAMEWORK

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#### 4. Introduction

Supreme Court of India has said that the rule of law is a basic feature of the Constitution which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure. The independence of the judiciary is an essential attribute of the rule of law<sup>1</sup>.”

Democracy is a philosophy for making good governance and recognizing the dignity of the individual. There is no doubt to say that the highest form of political organization that human societies have evolved over the years is democracy. Despite its inherent weaknesses and acquired organizational distortions, the democratic form of government continues to appeal to the popular mind everywhere<sup>2</sup>. The principle of rule of law is the bedrock of democracy, and the implementation of the rule of law is a primary responsibility of the judiciary of India. It has become a basic part of every constitution and it cannot be altered even by the exercise of new powers from Parliament. The process of judicial review is to ensure that democracy is inclusive and that there is accountability of everyone who use or exercises public power.

As Edmund Burke once said that all persons in positions of power ought to be strongly and lawfully impressed with an idea that "they act in trust," and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people<sup>3</sup>". India has parliamentary

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<sup>1</sup> Keshvananda Bharti v. State of Kerela AIR 1973 SC 1461.

<sup>2</sup> The Hindu, Newspaper, 7th December 2013.

<sup>3</sup> Dr M.L. Upadhyay, "Administrative Tribunals : No Alternative Mechanism for Judicial Review", Central India Law Quarterly, Vol. 2 (1989) 433-444; K.I. Vibhute, "Administrative Tribunals and the High Courts : A Plea for Judicial Review", 29 J.I.L.I. (1987) 524-546; J. S. Verma, "Ensuring Accountability and the Rule of Law: the Role of the Judiciary", A speech delivered by him at the

form of democracy, where every section of society is involved in policy-making, and decision taking so that there shall be a fair representation of every section of the people in every such body. The judiciary has vital role in such kind of inclusive democracy. In any republican democracy, the concept of accountability has to be remembered by everybody exercising public power.

#### **4.1. Concept of Rule of Law**

The concept of rule of law is fundamental to all democratic countries and the rule of law is practically as old as philosophy itself. The concept of rule of law has played an important role in the process and development of English legal and political thought. The doctrine of rule of law started evolving more than 2000 years ago, at the time of Aristotle. Aristotle, who saw the rule of law, as superior to the rule of man, to contemporaries like Ronald Dworkin and Judith Shklar, it has been subject of debate through the years. Yet the concept of rule of law remains a conundrum<sup>4</sup>. Aristotle once said that the “rule of law is better than that of any individual”. Lord Chief Justice Coke quoting Bracton said in one case of proclamation<sup>5</sup> that “the King himself ought not to be subject to man, but subject to God and the law, because the law makes him king.”

The term ‘Rule of Law’ is taken from the French phrase ‘la principe de legalite’ which means the ‘principle of legality’. It refers to a government based on principles of law and not of men’. It means that the concept of ‘la principe de legalite’ is opposed to arbitrary powers. It is a legal principle, of general application, which is sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition called a ‘Rule,’ because in doubtful or unforeseen cases it is guide or norm for their decision. The rule of law, sometimes called “the supremacy of law”, provides

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Inaugural Conference of the Asian Center for Democratic Governance titled ‘Making Democracy Work: Accountability & Transparency’( 2001).

<sup>4</sup> Dr. Lokendra Malik, ‘Rule of Law and Human Rights in India’, (2012) p. 89.

<sup>5</sup> (1610) 77 ER 1352.

that decisions should be made by the application of known principles or laws without the intervention of discretion in their application. Rule of law is the supreme manifestation of human civilization and culture. It is an eternal value of constitutionalism and inherent attribute of democracy and good government<sup>6</sup>.

Rule of law is one of the essential components of a good democracy or any form of government. Rule of law entails the absence of any centre of unlimited or arbitrary power in the country. In fact, Rule of law connotes a higher kind of law which is reasonable, just and non-discriminatory<sup>7</sup>. Dicey wrote on the rule of law at the end of golden Victorian era of laissez- faire in England. That's why Dicey's concept of rule of law contemplated the absence of wide power in the hands of government officials. He said that wherever there is discretion there is room for arbitrariness<sup>8</sup>.

According to Dicey, the three principles of rule of law are<sup>9</sup>:-

1. Absence of arbitrary power in the hands of government officials. Discretion implies absence of rules, hence in every exercise of discretion there is room for arbitrariness.
2. Equality before law:
  - a. Absence of any special privileges for a government official or any other person;
  - b. All the person irrespective of status must be subjected to the ordinary courts of the land;
  - c. Everyone should be governed by the rule of law passed by the ordinary legislative organs of the state.
3. Individual liberties: the rights of the people must flow from the customs and traditions of the people recognised by the courts in the administration of justice.

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<sup>6</sup> Dr. I. P. Massey, Administrative Law, (2001), p. 21.

<sup>7</sup> Supra note. 6.

<sup>8</sup> Dicey, "Law of the Constitution," p.198. (See also: Dr. I. P. Massey, Administrative Law, (2001), p. 21.)

<sup>9</sup> Supra Note.6 at p.26

In the case of **Keshvananda Bharti**<sup>10</sup>, the Supreme Court of India held that, rule of law is a part of the basic structure of the constitution. The rule of law is a fundamental component of democratic society and is defined broadly as the principles that all members of society both citizens and rulers are bound by a set of clearly and universally accepted laws<sup>11</sup>.

In a democracy, the rule of law is manifested in an independent judiciary, free press and a system of check and balances on leaders through elections and separation of powers among the branches of government. A written constitution is not necessary component of democracy, for example Great Britain does not have any one and in the United States the rule of law is based preliminary on the U.S. constitution and on the assurance that United States laws in conjunction with the constitution are fair and are applied equally to all members of society<sup>12</sup>.

The machinery of justice in India, amidst all the din and clamour of democracy, has been greatly influenced by rule of law as a transcendental and paramount value, over-seeing the exercise of all powers. The concept of rule of law shares the common English inheritance and apart from the statement of generalities, it embrace a body of specific detail. It is this detail that furnishes the foundation for a pragmatic system of governance. The editor of De Smith explain “that laws as enacted by Parliament be faithfully executed by officials; that orders of court be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard and that power should not be arbitrarily exercised.”<sup>13</sup>

Formal legality’ which assures ‘regularity’ and ‘consistency’ in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression in fact it is this dynamic aspect loosely called by many as ‘substantive’ aspect

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<sup>10</sup> Keshvananda Bharti v. State of Kerala AIR 1973 SC 1461.

<sup>11</sup> See: The Judges Speaks, p. 279

<sup>12</sup> Ibid. at p. 279.

<sup>13</sup> J.S.Verma, ‘New Dimension of Justice’, (2000), p.38.

that makes rule of law so important and an ideal<sup>14</sup>. In **Maneka Gandhi v. Union of India**<sup>15</sup> the Supreme Court of India pointed out that “these fundamental life represents the basic value cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the full extent.”

#### **4.1.1. Constitutional Provisions**

Constitution of India is supreme and the preamble clearly defines the principle of rule of law. It is sometimes said that planning and welfare schemes essentially strike at rule of law because they affect the individual freedoms and liberty in many ways. But rule of law always plays an effective role by emphasizing upon fair play and greater accountability of the administration. It lays greater emphasis upon the, principles of natural justice and the rule of speaking order in administrative process in order to eliminate administrative arbitrariness. The founders of India have enacted the doctrine of rule of law in Article 14. According to Article 14 of the Constitution of India, “the State shall not deny any person equality before the law or the equal protection of law within the territory of India<sup>16</sup>”.

In the case of **E.P. Royappa v. State of Tamil Nadu**<sup>17</sup> the Supreme Court propounded a new dimension to Article 14 of the Constitution as under:

“Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed cabined and confined” within doctrinal traditional limits. From a positive point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. When an act is arbitrary it is implicit in it that it is

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<sup>14</sup> Supra Note. 4. at p.88.

<sup>15</sup> 1978 1 SCC 248, p.277.

<sup>16</sup> [http://persmin.gov.in/otraining/UNDPPProject/undp\\_modules/Administrative%20Law%20N%20DL%20M.pdf](http://persmin.gov.in/otraining/UNDPPProject/undp_modules/Administrative%20Law%20N%20DL%20M.pdf) [Access on 21st Feb 2012 at 16:32 PM]

<sup>17</sup> AIR 1974 4 SCC 3.

unequal both according to political logic and constitutional law and is therefore violative of Art.14 and if it affects any matter relating to public employment, it is also violative of Art. 14 and 16 strike at arbitrariness in state action and ensure fairness and equality of treatment.”

The above provisions were aimed not only at checking, preventing and prohibiting discrimination in public employments, places of worship but also in private domain. Untouchability was abolished, forced labour prohibited and more importantly state was empowered to make special provision for sections of society historically subjected to exploitation in the past<sup>18</sup>.

#### **4.1.2. Indian Democracy and Rule of Law**

India is well-established democratic country. It has been a rememberable journey since independence to adoption of the Constitution on January 26, 1950. The Indian democracy has social, economic, political challenges, including an 18-month long State of emergency, the challenge to its democratic governance persists. The rule of law does not prevail in India. In fact, threats to the rule of law are relentlessly subverting Indian democracy and imperilling its system of governance in the country.

In fact, the social and economic progress gained by democratic countries is directly the result of their vigilant protection and enforcement of the rule of law. The right to equality before the law, often phrased as ‘equal protection of the law’, is fundamental to any just and democratic society. In the eyes of rule of law, rich or poor, majority or minority, etc all are entitled to equal protection before the law<sup>19</sup>.

Abraham Lincoln once stated that in a democratic State, no one is above the law. Democracy is for the people, by the people and of the people, the laws in a democratic set-up are created in the name of the people by the

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<sup>18</sup> Supra Note. 4. at p.88-89

<sup>19</sup> Democracy and Rule of Law, <http://cifo.in/uploads/20103349-Indian-Democracy-and-Rule-of-Law.pdf> [Access on 27th March 2013 at 9:10 PM].

elected representatives of the people. They are not supposed to be imposed upon them. There is an assumption that people of a democracy submit to their laws because they know that they are submitting to themselves, however indirectly, as makers of laws. When the laws passed, the people follow it, then law and democracy prevail.

In the absence of rule of law, the power-holders become corrupt and tyrannical. In a democracy, those who administer the criminal justice system use their power and the potential in wrong sense. The State power is exercised to imprison, seize property, torture, exile and execute individuals without legal justification and even without any formal charges being brought. No State can exist without having the power to maintain order and punish criminal acts. Democratic countries should have the power to punish the wrong-doers but the rules and procedures which have been enforced by the state must be explicit, transparent and open to the public view. Although, no any democratic state is free from secret, arbitrary and manipulative power and political trickery<sup>20</sup>.

There are some needs of due process of law in a democracy that are given below<sup>21</sup>:

1. No one's home can be broken into and searched by the police without a court order showing that there is good cause for such a search. The midnight knock of the secret police is repugnant to democracy.
2. No person can be arrested without manifest, written charges that specify the alleged violation. The accused are entitled to know the exact nature of the charge against them and must be released at once under the doctrine known as habeas corpus, if the court finds the charge and arrest invalid.
3. Persons charged with offence should not be held for protracted periods in prison. They must have the right to a speedy public trial, and to cross-examine their accusers.

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

4. The authorities must grant bail, or conditional release, to the accused pending trial, if there is little likelihood of the suspect to flee or commit other crimes. “Cruel and unusual” punishment, as determined by the traditions and laws of the society, such as community panchayat’s punishing members of their community for violation of their customs, must be prohibited.
5. Persons must not be compelled to be witnesses against themselves. This prohibition must be absolute and the police must not use torture or physical or psychological abuse against suspects. A legal system that bans forced confessions stops the police from using torture, threats, or other forms of abuse to obtain information because the court will not allow such information as evidence during trial.
6. No person shall be subject to double jeopardy; that is, no one be charged with the same offence twice.
7. The so-called ex post facto laws are also proscribed. These are laws made after the fact so that someone can be charged with an offence even though the act was not illegal at the time it was committed.
8. Defendants should have access to additional protections against coercive acts by the State. For example, in the United States the accused have a right to a lawyer who represents them at all stages of a criminal proceeding, even if the accused is not able to pay for such legal service. The police must inform suspects of their rights at the time of their arrest, including the right to have a lawyer and the right to remain silent for avoiding being witness against themselves.

These above efforts have been made to enforce and institutionalize the rule of law in India. But still they have not gained the intended results. The judiciary of India enjoys good reputation at the national and international level for its progressive interpretation of various provisions of the Constitution that has been helpful in promoting the social justice in country. Judicial interpretations have expanded the scope of our fundamental rights as enshrined in the Constitution for public welfare. Supreme Court has also been

a guardian and protector of our democracy and rule of law through public interest litigation. Supreme Court has created new avenues for seeking remedies for violation of human rights. It has accepted public interest litigation petitions and genuinely intervened in the areas of child labour, bonded labour, clean and healthy environment, and women's rights, to cite a few instances of judicial intervention. Such kind of judicial interventions regarding the human rights have been successful in maintaining the rule of law in our country<sup>22</sup>.

But, in view of the vast and unmitigated violations of justice, these judicial achievements simply pale into insignificance. The scale of prevailing inequalities and violations of human and fundamental rights have made the Indian democratic state look like a despotic dispensation. Enforcing the rule of law itself remains a fundamental challenge, leave aside other innumerable crises of the Indian legal system. Due to lack of implementation of laws in our country, we have a vast body of rules that are followed more in their violation than in their observation<sup>23</sup>.

The behaviour of those who govern is highly reprehensible. They have no respect for the laws of the land. Citizens too have ceased to care for the laws and be law-abiding. This lack of respect for laws by the government and the people at large is becoming a most serious threat to Indian democracy. The Indian people is losing their trust and faith from the democratic institutions<sup>24</sup>.

To pass more laws by the Parliament and establishing more institutions is just creating a great confusion in the legal system of the country. Too much laws and increasing number of tribunals, rights commissions are only increasing the role and size of the insensitive bureaucracy in the system of governance. They are developing unjust society that the people now accept as a fact to live with. There is an urgent need for a fundamental re-examination

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

of the approaches that have been adopted to enforce the rule of law and critically examine the effectiveness of Indian democracy

Supremacy of law, according to Dicey, the Englishmen are ruled by the law and the law alone. A man may be punished for a breach of law, but can be punished for nothing else<sup>25</sup>. Equality before law means subjection of all classes to the ordinary law of the land administered by ordinary law court. This means that no one is above law<sup>26</sup>. Predominance of legal spirit means that the source of the right of individual is not the written constitution but the rules as defined and enforced by the courts<sup>27</sup>.

Democracy and the concept of rule of law are inextricably connected with each other. There is need to urgent steps to establish a rule of law society in India, without which our fundamental credentials as a democracy will be seriously undermined.

#### **4.1.3. Rule of Law and Case law**

Indian courts said that rule of law is an “expression to give reality to something which is not readily expressible but which postulates the pervasiveness of the spirit of law throughout the whole range of governmental action”. That is where “Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler.” True enough that “where discretion is absolute man always suffered<sup>28</sup>.” It was suggested in the majority opinion in **Keshvananda Bharti v. State of Kerala**<sup>29</sup> that “rule of law” and “democracy” were amongst the “Basic Structure” of the Indian Constitution not amenable to the amending process under article 368 of the Constitution.

Supreme Court observed in the case of **Chief Settlement Commissioner v. Om Prakash**<sup>30</sup> that “In our Constitution system, the central and most characteristic features is the concept of rule of law which means, the present

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<sup>25</sup> See: Dicey, “The Law and the Constitution”, 1915, p-202.

<sup>26</sup> J.N. Pandey, “The Constitutional Law of India”, 2009, p-74.

<sup>27</sup> Ibid.

<sup>28</sup> Supra note. 13, p. 38

<sup>29</sup> AIR 1973 SC 1461.

<sup>30</sup> AIR 1969 SC 33

context the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court.”

In **A.D.M., Jabalpur v. Shivkant Shukla**,<sup>31</sup> an attempt was made to challenge the detention orders during the Emergency on the ground that it violates the principle of rule of law as the “obligation to act in accordance with the rule of law is a central features of our constitutional system and is a basic features of the constitution”. Though the contention did not succeed and some justice even went on to suggest that during an emergency the emergency provisions themselves constitute the rule of law, yet if the reasoning of all the five opinions is closely read it becomes clear that the contention was accepted, no matter it did not reflect in the final order passed by the court<sup>32</sup>. Therefore, even in the spite of the unfortunate order to the effect that the doors of the court during an emergency are completely shut for the detenus, it is gratifying to note that the concept of rule of law can be used as a legal concept.<sup>33</sup>

In a case of **Supreme Court Advocates on Record Association v. Union of India**<sup>34</sup>, Supreme Court of India reiterated that absence of arbitrariness is one of the essentials of rule of law. The Court observed. “For the rule of law to be realistic there has to be rooms for discretionary authority within the operation of rule of law even though it has to be reduced to the minimum extent necessary for proper, governance, and within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority. In such a situation, the exercise of discretionary authority in its application to individuals, according to proper guidelines and norms, further reduces the

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<sup>31</sup> 1976 2SCC 521: AIR 1976 SC 1207. (Popularly Known as Habeas Carpus Case).

<sup>32</sup> Upendra Baxi, “Developments in Indian Administrative Law” in A.G.Noorani (Ed), p-134, Public Law in India, 1982, See also by the same author, The Indian Supreme Court and Politics 1980).

<sup>33</sup> Supra note. 6. at p.22.

<sup>34</sup> AIR 1994 SC 268 at p.298.

area of discretion, but to that extent discretionary authority has to be given to make the system workable.

In **Indira Nehru Gandhi v. Raj Narain**<sup>35</sup>, in which the Supreme Court invalidated clause (4) of Article 329-A, inserted in the constitution by the Constitution (Thirty-ninth Amendment) Act 1975<sup>36</sup> to immunise the election dispute to the office of the Prime Minister from any kind of judicial review, Khanna and Chandrachud, JJ. held that Article 329-A violated the concept of basic structure<sup>37</sup>. Other justice though did not go to this extent but certainly held that Article 329-A, clause (4) offends the concept of the rule of law. Ray, C.J. held that since the validation of the Prime Minister's election was not applying any law, therefore it offended the rule of law<sup>38</sup>.

According to Mathew, J. clause (4) of Article 329-A offended the rule of law which postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in sphere<sup>39</sup>. Referring to the same constitutional provision, Beg J. observed that the jurisdiction of the Supreme Court to try a case on merits cannot be taken away without injury to the basic postulates of the rule of law and of justice within a politically democratic constitutional structure<sup>40</sup>. A study of Keshvananda, Indira Gandhi and Habeas Carpus cases writes according to Prof. Baxi, "provides a distillation of Indian judicial thought on the conceptions of the rule of law, which has evolved well over a quarter century". References to western theories and thinkers from Dicey onward abound in these opinions; but these occur by way of rhetorical flourishes, masking the typically Indian approaches.<sup>41</sup>

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<sup>35</sup> 1975 Supp SCC 1: AIR 1975 SC 2299

<sup>36</sup> Article 329-A was omitted by the Constitution (Forty-fourth Amendment) Act, 1978.

<sup>37</sup> Supra note.32. at p.134.

<sup>38</sup> 1975 Supp SCC 1, para 59.

<sup>39</sup> Ibid, para 336.

<sup>40</sup> Ibid. para. 623.

<sup>41</sup> Supra note.37.

In the case of **S.G. Jaisinghani v. Union of India and others**<sup>42</sup>, the Supreme Court portrayed the essentials of rule of law in a very lucid manner. It observed: “The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be continued within clearly defined limits. The rule of law from this points of view means that decisions should be made by the application of known principles and rules and, in general such decision should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is antithesis of a decision taken in accordance with the rule of law”.

The Supreme Court has developed some fine principles and developing the new constitutionalism. The Apex Court in **Veena Seth v. State of Bihar**,<sup>43</sup> extended the reach of the rule of law to the poor and the downtrodden, the ignorant and the illiterate, who constitute the bulk of humanity in India, when it ruled that the rule of law does not exist merely for those who have the means to fight for their rights and very often do so for the perpetuation of the status quo, which protects and preserves their dominance and permits them to exploit a large section of the community. The opportunity for this ruling was provided by a letter written by the Free Legal Aid Committee, Hazaribagh, Bihar drawing its attention to unjustified and illegal detention of certain prisoners in jail for almost two or three decades.

In the case of **P. Sambamurthy v. State of A.P.**<sup>44</sup>, Supreme Court stated that Art. 371-D (5) (Proviso) of the constitution clearly violates rule of law which is a basic features and essential feature of the constitution. This provision had authorized the state government of Andhra Pradesh to nullify any decision of the Administrative Services Tribunal. Declaring the provision unconstitutional, the court maintained that it is a basic principle of rule of law

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<sup>42</sup> AIR 1967 SC 1427.

<sup>43</sup> AIR 1983 SC 339.

<sup>44</sup> 1987 1SCC 362.

that the exercise of the power by the executive or by any other authority must not only be conditioned by the constitution but must also be in accordance with law and the power of judicial review as conferred by the constitution with a view ensuring that the law is observed and there is a compliance with requirement of law on the part of executive and other authorities, and it is through the power of judicial review that the rule of law is maintained and every organ of the state is kept within the limits of law. The Supreme Court rightly observed in **Som Raj v. State of Haryana**<sup>45</sup> that the absence of arbitrary power is the first postulate of rule of law upon which whole constitutional edifice is based. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of rule of law.

It is appreciable that the courts are making all concerted efforts to establish a rule of law in society of India by insisting on fairness in every aspect of the exercise of power by the state. Some of the early decisions of the Supreme Court are clear indicators of this trend. In **Sheela Barse v. State of Maharashtra**<sup>46</sup> the court insisted on fairness to women in police lock-up and drafted a code of guidelines for the protection of prisoners in police custody, especially female prisoners. In the case<sup>47</sup> the court secured ‘fairness’ in public employment by holding that reliance on police reports is entirely misplaced in a democratic republic.

Thus the efforts of the courts in legitimizing “due” administrative powers and illegitimizing “undue” powers<sup>48</sup> by operationalizing substantive and procedural norms and standards can be seen as a high benchmark of judicial activism for firmly establishing the concept of rule of law in India.

In the case of **Bashesar Nath v. CIT**<sup>49</sup>, the Supreme Court held that the principle of rule of law is an essential reminder of the guarantee of

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<sup>45</sup> 1990 2 SCC 653, p.658-659.

<sup>46</sup> 1983 2SCC 96: AIR 1983 SC 378.

<sup>47</sup> State of M.P. v. Ramashanker Raghuvanshi 1983 2SCC 145: AIR 1983 SC 374.

<sup>48</sup> M.P. Jain, “Changing Face of Administrative Law in India and Abroad”, 1982, p.3.

<sup>49</sup> Bashesar Nath v. CIT, (1959) Supp 1 SCR 528, 551.

equality. Fundamental Rights guaranteed by our constitution are not absolute because certain restrictions have been imposed on the exercise of the fundamental rights under Article 19.

The term rule of law can be used in two senses: (i). Formalistic sense and (ii). Ideological sense. In the ideological sense. Formalistic sense refers to organised power as opposed to a rule by one man and if used in an ideological sense it refers to the regulation of the relationship of the citizens and the government and in the sense it becomes a concept of varied interest and contents. In its ideological sense the doctrine of rule of law represents an ethical code for exercise of public power in any country. Strategies of this code may differ from society to society depending on the societies needs at any given time, but its basic postulates are universal covering all spaces and time<sup>50</sup>.

These postulates include equality, freedom and accountability. ‘Equality’ is not a mechanical and negative concept but has progressive and positive contents which oblige every government to create conditions social, economic and political where every individual has an equal opportunity to develop his personality to the fullest and to live with dignity<sup>51</sup>. ‘Freedom’ postulates absence of every arbitrary action, free speech, expression and association, personal liberty and many others. These basic rights of any society may be restricted only on the ground that the claims of these freedoms would be better served by such circumscription<sup>52</sup>.

#### **4.2. Rule of Law and Separation of Powers**

Judicial review is very important in the doctrine of separation of powers. Constitution of India has three wings of the state, judiciary, legislature and executive with their functions clearly chalked out in our Constitutions. Article 13 of the constitution of India mandates that the “state shall make no law, which violates, abridges or takes away rights conferred

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<sup>50</sup> Supra Note.6. p.25 (See also: Prof. Baxi’s Introduction to This Book)

<sup>51</sup> Ibid. p.25

<sup>52</sup> Ibid.

under part III'. This implies that both the legislature and judiciary in the spirit of the words can make a law, but under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the legislature<sup>53</sup>.

Article 50 of the Indian Constitution states that the judiciary should be kept separate from the executive. Separation of judiciary is the bed rock of a democracy. It is necessary for the administration of justice. The independence is not only needed in the higher judiciary but also the subordinate judiciary. The Supreme Court in **Kumar Padma Prasad v. Union of India**<sup>54</sup> has stated that independence of the judiciary is a part of the basic structure of the constitution. In the **S.P. Gupta v. Union of India**<sup>55</sup> case the Supreme Court laid down that, it is this concept of independence of the judiciary that keeps the government organs within the limits of the law and protects the citizen against the abuse of power by them; therefore it was essential that the judiciary be kept free from government pressure and influence.

The Second Judge's Case, **Supreme Court Advocates on record v. Union of India**<sup>56</sup>, laid emphasis on the importance of the independence of the judiciary in a democracy. This judgment also recognized that independence of the judiciary was an important part of the basic structure of the constitution and that this concept was essential in order to preserving the rule of law.

The doctrine of 'rule of law' and separation of powers are two of the main essentials of any democracy. For a democracy to be successful it is needed that these two principles be always upheld. There are numerous cases of the executive encroaching onto the judiciary's territory, and of the executive taking a number of arbitrary actions. This goes against the essence of 'Rule of Law'. 'Rule of Law' today envisages controlled power and not

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<sup>53</sup> Lellala Vishwanadham / VSRD Technical & Non-Technical Journal Vol. 3 (6), 2012 p.237.

<sup>54</sup> (1992) 2 SCC 428.

<sup>55</sup> AIR 1982 SC 149.

<sup>56</sup> AIR 1994 SC 268.

arbitrary power. It is the role of the judiciary to ensure that this principle is upheld<sup>57</sup>.

The origin of this principle of rule of law goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial. Locke categorized the powers of the Government into three parts namely: continuous executive power, discontinuous legislative power and federative power. “Continuous executive power” implies the executive and the judicial power, discontinuous legislative power implies the rule making power, federative power” signifies the power regulating the foreign affairs<sup>58</sup>. Legality and judicial independence are not enough to secure rule of law in the broad sense of the term. Broad rule of law involves much more than government under the laws, as it calls for inter alia: separation of powers, elections, representation and decentralisation of some sort<sup>59</sup>.

#### **4.2.1. Montesquieu’s Doctrine**

The French jurist Montesquieu in his book *L. Esprit Des Lois* (Spirit of Laws) published in 1748, for the first time enunciated the principle of separation of powers. That is why he is known as modern exponent of this theory. Montesquieu’s doctrine, in essence, signifies the fact that one person or body of persons should not exercise all the three powers of the Government viz. legislative, executive and judiciary. In other words, each organ should restrict itself to its own sphere and restrain from transgressing the province of the other<sup>60</sup>.

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<sup>57</sup> [http://www.indialawjournal.com/volume1/issue\\_4/article\\_by\\_ravitej.html](http://www.indialawjournal.com/volume1/issue_4/article_by_ravitej.html) [Access on 19th Jan 2013 at 19:55 P.M.]

<sup>58</sup> I.P. Massey, “Administrative Law”, (1970), p. 35.

<sup>59</sup> Jan-Erik Lane, Good Governance: The Two Meanings of “Rule of law”, *International Journal of Politics and Good Governance*, Vol.( 1), No. 1.1, Quarter I (2010), ISSN No. 0976 – 1195 at <http://onlineresearchjournals.com/ijopagg/art/40.pdf> [Access on 16th April 2013 at 9:50PM]

<sup>60</sup> Supra note.58. p.35

### **In the opinion of Montesquieu**

“When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers<sup>61</sup> .

To eradicate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. The decline of separation of powers requires that the functions of legislations, administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the distinct or separate bodies of persons<sup>62</sup> .

#### **4.2.2. Principles of Checks and Balances**

The concept of separation of powers may be traced back to an earlier theory known as the theory of mixed government from which it has been evolved. That theory is of great antiquity and was adurnbrated in the writings of Polybius, a great historian who was captured by the Romans in 167 BC and kept in Rome as a political hostage for 17 years. In his history of Rome, Polybius explained the reasons for the exceptional stability of Roman Government which enabled Rome to establish a worldwide empire. He advanced the theory that the powers of Rome stemmed from her mixed government. Unmixed systems of government that is the three primary forms of government namely, Monarchy, Aristocracy and Democracy were

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<sup>61</sup> Montesquieu, De L“ Espirit des lois”, (1748) quoted in Justice D.D. Basu: Administrative Law, p. 23.

<sup>62</sup> Supra Note.53. at p. 238.

considered by Polybius as inherently unstable and liable to rapid degeneration<sup>63</sup>.

The Roman constitutions counteracted that instability and tendency to degeneration by a happy mixture of principles drawn from all the three primary forms of government. The consuls, the senate and the popular Assemblies exemplified the monarchical, the aristocratic and the democratic principles respectively. The powers of government were distributed between them in such a way that each checked and was checked by the others so that an equipoise or equilibrium was achieved which imparted a remarkable stability to the constitutional structure. It is from the work of Polybius that political theorist in the 17th Century evolved that theory of separation of powers and the closely related theory of checks and balances<sup>64</sup>.

#### **4.2.3. Separation of Powers and Indian Constitution**

Indian constitution is a very well built document. It assigns different roles to all the three wings of government the legislature, executive and the judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping. The judiciary versus the executive or legislative is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point. Justice Mukherjee observed that it does not admit of any serious dispute that the doctrine of separation of powers has strictly speaking no place in the system of government that Indian has at the present day<sup>65</sup>.

The theory of checks and balance has been observed in the Indian Constitution. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus

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<sup>63</sup> Ibid. p.238.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

the Indian constitution has not applied the doctrine of separation of powers in its strictest form<sup>66</sup>.

#### **4.2.4. Constitutional Status of Separation of Powers in other Countries**

##### **4.2.4.1. Constitutional Status of Separation of Powers in United Kingdom**

The famous English Jurist Blackstone supported the doctrine of Montesquieu. According to him, “where ever the right of making and enforcing the law is vested in the same man or in the same body of men there can be no liberty”. During the 17th century in England, Parliament exercised legislative powers. The King exercised executive powers, and the Courts exercised judicial powers, but with the emergence of cabinet system of Government i.e. parliamentary form of Government, the doctrine remains no good. The renowned constitutional Bagehot observed. “The cabinet is a hyphen which joins, buckle which fastens, the legislative part of the state to the executive part of the state<sup>67</sup>.”

According to Wade and Phillips the doctrine of separation of powers implies<sup>68</sup>:

- (i) The same person should not form more than one organ of the Government.
- (ii) One organ of the Government should not exercise the function of other organs of the Government.
- (iii) One organ of the Government should not encroach with the function of the other two organs of the Government.

Now the question is whether this doctrine finds a place in England? In England the King being the executive head also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that same person should not

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<sup>66</sup> Id. at p.239

<sup>67</sup> Tej Bahadur Singh, Principle of Separation of Powers and Concentration of Authority <http://www.ijtr.nic.in/articles/art35.pdf>. p.2 [ Access on 19th July 2014 at 12:01PM]

<sup>68</sup> Ibid. at p.2

form part of more than one organ of the Government<sup>69</sup>. In England House of Commons control the executive. So far as judiciary is concerned, in theory House of Lords is the highest Court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus we can say that doctrine of separation of powers is not an essential feature of British Constitution<sup>70</sup>. Committee has aptly remarked:

“In the British Constitution there is no such thing as the absolute separation of legislative, executive and judicial powers<sup>71</sup>.”

#### **4.2.4.2. Constitutional Status of Separation of Powers in USA**

Generally, it may be said that the doctrine of separation of powers finds a good mention in the Constitution of United States while the Federal Constitution of the United States of America does not expressly provide for the principle of separation of powers. Having reliance on the doctrine of Montesquieu, Madison, the Federalist observed; “The accumulation of all powers legislative, executive and judicial, in the same hands whether of one, a few or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.” The same ideas were expressed by Hamilton in 1788<sup>72</sup>. In American Constitution, the legislative, executive and judicial powers are vested in separate entities<sup>73</sup>.

Section 1 of Article 1 declares: “All legislative powers herein granted shall be vested in a Congress of the United State”.

Section 1 of Article II says: “The executive power shall be vested in a President of the United States of America.”

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<sup>69</sup> Id. at p.2

<sup>70</sup> Ibid.

<sup>71</sup> Ibid. p.3.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

Section 1 of Article III reads: “The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.”

From the above mentioned provisions, it is obvious that the President is the head of the executive in U.S.A. Besides he (President) possesses the power to veto bills<sup>74</sup> passed by the Congress and such bills cannot become law unless they are subsequently passed again by each House, with a two thirds majority. The character of veto power vested in the President is purely legislative. It is true that the power is one of negation only, but the history of its origin shows that even in its qualified form, it is legislative in its nature<sup>75</sup>.

The President also exercises legislative power in making of treaties regarding foreign affairs. As John Marshall said in his great argument of March 7, 1800, in the House of Representative, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations”<sup>76</sup>. The President in his legislative capacity gives information of the state of the Union to the Congress<sup>77</sup>. Likewise the Congress interferes with the powers of President by casting vote on budget. The Budget and Accounting Act, 1921 established the principle and practice of the executive budget, under which the President is responsible for formulating and presenting to Congress a complete and detailed expenditure plan for the following fiscal year<sup>78</sup>.

Congress also plays important role in ratification of treaties, as well as in appointments through its senators. Congress has also judicial powers. Each house may expel its members by a two thirds votes or punish them for “disorderly behaviour”. Congress is the sole judge of the reason for expulsion. Not only this, American judges may be removed from the office only by

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<sup>74</sup> Article 1, Section 7(2) of U.S.A. Constitution.

<sup>75</sup> See: Bernard Schwartz, “American Constitution of Law,” (1955) p. 99.

<sup>76</sup> United States v. Curtiss-Wright Export Corp; 229 U.S. 304,319 (1936).

<sup>77</sup> Article II, Section 2 of Constitution of U.S.A.

<sup>78</sup> See: C. Herman Pritchett, “The American Constitution”. p.163.

impeachment proceedings instituted before the Congress<sup>79</sup>. So far as judicial organ is concerned the Courts have supervisory control over both the Congress and the President, by way of judicial review.

Although, it is true that legislature enacts the law, but it is also true that in dealing with the new problems, where Law is silent, the courts have to create the law. The Chief Justice Hughes's remarks are most pertinent in this connection, as he candidly said that "the Constitution is what the judges say it is"<sup>80</sup>. The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in constitution by American Supreme Court. In this way it can be said that in U.S.A. there is also not any possibility to have a rigid personal separation of powers<sup>81</sup>.

#### **4.2.4.3. Doctrine of Separation of Powers in France**

Under the despotic Rule of Louis XIV (1643-1715) France enjoyed a commanding influence in European affairs. Louis XIV had the same Kingship that James I had tried in vain to induce the English people to accept. It was the thinking of Louis XIV that the subject should obey the King absolutely without asking any question or making any criticism. Because of this capricious behaviour he was known as autocrat ruler<sup>82</sup>.

Montesquieu, the most profound of the political writers of the eighteenth century, being impressed by the thoughts of Locke, propounded his theory of separation of powers, based on British Constitution. He pointed out that the freedom which Englishmen enjoyed was due to the fact that the three powers of the government- legislative, executive and judicial- were not as in France in the same hands. Parliament made the laws, the King executed them,

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<sup>79</sup> Tej Bahadur Singh, "Principle of Separation of Powers and Concentration of Authority", J.T.R.I. Journal (II), Issue (4 & 5) March, 1996. p. 3-4.

<sup>80</sup> Hendel, Charles Evans Hughes and the Supreme Court (1951), II quoted by Bernard Schwartz, 'American Constitutional Law,' (1955) p. 130.

<sup>81</sup> Supra note. 79. at p. 4.

<sup>82</sup> Ibid.

and the courts independent of both, saw that they were observed<sup>83</sup>. He believed that the English would lose their liberties as soon as these powers fell under the control of one person or body of persons. His doctrine of separation of powers was also incorporated in French “Declaration of Rights of Man”. Article 16 of this declaration declares that there could be no constitutional or democratic government without separation of powers, but in practice this attempt has proved unsuccessful.<sup>84</sup>

Though no separation of powers, in the strict sense of the term, exists in United Kingdom and United States of America, yet the curious fact is that this doctrine has attracted the makers of the most modern constitutions, especially during the nineteenth century. Thus in France, the doctrine has produced a situation in which the ordinary courts are precluded from reviewing the validity not only of legislative enactments but even of the actions of the administration. The void has been filled by the establishment of special administrative courts<sup>85</sup>.

#### **4.2.4.4. Separation of Power in India**

The concept of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50 of Constitution of India which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers<sup>86</sup>. Thus principle of separation of powers is not fully accepted in the Indian Constitution. Mukherjee, J. observed in **Ram Jawaya v. State of Punjab**<sup>87</sup>, that “Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently, it can very well be said that our

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Supra note.58. p. 35.

<sup>86</sup> Separation of Powers in India and USA

<http://www.legalservicesindia.com/article/article/separation-of-power-in-india-&-usa-483-1.html>.[

Access on 4th March 2012 at 5:09PM].

<sup>87</sup> AIR 1955 SC 549.

Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.”

In the landmark case of **I.C. Golak Nath v. State of Punjab**<sup>88</sup>, Supreme Court of India held that “the Constitution brings into existence different constitutional entities, namely, the Union, the States and the Union Territories. It creates three major instruments of power, namely, the legislature, the executive and the judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.

In **Indira Nehru Gandhi v. Raj Narain, Ray** Chief Justice<sup>89</sup> also observed “that in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India. Chandrachud J. also observed that the political usefulness of doctrine of separation of power is not widely recognized. No constitution can survive without a conscious adherence to its fine check and balance. The principle of separation of power is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of valour<sup>90</sup>.”

In the landmark case of **Keshvananda Bharti v. State of Kerala**<sup>91</sup> the Supreme Court held that the ordinary legislative powers will be an encroachment on the theory of separation of powers. Nevertheless, Beg, J. added that separation of powers is a part of the basic structure of the constitution. None of the three separate organs of the republic can take over

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<sup>88</sup> AIR 1967 SC 1643.

<sup>89</sup> 1975 Supp SCC 1: AIR 1975 SC 2299.

<sup>90</sup> Separation of Powers in India and USA

<http://www.legalservicesindia.com/article/article/separation-of-power-in-india-&-usa-483-1.html>.[

Access on 4th March 2012 at 5:09PM].

<sup>91</sup> 1973 4 SCC 225: AIR 1973 SC 1461.

the functions assigned to the other. This scheme of the constitution cannot be changed even by resorting to Article 368 of the Constitution<sup>92</sup>.

### **Separation of Powers and the Judiciary**

The separation of powers is the essential feature of federation between the national government and the State governments but it is certain that in any federation there will be dispute about the terms of the division of powers. In a federal Constitution there is division of power between the Centre and the State and there is every possibility of dispute between the Centre and State government so in all such cases there must be a proper agency to settle all these disputes and define the exact sphere of each Government (State) and its respective authority<sup>93</sup>. It is the federal judiciary, more than any other organ of the government that interprets the constitutional document. The judiciary in a federation is therefore, an unavoidable institution to interpret the Constitution and thereby to resolve the dispute that arises between the States<sup>94</sup>.

The principle of division of powers which is a dominant features of the American Constitution, had helped the Supreme Court a great deal in this connection. In Canada, and India the existence of a parliamentary government, which ensures the responsibility of the executive to the legislature, minimizes the possibilities of conflict between the various agencies of the government. However, the position of the federal judiciary in these countries is more or less the same and is similar, to a great extent, to that in the United States regarding constitutional interpretation<sup>95</sup>.

The situation in Canada and India is much different from that of the United States. In these federations the judges of the federal judiciary are appointed by the federal executive as in the U.S. but there is no

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<sup>92</sup> 1975 Supp SCC 1, 61, para 136.

<sup>93</sup> M.V. Pylee, 'Federal Court of India', Vikas Publication House Delhi 1996, p. 11-12.

<sup>94</sup> Judicial Review, [http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09_chapter%202.pdf) [Accessed on 12 Feb 2014 at 5:12 PM]

<sup>95</sup> Supra note. 93. at p. 21.

necessity of an approval by the federal legislature like the power exercised by American Senate. In fact, in these countries there is no chance of a friction between the federal executive and the legislature on this matter, as they have a parliamentary system of government which ensures harmony between the executive and the legislature<sup>96</sup>.

Thus it is clear that in most federations the judiciary becomes the pivot on which the constitutional arrangements of the country turns. Its proper appreciation of this pre-eminent position that Dicey has asserted that “federalism means legalism – the predominance of the judiciary in the Constitution, the prevalence of a spirit of legality among the people<sup>97</sup>.”

#### **4.2.4. Debates of Constituent Assembly on Separation of Powers in India**

In the debates of Constituent Assembly, Prof. K.T. Shah, a member of Constituent Assembly, laid emphasis to insert by amendment a new Article 40-A concerned with doctrine of separation of powers. This proposed Article read that “there shall be complete separation of powers as between the principal organs of the State, viz; the legislative, the executive, and the judicial<sup>98</sup>.” Kazi Syed Karimuddin (a member of Constituent Assembly) was entirely in agreement with the amendment of Prof. K.T. Shah.

Shri K. Hanumanthiya, a member of Constituent Assembly dissented with the proposal of Prof. K.T. Shah. He stated that Drafting Committee has given approval to Parliamentary system of government suitable to this country and Prof. Shah sponsors in his amendment the Presidential executive. He further stated that:

“Instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we completely separate the executive, judiciary and the legislature conflicts are bound to arise between these three departments of government. In any country or in any government, conflicts are suicidal to the

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<sup>96</sup> Ibid. p. 24.

<sup>97</sup> Ibid. p. 26-27.

<sup>98</sup> Constituent Assembly Debates Vol. No. VII (1989), p. 959.

peace and progress of the country... Therefore in a governmental structure it is necessary to have what is called “harmony” and not this three-fold conflict<sup>99</sup>.”

Dr. B.R. Ambedkar, one of the important founder of Indian Constitution, disagreeing with the argument of Prof. K.T. Shah, advocated thus<sup>100</sup>.

“There is no dispute whatsoever that the executive should be separated from the judiciary. With regard to the separation of the executive from the legislature, it is true that such a separation does exist in the Constitution of United States; but many Americans themselves were quite dissatisfied with the rigid separation embodied in the American Constitution between the executive and legislature. There is not slightest doubt in my mind and in the minds of many students of political science, that the work of Parliament is so complicated, so vast that unless and until the members of the legislature receive direct guidance and initiative from the members of the executive, sitting in parliament, it would be very difficult for members of Parliament to carry on the work of the legislature. He personally do not think that there is any very great loss that is likely to occur if we do not adopt the American method of separating the executive from the legislature.”

With the aforesaid observations, the motion to insert a new Article 40-A dealing with the separation of powers was negatived i.e. turned down. In constitution of India, it is cleared that “executive power of the Union shall be vested in the President<sup>101</sup>, and the executive power of the state shall be vested in Governor<sup>102</sup>.” But there is not given any express provision that legislative and judicial powers shall be vested in any person or organ.

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<sup>99</sup> Ibid. p.962.

<sup>100</sup> Ibid. p. 967-968.

<sup>101</sup> Article 53(1) of Indian Constitution.

<sup>102</sup> Article 154(1) of Indian Constitution.

#### 4.2.5. Importance of the Doctrine of Separation of Powers

Thus, the doctrine of separation of power is so rigid. This is why that this doctrine has not been accepted by a large number of countries in the world. The object of doctrine of separation of power is that there should be government of law rather than having will and whims of the official. One important feature is that there should be independence of judiciary i.e. there should be no interference in the work of the judiciary from the side of other organs of the state. The judiciary is the medium through which one can assume the welfare of the state. In the absence of virtue of independence, the power will be concentrated in a single hand and then it would be misused.

Hence the doctrine of separation of power plays a vital role in the creation of a fair government. When judiciary has independence, obviously it will dispense the fair and proper justice. The importance of the above said doctrine can be traced back to as early as 1789 where the Constituent Assembly of France in 1789 was of the view that “there would be nothing like a constitution in the country where the doctrine of separation of power is not accepted<sup>103</sup>”.

It is obvious that that the doctrine of separation of powers has not been accepted in India in its rigid sense. In India, not only there is functional overlapping but there is personnel overlapping also. According to Article 13 of constitution the Supreme Court has power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the constitution or the law passed by the legislature in case of executive actions. The executive can affect the working of the judiciary by making appointments to the office of Chief Justice and other judges.

In **Chandra Mohan v. State of U.P.**<sup>104</sup> Supreme Court held that “the Indian constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the states. But at the time

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<sup>103</sup> Supra Note. 90.

<sup>104</sup> AIR 1966 SC 1987 at p. 1993 (See Also: (See also S.C. Advocates-on-Record Case, AIR 1994 S.C. 268 at p. 272.

the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the power levels would be a mockery.”

The doctrine of separation of powers is accepted in India under the Indian Constitution, executive powers are with the President, legislative powers with Parliament and judicial powers with Judiciary (Supreme Court, High Courts and Subordinate Courts).

The President’s functions and powers are enumerated in the Constitution itself. Parliament is competent to make any law subject to the provisions of the Constitution and there is no other limitation on its legislative power. The judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or by the legislature. The Supreme Court and High Courts are given the power of judicial review and they can declare any law passed by the parliament or the legislature unconstitutional. Taking into account these factors, some jurists are of the opinion that the doctrine of separation of powers has been accepted in the Indian Constitution<sup>105</sup>.

In any country, the judiciary plays the important role of interpreting and applying the law and adjudicating upon controversies between one citizen and the State. In a country with a written Constitution, courts have the additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and keeping all authorities within the constitutional framework. In a federation, the judiciary has another meaningful assignment, namely, to decide controversies between the constituent States inter se, as well as between the Centre and the States<sup>106</sup>.

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<sup>105</sup> Supra note.98.

<sup>106</sup> Ibid.

### **4.3. Rule of Law and Judicial Review**

The meaning of judicial review is the revision of the decree or sentence of an inferior court by a superior court. Under general law, it works through the remedies of appeal/revision and the like, as prescribed by the procedural laws of the land, irrespective of the political system which prevails<sup>107</sup>. Judicial review has, however, a more technical significance in public law, particularly in countries having written Constitutions<sup>108</sup>. In such countries it means that courts have the power of testing the validity of the legislative as well as other governmental actions<sup>109</sup>. The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on one hand and the judiciary on the other hand provides the means by which mistakes committed by one are corrected by the other and vice versa. The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of the statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly<sup>110</sup>.

Three wings of the state are bound by the constitution. The ministers representing the executive, the elected members of Parliament represent the legislature and the higher judiciary (Supreme Court and the High Courts) representing the judiciary. They all have taken oaths as given in the third schedule of the constitution. They all have also take swear to be truth, fair and allegiance to the constitution. When it is said, that the judiciary is the protector of the rule of law and our constitution, it is not implied that the legislature and executives are not equally to guard the constitution. For the development of the country, it is essential that all the three organs like

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<sup>107</sup> Supra note. 94. at p. 73.

<sup>108</sup> Soli. J. Sorabji, "Law & Justice an Anthology", (2003) p. 377-378.

<sup>109</sup> D.D. Basu, Limited Government and Judicial Review, (1972) Sarkar and Sons, Calcutta, p. 275.

<sup>110</sup> Ibid. p.378.

executive, legislature and the judiciary perform their functions in complete harmony.

Judicial review is an essential component of the rule of law, which is a basic feature of the Indian Constitution. The essence of judicial review is a constitutional fundamental. Every state action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by reason of a doubt raised in that behalf, by the courts<sup>111</sup>. Edward S. Corwin stated that that Judicial Review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the State governments, which in the Court's opinion transgresses the Constitution<sup>112</sup>.

This well-established constitutional principle of the existence of the power of judicial review and its need was observed by Chief Justice Marshall in **Marbury v. Madison**<sup>113</sup>. He observed in this case that "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each".

So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law; disregarding the constitution; or conformably to the constitution, disregarding the law; that court must determine which of these conflicting rules governs the case. This is of very essence of judicial duty<sup>114</sup>.

The progress of the society is dependent upon proper application of law to its needs and since the society today realises more than ever before its rights and obligations. The mere existence of a particular piece of beneficial legislation cannot solve the problems of the society at large unless the judges

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<sup>111</sup> Supra note. 99. p.378

<sup>112</sup> Corwin, Edward S., A Constitution of Powers in a Secular State, The Michie Company, USA, 1951, p. 3-4.

<sup>113</sup> 2 L Ed. 60.

<sup>114</sup> Supra Note. 99. p. 379.

interpret and apply the law to ensure its benefit to the right quarters. Initially the court followed a policy of adhering to a narrow doctrine and tended to shy away from development of the law<sup>115</sup>.

In the case of **A.K. Gopalan v. State of Madras**<sup>116</sup> the Supreme Court placed a rather narrow and restrictive interpretation upon Article 21 of the Constitution. Supreme Court held in that case that "the procedure established by law" means procedure established by a law made by the State" and the court refused to infuse in that procedure the principles of natural justice. The court also arrived at the conclusion that article 21 excluded enjoyment of the freedoms guaranteed under the Article 19. Gopalan's case<sup>117</sup> was decided soon after the Constitution came into force, more than 49 years ago. The judgment was mainly based on the language of the Constitution and the requirements of the particular case before the court. The law has not remained static. The doctrine of exclusivity of fundamental rights as evolved in Gopalan's case was thrown overboard by the same Supreme Court, about two decades later in **Bank Nationalisation case**<sup>118</sup>, and four years later in 1974, in **Haradhan Saha's**<sup>119</sup> case, the Supreme Court judged the constitutionality of preventive detention with reference to Article 19 also. Twenty eight years after the judgment in **Gopalan's case**<sup>120</sup> in 1978, the Supreme Court in **Maneka Gandhi's v. Union of India case**<sup>121</sup>, pronounced that the procedure contemplated by Article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

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<sup>115</sup> Ibid. p.380.

<sup>116</sup> AIR 1950 SC 27.

<sup>117</sup> Supra Note. 98.

<sup>118</sup> Rustom kavasjee Cooper v. Union of India, AIR 1970 SC 564.

<sup>119</sup> Haradhan Saha v. State of West Bengal AIR 1974 SC 2154.

<sup>120</sup> Supra Note. 106.

<sup>121</sup> AIR 1978 SC 597.

The court attempts to give such interpretation to the impugned statute so that it may be held constitutional<sup>122</sup>. The Constitution of Canada does not contain any express provision for judicial review but it has become an integral part of the constitutional process.

The doctrine of judicial review is an integral part of the American judicial and constitutional process although the U.S. Constitution does not explicitly mention the same in any provision. The power of the Courts to interpret the Constitution and to secure its supremacy is inherent in any constitution which provides government by defined and limited powers<sup>123</sup>. Madison explained, “A Constitution can be preserved in practice in no other way than through the medium of the courts of justice”. Whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular freedoms or liberties or privilege amount to nothing<sup>124</sup>.

Montesquieu’s theory of separation of power put a curb on absolute and uncontrollable power in any one organ of the government. It is by balancing each of these two powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in the Constitution<sup>125</sup>. Thus the basis of Judicial Review found in the ‘limited government’ to promote constitutionalism and to maintain rule of law<sup>126</sup>.

#### **4.4. Rule of law and Accountability of the Indian Judiciary**

The judiciary of India have gained public confidence in their favour in discharging their constitution functions through their revolutionary judgment in the way of social justice. The Indian judiciary has gained respect from the people of this country simply because of the executive and legislature has

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<sup>122</sup> Jain, M.P., op. cit., p. 830.

<sup>123</sup> Supra note. 94. at p. 75.

<sup>124</sup> Jitendra Pandey, Jitendra and R.K. Dubey, ‘Civil liberty under Indian Constitution’,(1992) Deep & Deep Publication, Delhi, p. 32.

<sup>125</sup> J.N. Pandey, op. cit., p. 61.

<sup>126</sup> Supra note. 94. at p. 75.

been failure in performing their functions. Judiciary has been impartial. The judiciary of India has gained confidence due to its independence, integrity. Impartiality, and independence are the ornaments of the judiciary in every country. To keep the faith of people in judiciary the judges follow the standard code of conduct. Actually it becomes need of the present that the judges should be impartial and accountable to the society at large.

Justice Sawant has held in one case that our legal system provides for internal and external checks and limits of the law. Accountability to the rule of law, in its most basic form aims at structuring and placing certain limits on governmental action. Time-tested constitutional mandates of separation of powers, checks and balances, independent constitutional review and an independent judiciary provide the institutional basis for judges to find and articulate laws independently<sup>127</sup>.

The most disputed violation relating to rule of law occurs where in state action conflicts directly with individual rights. Especially when a, wide range of discretionary powers are conferred on the executive, and it exercises powers not under its legal jurisdiction. The simple proposition that a public authority may not act outside its powers forms the formalistic basis of administrative law. Within it lies the core principle of Ultra Vires. It is also essential to note that any administrative act which is Ultra Vires is void in law i.e. deprived of legal effect<sup>128</sup>.

In a democratic set up, the rule of law is the primary object of the judiciary. Political accountability is the responsibility of the legislature due to election and periodical return to the people. Executive is liable in parliamentary democracy to the legislature ministers being the members of the executive are answerable to the Lok Sabha. The judiciary, a creature of the constitution as an only self-restraint. It does not have any full pledged mechanism of the accountability. The constitution does not provide for

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<sup>127</sup> Rule of Law, [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) [Access on 7th March 2013 at 5:42PM]  
<sup>128</sup> Ibid.

accountability of the judiciary. It has been observed by the Justice Verma that independence of the judiciary is the key of the accountability. Justice Verma narrates that judicial independence means independence from your own infirmities<sup>129</sup>.

To maintain the people's trust in the judiciary of India and for the preserving of rule of law there is urgent need to take some remedial measures. It is appreciable that the government of India has adopted various measures to introduce reforms in the judiciary. "The Judges Standards and Accountability Bill" 2010 which would make the judiciary more accountable, has been passed by the Lok Sabha but still it is pending in Rajya Sabha. This law would reassure the people that the Indian judiciary is above board. To bring the changes in present collegium system of appointing of judges the Lok Sabha and Rajya Sabha passed National Judicial Appointment Commission Bill 2014. This Bill will scrap the collegium system of appointing Supreme Court and High Courts judges. Hope it would bring more transparency in appointment and transfers of the judges in higher judiciary. Simultaneously, the Indian government proposes to set up Gram Nyayalayas (village courts) under the Gram Nyayalayas Act of 2008 to make justice available to the rural population in their villages<sup>130</sup>.

These reforms would ensure a speedier justice delivery system and would also reassure the people all over the world that the Indian judicial system is independent, impartial and upholds the rule of law. Rather, this is the only pillar of the Indian democracy in which not only all Indians, but also all multinational businesses that are carrying on industrial and business activities in India, have full faith and confidence<sup>131</sup>.

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<sup>129</sup> A.S. Anand, "Indian Judiciary and challenges of 21st century, Indian Journal of Public Administration, July-September (1999), p. 287-288.

<sup>130</sup> Prof. Rajiv Khanna, "The Judiciary: A Pillar of Indian Democracy. In Direct Need of Reform" <http://www.biztechreport.com/story/443-judiciary-pillar-indian-democracy-dire-need-reform> [Access on 16th April 2013 at 8:54 P.M.]

<sup>131</sup> Ibid.



# *Judicial Independence And Judicial Accountability*

## CHAPTER 5

# JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

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### 5. Introduction

“No Courts decision should be a hostage to the times, prompted by current political, economic or other motives<sup>1</sup>”.

“Let the Heaven fall- but justice must be done”. Judiciary is not weak, nor the people at large so spineless that the arrogant empty threats of temporarily elected executive and legislature can deflect the judiciary from its path of constitutional resituated and duty<sup>2</sup>”.

The independence of judiciary plays vital role in controlling the arbitrary act of the administration. It is also necessary in maintaining the rule of law and fair judicial administration in the country<sup>3</sup>. The virtue of judicial system depends upon its independence maintaining human rights and civil liberties. In the absence of independence of judiciary the rights and liberties shall have no meaning. They shall be reduced to the level of no more than ornamental show-pieces. A constitution which has no provision to enforce the rights in true spirit is no constitution at all. There should be enough provisions in the constitution of the country that the judges work independently and protect the rights of the citizens. In fact, the judiciary is tested at the time of abnormal conditions in the country. Judicial process is not to achieve political objectives. In case of abnormal circumstance in a country, the functioning of the judiciary itself rests on trial. The judges are expected to maintain and dispense justice with fairness, independence and without any fear, so that the confidence of the people is not shaken.

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<sup>1</sup> Valdimir Terebilov, Chief Justice, USSR Supreme Court

<sup>2</sup> J. Rajindra Sachar, Judicial Power No Tinkering Please (cited in Lawyer's update, Vol. XIV, Part 4, April 2008)

<sup>3</sup> Prof. Rai Kailash, 'The Constitution Law of India', (2000), p. 359.

Professor Laski was of the view that the judiciary of a state may be defined as that body of officials whose work consists in the resolution of complaints, whether between subject and subject, or between state and subject that the laws of the state have been a matter of fairly common agreement among thinkers that the judicial powers should be regarded in its nature and even more in the persons who administer it as separate from other aspects of political authority<sup>4</sup>.

"Independence" literally means the absence of dependence, which is to say complete autonomy and insusceptibility to external guidance, influence, or control<sup>5</sup>. The Judicial independence has always been an integral part of democracy, with intent to shield the judicial process from external affairs or influences and to widen the full legal protection to all individuals going to court for whatever reason. Courts are always expected to act as protectors of the law, who independently perform their judicial functions without any external or individual interference. Such interference usually comes from executive and legislative officials, political parties, the military, paramilitary and the judicial hierarchy itself.

This object of this chapter is to give an overview of the issues surrounding judicial independence and its accountability on the basis of analysis with reference to Indian Constitution. The permanent questions to be dealt with in this study are – whether Indian judiciary is independent? Whether the Independence of judiciary is covered by the Constitutional Provisions? What is the meaning of independence of judiciary and to what extent? How the independence of judiciary in India is working? Whether it is successfully working or facing any problems or crisis? If so what is the remedy to be suggested<sup>6</sup>?

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<sup>4</sup> Laski, H.J., 'Judiciary in E.R.A. Seligman (ed.) Encyclopedia of Social Sciences (New York: Macmillan: Co.,1962), Vol. VII, p. 464. See also Mans Chakrabarty, Judicial Behaviour and Decision-Making of the Supreme Court of India, p.1

<sup>5</sup> The American Heritage Dictionary 654 (2d Coll. ed. 1982). See also: Charles G. Geyh, "Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts" Indiana Law Journal (2003) Vol. 78 p. 159.

<sup>6</sup> Statement of the Problem in Independence of Judiciary

The power of independence has been guaranteed by the Constitution to the Indian judiciary and in almost all countries to exercise their work without any legislative or executive interference. The judiciary becomes more active in the preparation of the judicial budget, but it still lacks adequate funds for proper performance. There is also a lack of adequate respect and support from other branches and, in some transitional countries, a lack of public confidence in the judiciary. Judges in many countries now enjoy life tenure or a relatively long term of office and have gained a higher status. They may also enjoy a higher salary, although generally judicial remuneration is not adequate. Because of this, courts are not able to hire well-qualified lawyers. More dangerously, there is widespread judicial corruption in many countries<sup>7</sup>.

### **5.1. Meaning of Independence of Judiciary**

The definition of independence of judiciary was evolved by the International Commission of Jurists in 1981 and it is formulated as Article 2 of the Syracuse Draft Principles. This concept was also discussed in the 19th Biennial Conference of the International Bar Association held at New Delhi in 1982 where the Draft paper of Dr. Shimon was adopted as the Delhi Minimum Standards of Judicial Independence<sup>8</sup>.

The independence of judiciary is the sine qua non for the very existence of democracy. Judicial independence' assumes large importance and is a matter of deep concern in many countries. It means that judges can decide cases in environment free from fear and threats<sup>9</sup>. After attaining independence, the people of India have adopted and chosen for themselves a democratic form of government. Like any other democratic polity, the Constitution of India has three organs, viz. legislature, executive and

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<http://llmprojects.blogspot.in/2012/11/statement-of-problem-in-law.html> [Accessed on 25 Feb 2013 at 6:16 PM].

<sup>7</sup>Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, Luu Tien Dung, (2003) p. 3.

<sup>8</sup>Supra Note. 6.

<sup>9</sup>Dr. Bhure Lal "Judicial Activism and Accountability" (2004), Sidharth Publications, New Delhi. p. 111.

judiciary. The constitution divides the power amongst these three wings and makes them independent of each other, yet creating a system of check and balances. The role assigned to the judiciary is of utmost importance. The organ is vested with the duty to uphold the constitution and guarantee that the rule of law envisaged in our constitution will always prevail<sup>10</sup>.

The Preamble to the Constitution enshrines the ideals of securing social, economic and political justice to all its citizens. Justice, failed to be meted out in a fair manner, jeopardizes the interests of the civil society, vitiating the principle of rule of law. An independent judiciary can be stated to be the cornerstone of a democracy<sup>11</sup>.

The Constitution of India operates in happy harmony with the instrumentalities of the executive and the legislature. But to be truly great, the judiciary exercising democratic power must enjoy independence of a high order. But independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability; without these, the robes may prove arrogant.

In order to ensure that the judiciary is able to discharge this onerous responsibility, the concept of independence of judiciary was framed in the Constitution as one of its basic structures, tinkering with which is a taboo. The concept of independence of judiciary was the cause of concern to the Supreme Court in the case of **S. P. Gupta**<sup>12</sup>, and the court observed thus: - “The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity”.

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<sup>10</sup> V.R. Krishna Iyer, Judicial appointments & disappointments, *The Hindu*, Saturday, August 18, 2012.

<sup>11</sup> It is a part of the basic structure of the Constitution of India: see generally *All India Judge’s Association v. Union of India* (2002) 4 SCC 247; *S.C. Advocates –on- Record v. Union of India* AIR 1994 SC 268, 421; *S.P. Gupta v. Union of India* AIR 1982 SC 149,197,198; *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261,301; *Kumar Padma Prasad v. Union of India* AIR 1992 SC 1213, 1232.

<sup>12</sup> *S. P. Gupta v. Union of India* [1981 (Suppl.) SCC 87]

However, this does not mean that judges are not accountable. First, judges are bound by the rule of law. They must decide cases in accordance with the evidence before them and the law. With the exception of the highest appellate level, the judgments of all trial courts and appellate courts as well as the manner in which the proceedings have been conducted by them are subject of appeal and, if warranted, correction or modification by the court of appeal<sup>13</sup>.

Aspects of security of tenure and of immunity may be viewed by some as unnecessarily limiting accountability on the part of judges. Nevertheless, such autonomy is necessary to ensure an independent judiciary. All judicial proceedings are conducted in open court, under the scrutiny of the bar, the public and the press. The reasoning in judicial decisions and the conduct of proceedings are subject to criticism by courts of appeal, by other judges, the legal profession, academics, and by the press and the public<sup>14</sup>.

It is opinion of all the jurists that Indian judicial system is most powerful after the judicial system of United States of America. In a democratic set up of India the judiciary is considered the highest and strongest pillar of the democracy.

Indian constitution has given power to the Supreme Court to interpret the constitution and even to declare a law framed by the Parliament or the legislature of the state to be ultra vires of the constitution. The result of this power given to the Supreme Court and the High Courts has made them accountable to none. Indian judiciary enjoys independence but sometimes in the name of independence the judiciary misuses its power and privileges. The concept of judicial accountability is now a days a matter of controversy. The judicial accountability of the Indian judiciary may be compared with the judicial accountability in other nations of the world like USA, Canada etc.

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<sup>13</sup> [http://supremecourtsofindia.nic.in/speeches\\_200/eje.pdf](http://supremecourtsofindia.nic.in/speeches_200/eje.pdf). [Access on 6th March 2013 at 4:54PM]

<sup>14</sup> Subhash. C. Kashyap, *The Citizens and Judicial Reforms under Indian Polity*, ( 2003 ) , Universal Law Publishing, Delhi, pp- 179-180

Now the question arises as to what are the necessities of judicial accountability.

According to Oxford Dictionary<sup>15</sup> accountability means responsible to your decisions and actions with a responsibility to explain decisions and actions when one is asked to explain the same. Judges have been accorded a distinct position keeping in view their association with higher cause of truth and justice. The constitutional provisions provide that impartial and independent judicial body must be there in every country to adjudicate upon the matter and as to act as the interpreter and guardian of the constitution. The constitution assures that any authority deriving its existence may not claim absolute and unaccountable authority. Such authority must be accountable either to the source of its origin or to the people.

Although, legislature and executive are accountable to the people of the nation but the judiciary is accountable to none. This is not good situation in real sense. Every wing of the state must be accountable to the people of the nations. Judiciary should not be also unbridled. No wing of the government should interfere and invade into the domain of other organs maintaining together judicial independence.

The judges take oath to act without fear, favour, affection and ill-will. They take oath to uphold the constitution at the large. In the name of judicial independence sometimes judge act beyond their domain even then they are accountable to none.

In **Union of India v. Sankalchand Himmatlal Seth**<sup>16</sup>, Untwalia J. called the judiciary as a “watching tower above all the big structures of the other limbs of the state from which it keeps a watch like a sentinel on the functions of the other limbs..”. Therefore, the presence of a strong, independent and efficient judiciary, both in letter and spirit, is an absolute necessity to achieve the laudatory goals imbibed in the Constitution, for it is

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<sup>15</sup> Oxford Concise English Dictionary, Oxford University Press (2009) p.10.

<sup>16</sup> AIR 1977 SC 232.

an established principle of natural justice that justice is not only to be done but should be manifestly seen to be done. In **S. C. Advocates on Record Association v. Union of India**<sup>17</sup> the Supreme Court has delivered important judgment for the maintenance of judicial independence in India.

### **5.1.1. Need for the Independence of the Judiciary**

The basic need for the independence of the judiciary rests upon the following points<sup>18</sup>:

1. Judiciary of India acts as a watchdog by ensuring that all the organs of the state function within their respective areas and according to the provisions of the constitution. Judiciary also acts as a protector of the constitution and also aids in securing the doctrine of separation of powers.
2. The framers of the constitution were well aware of the fact that in future the ambiguity will arise with the provisions of the constitution so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. If the judiciary is not independent, the other organs of the state shall interfere in the work of judiciary and they may pressurize the judiciary to interpret the provision of the constitution according to them. Judiciary is given the job to interpret the constitution according to the constitutional philosophy and the constitutional norms.
3. It is expected of the judiciary to deliver judicial justice and not partial or committed justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving justice and not considering all the aspects involved in a particular situation. Similarly judiciary must act in an unbiased manner.

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<sup>17</sup> AIR 1994 SC 268.

<sup>18</sup> Independence of Judiciary in India: A Critical Analysis, <http://mulnivasiorganiser.bamcef.org/?p=482> [ Accessed on 2nd August 2014 at 8:19PM].

## 5.1.2. Relationship between Judicial Accountability and Independence

### 5.1.2.1. Independence and Impartiality

Sir Winston Churchill once said that “The principle of the complete independence of judiciary from the executive is the foundation of many things in our island life. It has been widely imitated in varying degrees throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule”<sup>19</sup>.

For the protection of judicial independence the judges must be impartial and independent and free in determining the facts and applying the laws to the facts independently without being influenced by any source. There are two aspects of judicial independence: external and internal<sup>20</sup>.

External independence of the judiciary implies that the judiciary must be independent of any outside institutions, including legislative, executive, political parties, other legal professions, press, civil societies, litigants, or any other “forces outside of the judiciary itself that can encroach on the autonomy of the judiciary collectively or of the individual judge<sup>21</sup>.” Internal independence means that judges must be independent of colleagues including their horizontal and vertical bosses, and even of their own personal desires<sup>22</sup>. Judges may share the facts of the cases and discuss specific relevant legal issues with colleagues, including senior judges, but this consultation process must be regarded as advisory and never as authoritarian instruction<sup>23</sup>.

A contextualized understanding of judicial independence in India therefore entails a plethora of ruling pronounced by the Hon’ble Supreme Court emphasizing the need for an independent judiciary time and again. In

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<sup>19</sup> P. J. Dhan, Dr. Ambedkar and the Principle of Independence of Judiciary, (1997) 24 Indian Bar Review 97.

<sup>20</sup> Petter H., Russell, and David M., O’Brien (eds.), *Judicial Independence in The Age of Democracy*, (2001) University Press of Virginia, p. 11.

<sup>21</sup> Ibid.

<sup>22</sup> Bangalore Principal Conduct 2002.

<sup>23</sup> *Judicial independence in Transitional Countries*, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, Luu Tien Dung, January (2003) p. 11.

**State of Bihar v. Balkumud Shah**,<sup>24</sup> the independence of judiciary was elevated to the status of being a constituent of the basic structure of the constitution, the seeds of which were borne in the locus classicus **Keshvananda Bharti v. State of Kerela**<sup>25</sup>. In a host of other rulings, the need for an independent judiciary free from the inference of unwarranted political processes has been advocated as the sine qua non of a democratic society<sup>26</sup>.

Thus, the need for judicial independence cannot be over emphasized. The idea of judicial independence shares an inextricable relationship with judicial ethics, of which accountability is one of the dimensions. It is often that the two are antithetical to each other and hence, one cannot exist in the presence of the other. This has often been a favourite area for the legal scholars to deliberate upon and thus has been subject to extensive scrutiny<sup>27</sup>.

The concept of judicial independence shares an inextricable relationship with judicial ethics, of which accountability is one of the dimensions. It is often thought that the two are antithetical to each other and hence, one cannot exist in the presence of the other. This has often been a favorite area for the legal scholars to deliberate upon<sup>28</sup> and thus has been subject to extensive scrutiny<sup>29</sup>.

Judicial independence cannot be viewed to have a separate existence because it is only in an accountable judiciary that the faith of judiciary can be reposed. The element of accountability is a necessary concomitant to establish the supremacy of the institution. This, in turn, it seeks to promote the element

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<sup>24</sup> AIR 2000 SC 1296, 294

<sup>25</sup> AIR 1973 SC 1461

<sup>26</sup> S.P. Gupta v. Union of India, AIR 1982 SC 149.

<sup>27</sup> Shayonee Dasgupta & Sakshi Agarwal, Judicial Accountability and Independence: Exploring The Limits of Judicial Power, NUS Law Review 2NUJS L. Rev.779 (Oct-Dec 2009) p. 785-788.

<sup>28</sup> For example, Stephan Burbank argues that judicial independence is not a monolith and inquiries as to whether there is a long felt need of making different mechanism of accountability and independence operative on the consideration of the different functions performed by the courts.

<sup>29</sup> Supra note. 27.

of independence and thus forms vicious cycle and one runs the risk of not appreciating the delicate relationship between corruption and independence<sup>30</sup>.

The argument is that the tension between judicial independence and accountability is an artificial one since judicial independence is largely dependent on the public acceptance of the judiciary to be a fair institution, executing its responsibilities in accordance with the law of the land. It is to ensure this element of fairness that it is patently wrong to argue that accountability is in conflict with independence. It seems that the dichotomy between the two is rather superimposed and dispelling the myth surrounding the same is the need of the hour. The demand of accountability, according to us, is the first step towards eradicating the occurrence of any event of misfeasance as a dishonest judge should not be serving the Bench<sup>31</sup>.

Prashant Bhushan stated that a greater demand of accountability, if at all, compromises with the need for independence, is welcome as a step to eradicate any disastrous consequences of letting a dishonest adjudicator decide on the fate of the people<sup>32</sup>. In a democratic country like India where powers are vested with politicians, judges and bureaucrats its accountability becomes a question of utmost importance to prevent the disaster. Accountability raises questions of quality of judgments, the accumulated arrears and consequent delay in judicial proceedings, inequalities and inequities in accessing justice, balance of power and good governance, uncertain in law arising out of conflicting opinions and the ineffectiveness of mechanisms to deal with judicial corruption<sup>33</sup>.

## **5.2. Concept of Independence of Judiciary: Constitutional framework**

The fundamental concept of judicial independence came into being in England and Wales in 1701 with the enactment of the Act of Settlement. This

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> See V. Vankatesan, Of Accountability to the People, Frontline, September 2009, p.33.

<sup>33</sup> Judicial Accountability Bill Need and Consequences,  
<http://www.lawyersclubindia.com/articles/Judicial-Accountability-Bill-Need-and-Consequences-5276.asp#.UQN8MiC6apo> [Access on 25th Jan 2013 at 12:20 PM.]

statute formally recognized the principles of security of judicial tenure by establishing that High Court judges and Lords Justice of Appeal hold office during good behavior. Appropriate and formal mechanisms had to be in place before a judge could be removed.

Before 1701 senior judges held office at the sovereign's pleasure and there are many examples of judges being removed from office for failing to decide cases in accordance with the wishes of the King or Queen. Since the Act of Settlement it has only been possible to remove a senior judge from office through an Address to the Queen agreed by both Houses of Parliament<sup>34</sup>. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective<sup>35</sup>.

In India, though judges were appointed by the crown in many states, the judges were allowed to act independently free from any interference from the crown. When the people of India adopted the constitution, all these principles were expressly taken into consideration and the judicial independence is protected by various provisions of the constitution.

The independence of the judiciary is guaranteed by the Constitution of India which enacted that every judges of the Supreme Court will hold office until he attains the age of 65<sup>36</sup> and that every High Court until the age of 62 years<sup>37</sup>. The Parliament is authorized to prescribe the privileges allowances,

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<sup>34</sup><http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/independence>. [Access on 7th March 2013 at 5:26PM]

<sup>35</sup> [http://supremecourtindia.nic.in/speeches\\_200/eje.pdf](http://supremecourtindia.nic.in/speeches_200/eje.pdf) [Access on 6th March 2013 at 4:54PM]

<sup>36</sup> Art. 124(2) reads: 'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted...'

<sup>37</sup> Art. 217(1) reads: 'Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High

leave and pension of the judges of the Supreme Court, subject to the safeguard that these cannot be varied during the course of tenure of the judges to their disadvantages<sup>38</sup>. No judge shall be removed from his office by the President except from the presentation of him of an address by each house of parliament for such removal on the ground of proved misbehaviour or incapacity<sup>39</sup>. A judge of the Supreme Court or the High Court is appointed by the President of India in consultation with the Chief Justice of India and such of the judges of the Supreme Court and High Courts as he may deem necessary<sup>40</sup>. The Constitution of India insulated the Supreme Court and High Courts from political criticism. The independence of judiciary is further protected by treating the Supreme Court as “the court of record<sup>41</sup>”, the member of the subordinate judiciary are also protected by the provisions of Judge’s Protection Act<sup>42</sup>.

In many commonwealth countries, judicial accountability has assumed importance and the judiciary in many countries can no longer use judicial independence as a defense for providing accountability<sup>43</sup>. Judiciary acts as a watchdog. It ensures that all organs of the state function within their respective limits. Judiciary act as a guardian of the constitution.

It also ensures the doctrine of separation of power. To maintain the independence of the judiciary, framers of the constitution gave the power to the judiciary to interpret the provisions of the constitution to clear the ambiguity. However, the interpretation must be unbiased that is free from any pressure, from any organs like executive. In the action of the independence of

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Court and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.

<sup>38</sup> Art. 125 of Constitution of India.

<sup>39</sup> Art. 124 (4) of Constitution of India.

<sup>40</sup> Art. 124(2) of Constitution of India.

<sup>41</sup> Art.129 of Constitution of India.

<sup>42</sup> Judge’s Protection Act, 1985.

<sup>43</sup> Mona Shukla, *Judicial Accountability: Welfare and Globalization* (2010), p.25-26.

the judicial institution other organs may pressurize the judiciary to interpret the constitutional provisions as per their dictates<sup>44</sup>.

Judiciary is expected to deliver justice in true sense in judicial way and not partial or committed justice. The judiciary is therefore expected to act in an unbiased manner. Thus, twin conditions are necessary to have an independent judiciary. Impartiality is the word for courts. People in any country would recognize this as their answer to their quest of justice. Most democratic governments can endeavor that their judicial systems are immune from external influence which will include either governmental source or from private interest viz. economic, ethnic and religious pressure on judges. Judicial independence is the soul for the courts integrity and credibility within a political system.

The independence of the judiciary is valued by the people of our country which is apparent from the fact that people turn to judiciary in the quest of justice. Justice is to protect not only one person against another but also between State and the citizens. State is, in fact, a major litigant when it comes to litigation. The judiciary interprets the constitution. At the same time, it acts as its protector and the guardian of the rule of law. Our Constitution envisages there are three essential pillars of democracy which are executive, legislature and judiciary<sup>45</sup>.

The modern concept of judicial independence cannot be confined to individual judges and to their substantive and personal independence but most also include the collective independence of the judiciary as an institution.

Conceptually, the independence of judiciary comprises of independence of judiciary as an institutionalized organ and independence of the individual judges. Thus, twin conditions are necessary to have an

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<sup>44</sup> Subhash. C. Kashyap, *The Citizens and Judicial Reforms under Indian Polity*, Universal Law Publishing, Delhi, p.179-180.

<sup>45</sup> *Ibid.* p.180.

independent judiciary. Impartiality is the word for courts. People in any country would recognize this as their answer to their quest of justice<sup>46</sup>.

### **5.3. Separation of Powers - A Basic Rule for the Independence of the Judiciary**

There are three organs of the administration of a country. The first organ may be called legislature. It consists of representative of the people of the nations. These representative are responsible for the running of democratic set up of a government. The function of the legislature is to legislate the law for the whole of the nation or whole of the state. It is law-making body and it represents the wishes of the people of a nation in the form of a legislation. The enforcement of the enactments made by legislature is the responsibility of the executives. The executive has no power to make ifs and buts in the legislation. It is the work of the third organ that is judiciary<sup>47</sup>.

The judiciary is responsible to see that laws which framed by the legislature or executive are working properly. Sometimes each organ of the state usurps the power of the other organ of the state. Sometimes controversies arise that there should be complete separation of power among the organs or not. Philosophical and jurisprudential debates among law scholars raise this point and they stress that there should be complete separation of power among the three organs<sup>48</sup>.

Justice Mukherjee observed that “it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking, no place in the system of government that Indian has at the present day.<sup>49</sup>” In this regard judiciary gets and upper hand over the two organs because the constitution has given judiciary the power of judicial interpretation. It has also to review any act of the two organs. In this regard there are several cases

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<sup>46</sup> Ibid.

<sup>47</sup> Dr. I.P. Massey, Administrative Law (2001), Eastern Book Co. Delhi, p-33.

<sup>48</sup> Doctrine of Separation of Powers and Significance and Importance of Judicial Powers in India, Lellala Vishwanadham, VSRD Technical & Non-Technical Journal Vol. 3 (6), (2012) p.238.

<sup>49</sup> Ibid.

which shows that the judiciary tries to maintain its supremacy over the rest of the two organs<sup>50</sup>.

The origin of doctrine of separation of powers goes back to the period of Plato and Aristotle. It was Aristotle who for the first time classified the functions of the Government into three categories viz., deliberative, magisterial and judicial. Locke categorized the powers of the Government into three parts namely: continuous executive power, discontinuous legislative power and federative power<sup>51</sup>.

Montesquieu, the old scholar of 16th century of France was of the view that all the powers of the state should not be vested in the hands of one organ otherwise there shall be a tyranny. He was of the view that the powers of the state should be distributed among the three organs instead of concentrating the powers in one organ. In the view of Montesquieu<sup>52</sup>:

“When the legislative and executive powers are united in the same person, or in the same body or Magistrate, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers.

Montesquieu discerned a separation of powers among the monarch, Parliament, and the courts of law. Montesquieu stated that the independence of the judiciary has to be real, and not apparent merely. "The judiciary was

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<sup>50</sup> Indian Constitution and Separation of Powers, <http://www.lawteacher.net/constitutional-law-essays/Indian-constitutio-and-separation-of-powers-constitutional-law-essay.php> [Access on 28th March 2013 at 2:13PM]

<sup>51</sup> Supra Note. 47. at 35.

<sup>52</sup> See: Montesquieu, De L' "Esprit des lois, 1748 quoted in Justice D.D. Basu: Administrative Law, p. 23.

generally seen as the most important of powers, independent and unchecked", and also was considered dangerous<sup>53</sup>.

There shall be no overlapping of powers, the three organs of the states shall work in their fields smoothly. Thus, doctrine of separation of power as given by Montesquieu depends on this theory that no one shall be dictator. No organ shall try to encroach upon the power of the other. It shall not be in the interest of the state to give all the powers of the three organs to the same man or the same body whether they are off nobles or off peoples<sup>54</sup>.

Montesquieu was of the view that vesting of executive and legislative power in the one and same man shall result in arbitrariness and despotism. Concentration of all the powers of the three organs in one and the same body shall cause a serious threat to liberty of the people. The people shall have no defense against the state<sup>55</sup>. The separation of powers of the state organs is the best way to check and balance for each other. The concept of separation of power has almost been adopted throughout the world except a few countries leading kingship or dictatorship<sup>56</sup>.

#### **5.4. Doctrine of Separation of Powers in UK, USA and France**

##### **5.4.1. United Kingdom**

English Jurist Blackstone also supported the doctrine of Montesquieu. According to him, "where ever the right of making and enforcing the law is vested in the same man or in the same body of men, there can be no liberty".

During the 17th century in England Parliament exercised legislative powers. The King exercised executive powers, and the Courts exercised judicial powers, but with the emergence of cabinet system of Government i.e. parliamentary form of government, the doctrine remains no good. The

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<sup>53</sup> See: Montesquieu, Charles-Louie. The Spirit of Laws (1748)

<sup>54</sup> Ibid.

<sup>55</sup> The Spirit of The Laws (Trans Nugent), pp. quoted in Thakkar, C.K.: Administrative Law, (1992), EBC, p.31.

<sup>56</sup> Indian Constitution and Separation of Powers, <http://www.lawteacher.net/constitutional-law/essays/indian-constitution-and-separation-of-powers-constitutional-law-essay.php> [Accessed on 28March 2014]

renowned constitutional Bagehot observed. “The cabinet is a hyphen which joins, buckle which fastens, the legislative part of the State to the executive part of the State<sup>57</sup>.”

According to Wade and Phillips the doctrine of separation of powers implies<sup>58</sup>:

- i. The same person should not form more than one organ of the Government.
- ii. One organ of the Government should not exercise the function of other organs of the Government.
- iii. One organ of the Government should not encroach with the function of the other two organs of the Government.

Now the question in subject is whether this doctrine finds a place in England? In England the King being the executive head is also an integral part of the legislature. His ministers are also members of one or other Houses of Parliament. This concept goes against the idea that same person should not form part of more than one organ of the Government. In England, House of Commons controls the executive. So far as judiciary is concerned, in theory House of Lords is the highest court of the country but in practice judicial functions are discharged by persons who are appointed specially for this purpose, they are known as Law Lords and other persons who held judicial post. Thus we can say that doctrine of separation of powers is not an essential feature of British Constitution<sup>59</sup>.

#### **5.4.2. U.S.A.**

The doctrine of separation of powers finds a good mention in the Constitution of United States; while the Federal Constitution of the United States of America does not expressly provide for the principle of separation of powers. The same thoughts were expressed by Hamilton in 1788. Father of

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<sup>57</sup> Tej Bahadur Singh, Principle of Separation of Powers and Concentration of Authority, <http://www.ijtr.nic.in/articles/art35.pdf> [Access on 30March 2012 at 23:11PM] p-2.

<sup>58</sup> Ibid.

<sup>59</sup> Supra note. 57.

the American Constitution James Madison also believed in doctrine of separation of powers. He was of the view that the accumulation of, legislative, executive and judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny<sup>60</sup>.

In American Constitution we find that legislative, executive and judicial powers are vested in separate entities.

- Section 1 of Article 1 declares: “All legislative powers herein granted shall be vested in a Congress of the United State”.
- Section 1 of Article II says: “The executive power shall be vested in a President of the United States of America.”
- Section 1 of Article III reads: “The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.....”

It is clear from the above mentioned provisions that the President is the head of the executive in U.S.A. Besides he (President) possesses the power to veto bills passed by the Congress and such bills cannot become law unless they are subsequently passed again by each House, with a two thirds majority. The character of veto power vested in the President is purely legislative. It is true that the power is one of negation only, but the history of its origin shows that even in its qualified form, it is legislative in its nature<sup>61</sup>. The President also exercises legislative power in making of treaties regarding foreign affairs. As John Marshall said in his great argument of March 7, 1800, in the House of Representative, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations<sup>62</sup>”. The President in his legislative capacity gives information of the state of the Union

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<sup>60</sup> American 4th US President (1809-17), and Father of the American Constitution. See also, <http://www.lawteacher.net/constitutional-law/essays/indian-constitution-and-separation-of-powers-constitutional-law-essay.php> [Accessed on 28 March 2014]

<sup>61</sup> Bernard Schwartz: American Constitution of Law, (1955) p.99.

<sup>62</sup> United States v. Curtiss-Wright Export Corp; 229 U.S. 304,319 (1936).

to the Congress<sup>63</sup>. Likewise the Congress interferes with the powers of President by casting vote on budget. The Budget and Accounting Act, 1921 established the principle and practice of the executive budget, under which the President is responsible for formulating and presenting to Congress a complete and detailed expenditure plan for the Article 1, Section 7(2) of U.S.A. Constitution.

Congress also plays important role in ratification of treaties, as well as in appointments through its senators. Congress has also judicial powers. Each house may expel its members by a two thirds votes or punish them for “disorderly behaviour”. Congress is the sole judge of the reason for expulsion. Not only this, American judges may be removed from the office only by impeachment proceedings instituted before the Congress<sup>64</sup>.

So far as judicial organ is concerned the courts have supervisory control over both the Congress and the President, by way of judicial review. It is true that legislature enacts the law, but it is also true that in dealing with the new problems, where law is silent, the courts have to create the law. The Chief Justice Hughes remarks are most pertinent in this connection, as he candidly said that “the Constitution is what the judges say it is”. The amendments which have been incorporated in American Constitution, all are not by Congress itself, but most of the amendments have been incorporated in Constitution by American Supreme Court. In this way it can be said that in U.S.A. there is also not any possibility to have a rigid personal separation of powers<sup>65</sup>.

### **5.4.3. France**

Under the despotic rule of Louis XIV (1643-1715), France enjoyed a commanding influence in European affairs. Louis XIV had the same Kingship that James I had tried in vain to induce the English people to accept. It was

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<sup>63</sup> Article II, Section 2 of Constitution of U.S.A. following fiscal year.

<sup>64</sup> C. Herman Pritchett: The American Constitution 3rd Edn. p.163.

<sup>65</sup> Hendel, Charles Evants Hughes and the Supreme Court (1951), II quoted by Bernard Schwartz in American Constitutional Law 1955 page 130.

the thinking of Louis XIV that the subject should obey the King absolutely without asking any question or making any criticism because of this capricious behaviour he was known as autocrat ruler<sup>66</sup>.

The political writers of the eighteenth century, were impressed by the thoughts of Locke on the theory of separation of powers which was based on British Constitution. He pointed out that the freedom which Englishmen enjoyed was due to the fact that the three powers of the Government- legislative, executive and judicial- were not as in France in the same hands. Parliament made the laws, the King executed them, and the courts independent of both, saw that they were observed. He believed that the English would lose their liberties as soon as these powers fell under the control of one person or body of persons. His doctrine of separation of powers was also incorporated in French “Declaration of Rights of Man”<sup>67</sup>. Article 16 of this declaration declares that there could be no constitutional or democratic government without separation of powers, but in practice this attempt has proved unsuccessful<sup>68</sup>.

#### **5.4.4. India**

The doctrine of separation of powers has no place in strict sense in Indian Constitution. The separation of the executive from the judiciary was a demand of the Congress Party and others before independence. The same individual acting as prosecutor, judge, and jury was unacceptable<sup>69</sup>.

The doctrine of separation of power dates as long back as the constitution itself. This doctrine was discussed in our Constituent Assembly. The framers of the Constitution of India had in their mind the doctrine of separation of powers but this doctrine was not kept explicatory in our constitution. Although the framers of the constitution impliedly kept the powers of the three organs separated from each other. The members of the

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<sup>66</sup> Supra note. 56.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Granville Austin, Working a Democratic Constitution, p.139.

Constituent Assembly were of the views that our judiciary should be independent from the executive and legislature and it must also be competent in itself. Dr. Ambedkar expressed his opinion as to how the independence of the judiciary from the executive and the competency can be obtained. In the beginning, the executive was discharging the functions of the judiciary<sup>70</sup>.

The framers in the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. They always wanted to insulate the courts from any kind of interference or from forces within and outside the government. Sapru Committee Report on judiciary and the Constituent Assembly's ad hoc committee on the Supreme Court report formed the bulk of the guidelines for judiciary. A.K. Ayyar, K. Santhanam, M.A. Ayyangar, Tej Bahadur Sapru, B.N. Rau, K.M. Munshi, Saadulla and B.R. Ambedkar played important role in shaping the judicial system of India<sup>71</sup>.

Ambedkar was perhaps the greatest apostle in the Assembly of what he described as "one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the civil, or the criminal law, essential to maintain the unity of the country"<sup>72</sup>.

The executive and legislative wings were closely connected with each other. To some extent it is still prevalent. The executive is responsible to the legislature for its actions and derives its powers from legislature. The doctrine of separation of powers which enjoins separation of judiciary from the executive is laid down in Article 50 of the Constitution of India. In fact, the constitutional scheme does not represent the idea or quality of any formalistic dogmatic views about the division of powers among the three organs<sup>73</sup>.

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<sup>70</sup>Constituent Assembly Debates (Proceedings)- Vol. VIII, <http://164.100.47.132/LssNew/constituent/vol8p11.pdf>. Access on 29th March 2014 at 2PM). See also Constituent Assembly Debates Book No.2, Vol. No. VII Second Print 1989, p. 959.

<sup>71</sup> Ibid.

<sup>72</sup>Need to Strengthen Access to Justice and Judicial Accountability, [http://socialissuesindia.files.wordpress.com/2012/03/judicial\\_accountability\\_in\\_india.pdf](http://socialissuesindia.files.wordpress.com/2012/03/judicial_accountability_in_india.pdf) Access on 1st Jan2013 at 2:33PM

<sup>73</sup> Upendra Baxi, "Developments in Indian Administrative Law", in A.G. Noorani (ed.), Public Law in India, (1982). p. 136.

Supreme Court held in **Ram Jawaya's case**<sup>74</sup> that "Indian Constitution has not indeed recognized the concept of division of powers in its full rigidity but the functions of the different branches of the government of India may be sufficiently differentiated and it can be easily observed that Constitution of India does not contemplate assumption by one organ or part of the State of functions that essentially belongs to another.

The President of India, no doubt, is the executive head of the nation. But he is only nominal head. The real power is vested with the Prime Minister and his cabinet minister<sup>75</sup>. In certain circumstances the President of India exercises judicial and legislative functions. Judiciary also performs administrative and legislative functions. Parliament also exercises judicial functions. Parliament exercises its judicial functions at the time of impeachment. In the proceeding of impeachment, both houses of parliament take active part. Thus, all the three organs act as a check and balance to each other and work in coordination and cooperation to make our parliamentary system of government workable.

The doctrine of separation of power is an important principle of our constitution. Our judicial system is completely independent from the executive and legislature. High Court and Supreme Court have the power of judicial review<sup>76</sup>. This power of judicial review is exercised to declare any law as unconstitutional. Judicial review in India stands on a more solid basis than in United States because it is not based on any judicial dogma, but is provided for by the constitution itself<sup>77</sup>. The judges are totally protected by our constitution. Their conduct cannot be discussed in parliament. Their appointments can only be made by the President of India in consultation with the Chief Justice of India and judges of the Supreme Court.

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<sup>74</sup> Ram Jawaya v. State of Punjab AIR 1955 SC 549.

<sup>75</sup> Art 74(1) of Constitution of India.

<sup>76</sup> Article 13 of the constitution mandates that the 'State shall make no law, which violates, abridges or takes away rights conferred under Part III'. This implies that both the Legislature and the Judiciary in the spirit of the words can make a Law. But under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the legislature. Hence, the introduction of Judicial Review.

<sup>77</sup> Noor Mohammed Bilal, Dynamism of Judicial Control and Administrative Adjudication p.197

Judicial independence' assumes large importance and is a matter of deep concern in many countries. It means that judges can decide cases in environment free from fear and threats<sup>78</sup>. Independence of judiciary envisages that the judiciary should be separated from the other organs of government. That is, courts should not be in improper influence from the other organs of government, or from private institutions. Many countries have adopted the idea of judicial independence through different means of judicial selection, or choosing judges. One way to promote judicial independence is by granting life tenure or long tenure for judges, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests. In many countries, the ability of the judiciary to check the legislature is enhanced by the power of judicial review. This power can be used, for example, by mandating certain action when the judiciary perceives that a branch of government is refusing to perform a constitutional duty, or by declaring laws passed by the legislature unconstitutional<sup>79</sup>.

The doctrine of the separation of powers may play the important role to prevent judges from acting as an extension of legislative or executive branches. Therefore, each legal system should be based on the doctrine of separation of powers to ensure the independence of powers as every organ can conduct their work without any external interference of any organ. It may be helpful to maintain the democracy and rule of law in country to a great extent. The constitution of India provides many provisions for the independence of the judiciary but it does not give clear definition about the independence of the judiciary. The independence of the judiciary is not clear in true sense. The independence of the judiciary is basically based on the doctrine of separation of power. The independence of the judiciary means unbiased that is free from external factors. Shetreet explained the word 'independence' and 'judiciary'

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<sup>78</sup> Dr. Bhure Lal, *Judicial Activism and Accountability* (2004) p.111.

<sup>79</sup> Judicial Independence, <http://en.wikipedia.org/wiki/Judicial-independence>. [Accessed on 28<sup>th</sup> March 2013 at 3:09PM.]

separately. He says that judiciary is although the organ of government but is not a part of executive or legislature<sup>80</sup>.

The framers of the constitution were of the view that such a society can be created only by the guarantee of fundamental rights and the independence of the judiciary to enforce fundamental rights is the basic requirements to ensure a free and fair society under the rule of law. The rule of law only can be possible when the judiciary is unbiased. The legislature and executive provide for a responsibility to the judiciary to act as a watchdog to check whether executive and legislature are working within their limits. They are expected not to interfere in each other functioning.

The doctrine of separation of power in true sense cannot be maintained unless the judiciary is independent. Several provisions are provided in the constitution about the independence of the judiciary. However, a major task lies in creating a favourable environment for the functioning of the judiciary in which all other state organs work in cooperation to achieve the independence of the judiciary.

Some restrictions must be imposed on the judiciary as an institution and on the individual judge. Judiciary is the most important organ of the state. It has always been accepted as one of the essential parts of the state. In the words of Bryce, “if the law be dishonestly administered, the salt lost its flavour. If the lamp of justice goes out in darkness, how great is its darkness. This statement clarifies the importance of the judiciary<sup>81</sup>.

In **Indira Nehru Gandhi v. Raj Narain**<sup>82</sup> the court observed that the concept of separation of powers in a broad sense is present in only Indian Constitution. And the provision of rigid separation of powers as it is laid down by the America and Australian Constitution would not apply on India.

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<sup>80</sup> Shimon Shetreet, (2012) Fundamental Values of the Justice System, 23 The European Business law Review 61-76.

<sup>81</sup> Bryce James, Modern Democracies (London: Macmillan Company Ltd., 1923), Vol. 11, p. 421. See also Mans Chakrabarty, Judicial Behaviour and Decision-Making of the Supreme Court of India Deep & Deep Publications Pvt. Ltd, p.2.

<sup>82</sup> 1975 Supp SCC 1: AIR 1975 SC 2299

Most democratic governments can endeavor that their judicial systems should be free from external influences which will include either governmental source or from private interest viz. economic, ethnic and religious pressure on judges. René Foqué<sup>83</sup> stated that without an independent judiciary political power can no longer be legitimized in the eyes of responsible and mature citizens.

### **5.5. Constitutional Provisions for Maintaining Judicial Independence**

The constitution of India provides many provisions that ensure the independence of the judiciary. They are following:

1. The tenure of the judges of the Supreme Court and High Court is secured. They cannot be deprived of their post before 65 years<sup>84</sup> of age in case of judges of the Supreme Court and 62 years<sup>85</sup> in case of judges of the High Courts without the process of impeachment and the process of impeachment can be initiated on the proved misbehaviour or incapacity. Impeachment can only be passed by a majority of total membership of each house of Parliament and also by a majority of not less 2/3rd of the members of the House present and voting. So far as no impeachment could be passed till today due to the complicated process of impeachment<sup>86</sup>. There are instances in which process of impeachment for the removal of Justice Ramaswami of the Supreme Court, Justice Dinakaran, Justice Soumitra Sen of High Court was adopted but failed. The process of the Supreme Court cannot be curtailed unless any such move is passed by the Parliament.
2. Salary and allowances of judges of the judges cannot be altered to their disadvantages till they are in office. The salary of judges is charged on

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<sup>83</sup> René Foqué, *The Independence of the Judiciary and the Administration of Criminal Justice*, European Journal of Crime, Criminal Law and Criminal Justice, 1993 vol. 1, issue 4, p. 348.

<sup>84</sup> Article 124(2) of Constitution of India.

<sup>85</sup> Article 217 of Constitution of India.

<sup>86</sup> Article 124(4) of Constitution of India.

the Consolidated Fund of India in the case of Supreme Court and Consolidated Fund of State in the case of High Court judges<sup>87</sup>.

3. The conduct of the judges cannot be discussed in State Legislature or Parliament except in the case of impeachment. The Supreme Court and High Court have powers to punish any person of their contempt<sup>88</sup>.
4. In the Directive Principle of State Policy, it is provided that the state shall take steps for the separation of judiciary from the executive<sup>89</sup>. Article 50 specially provides that separation of judicial service from the executive control must be done.

The allegations that the court exceeds its constitutional limits by extending its jurisdiction to the legislative and executive field is levelled mainly due to the ignorance or misconception regarding the courts constitutional power to declare laws lacking legislative competence and violating fundamental rights as vires and void its power to issue high prerogative writs, particularly the writ of mandamus and the constitute mandate of Article 144 that the civil and judicial authorities should function in the aid of the Apex Court. The nature of Mandamus itself requires examination of breaches of duties by the executive and rectifying commands on the executive, to do something, which the law require them to do.

### **5.6. Basic Principles on the Independence of the Judiciary**

The basic principles which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 are examined below.<sup>90</sup>

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<sup>87</sup> Article 125. of Constitution of India.

<sup>88</sup> Article 129 of Constitution of India.

<sup>89</sup> Article 50 of Constitution of India.

<sup>90</sup> Basic Principles on the Independence of the Judiciary

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> Access on 29th March 2013 at 4:17PM].

Charter of United Nations describes that such condition should be maintained under which justice can be achieved along with international co-operation and encouraging respect for human rights and fundamental freedom without any kind of discrimination. Universal Declaration of Human Rights declares the principles of equality before the law. It also presumes of innocence, of accused and of their right to be treated fairly. It envisages fair public hearing by a competent, independent and impartial tribunal set up by law.

International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of the fundamental rights, human rights, fair trial, etc. The Covenant on Civil and Political Rights guarantees the right to be tried without undue delay. The organization and administration of justice in every country should be inspired by the above said principles. It expects the exercise of the above said right into reality and judges are expected to exercise their powers in such a way that the above said principles are achieved. The judges are expected to work accordingly with fairness and independence.

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, called upon the committee by its 16<sup>th</sup> resolution to include priorities the elaboration of guidelines relating to the independence of judges and the process of their selection, professional training. It is therefore, necessary to consider the role of the judges in relation to the system of justice and to the process of their selection, training and conduct, following basic principles to assist Member States in their task of the securing and promoting the independence of the judiciary.

The Committee on Crime Prevention and Control of the United Nations Congress expects from the Member States to formulate within their national legislation and practice to attract the attention of judges, lawyers, members of the executive and the legislature and the public in general. The

principle have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

### **5.6.1. Independence of the judiciary**

The provisions to maintain independence of judiciary are giving following<sup>91</sup>:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

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<sup>91</sup> Ibid.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

**5.6.2. Freedom of Expression and Association**

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

**5.6.3. Qualifications, Selection and Training**

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

**5.6.4. Conditions of Service and Tenure**

11. The term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

#### **5.6.5. Professional Secrecy and Immunity**

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

#### **5.6.6. Discipline, Suspension and Removal**

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

#### **5.7. International Documents on Judicial Independence**

Independence of the judiciary is an important issue in every country. In fact, an independent judiciary is a common feature for all democracies.

Different rationalisations have been suggested for the importance and need of an independent judiciary in democracies. Therefore, some key international documents on judicial independence are as follows<sup>92</sup>:

**5.7.1. The United Nations Basic Principles on the Independence of the Judiciary** (Basic Principles) endorsed by General Assembly in 1985<sup>93</sup>.

**5.7.2. The Syracuse Draft Principle on Independence of the Judiciary** (Syracuse Principles) which was prepared by a Committee of Jurists and the International Commission of Jurists at Syracuse, Sicily on 25th – 29th May, 1981<sup>94</sup>;

**5.7.3. International Bar Association Minimum Standards of Judicial Independence**<sup>95</sup> (1982 IBA Standards) are the most stringent requiring that “judicial appointments should generally be for life, subject to removal and compulsory retirement, at an age fixed by law at the date of appointment”.( The IBA Standards, 22. (a)) Here the same problem of balancing independence and accountability is encountered.

**5.7.4. Montreal Universal Declaration**<sup>96</sup> on the Independence of Justice (1983) suggests that participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.

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<sup>92</sup> Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, Luu Tien Dung, January (2003) p-11.

<sup>93</sup> These principles were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See full text of the Principles at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)).

<sup>94</sup> Supra note. 92.

<sup>95</sup> Ibid. (See Also: .( For an interesting discussion of the independence and accountability of judges related to the role of courts in society (the more judges are making policy the more accountability of judges is needed) see Peter D. Webster, op. cit., pp. 3-10) See also (8) See full text of the Standards at <http://www.ibanet.org/pdf/HRIMinimumStandards.pdf>).

<sup>96</sup> The Montreal Declaration, 2.14. b See also: Judicial independence in transitional countries, United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme, Luu Tien Dung, January 2003 p-11.

**5.7.5. Singhvi Draft Universal Declaration of Justice (1989)<sup>97</sup>**

**5.7.6. The Universal Charter of the Judge by the International Association of Judges (1999)<sup>98</sup> (Charter of the Judge)**

**5.7.7. Beijing Statements of the independence of the judiciary (1995)<sup>99</sup>**

**5.7.8. Mount. Scopus International Standards emphasized the importance of maintaining and securing judicial independence. The some main provisions of Mount Scopus Standards are following<sup>100</sup>:**

**5.7.8.1. Independence of the Judiciary**

An independent and impartial judiciary is an institution of the highest value in every society and an essential pillar of liberty and the rule of law. The objectives and functions of the judiciary shall include:

- i. To resolve disputes and to administer the law impartially between persons and between persons and public authorities;
- ii. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- iii. To ensure that all people are able to live securely under the rule of law.

**5.7.8.2. The Judiciary and the Executive**

The Judiciary as a whole shall be independent. Each judge shall enjoy both personal independence and substantive independence:

- i. Personal independence means that the terms and conditions of judicial service are adequately secured by law so as to ensure that individual judges are not subject to executive control; and
- ii. Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.
- iii. The Judiciary as a whole shall enjoy collective independence and autonomy vis-à-vis the Executive.

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<sup>97</sup> Singhvi Declaration, 25 CJIL Bulletin(Special Issue on Judicial Independence (Geneva: Center for Independence of Judges and Lawyers, 1989).

<sup>98</sup> <http://www.iaj-uim.org/ENG/07.html>.

<sup>99</sup> Supra note. 92.

<sup>100</sup> <http://www.jiwp.org/#!mt-scopus-standards/c14de>.

- iv. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence as long as they are in accordance with Principles.
- v. No executive decree shall reverse specific court decisions, or change the composition of the court in order to affect its decision-making.
- vi. The Executive may only participate in the discipline of judges by referring complaints against judges, or by the initiation of disciplinary proceedings, but not by the adjudication of such matters.
- vii. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
- viii. The power of removal of a judge shall preferably be vested in a judicial tribunal.
- ix. The Executive shall not have control over judicial functions. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.
- x. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
- xi. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive. The principle of democratic accountability should be respected and therefore it is legitimate for the legislature to play a role in judicial appointments and central administration of justice provided that due consideration is given to the principle of judicial independence.
- xii. The process and standards of judicial selection shall give due consideration to the principle of fair reflection by the judiciary of the society in all its aspects.

- xiii. Taking into consideration the principle of fair reflection by the judiciary of the society in all its aspects, in the selection of judges, there shall be no discrimination on the grounds of race, colour, gender, language, religion, national or social origin, property, birth or status, subject however to citizenship requirements.
- xiv. The power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
- xv. Judicial salaries and pensions shall be adequate at all times, fixed by law, and should be periodically reviewed independently of Executive control. The position of the judges, their independence, their security of tenure, and their adequate remuneration shall be entrenched constitutionally or secured by law. Judicial salaries, pensions, and benefits cannot be decreased during judges' service except as a coherent part of an overall public economic measure.
- xvi. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.
- xvii. The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment. The Executive shall not have the power to close down, or suspend, or delay, the operation of the court system at any level.

**5.7.8.3. The Judiciary and the Legislature**

- i. The Legislature shall not pass legislation which reverses specific court decisions.
- ii. Legislation introducing changes in the terms and conditions of judicial service shall not be applied to judges holding office at the time of

passing the legislation unless the changes improve the terms of service and are generally applied.

- iii. In case of legislation reorganizing or abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same or materially comparable status.
- iv. Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts.
- v. Part-time judges should be appointed only with proper safeguards secured by law.
- vi. The Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation.

### **5.8. Tension between Judicial Accountability and Judicial Independence**

The concept of judicial independence is generally viewed as an essential feature of liberal democracy<sup>101</sup> thus, don't we want judges to exercise their independent judgment in interpreting and applying the law? The answer to this question is ambiguous. Yes, we want judges to exercise their independent judgment but so long as they are not too independent. Indeed, judges should be accountable to the public, especially to democratic institutions. The role of courts has increased around the world, country after country has begun to face what Professor Alan Paterson succinctly described as a conundrum of the apparently insoluble tension between judicial independence and judicial accountability<sup>102</sup>. Judicial accountability and judicial independence both are important in maintaining the rule of law. Sometimes they conflict with each other. A judicial independence does not

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<sup>101</sup> Russell, P. "Toward a General Theory of Judicial Independence" in *Judicial Independence in the Age of Democracy*. P. H. Russell and D. O'Brien. (eds.) Charlottesville: University Press of Virginia, 2001: 1.

<sup>102</sup> Paterson, A. "The Scottish Judicial Appointment Board: New Wine in Old Bottles?" *Appointing Judges in an Age of Judicial Power: critical perspectives from around the world*. Eds. P. Russell and K. Malleon. Toronto, Buffalo: University of Toronto Press, 2006.

allow a judge to practice misconduct. A judge who is not judicially accountable must not be an independent judge.

Independent working of the judges with essence of judicial accountability is essential to the rule of law. To maintain the faith in the judiciary the judges are expected to be independent. They are also expected to be accountable to their decisions. In the absence of accountability on the part of a judge, he cannot be said to an independent judge. A judge must be accountable to his duties. He must be independent in his working in spite of allegations against his misconduct. The dismissal power of a judge on misconduct must also not be easy otherwise there shall be no fear in the mind of the judge. He shall not be an independent and fearless judge hence security to his job must be given.

Thus in the name of independence, corrupt judge may flourish. It became important as to how to single out a corrupt judge accurately. Without eroding his independence the executive and legislature branches may be authorized to investigate as and when an unpopular decision is given. Judge may be guilty of crime. A criminal prosecution may be launched against himself<sup>103</sup>.

Total safety against the removal of a judge from his office means to protect a corrupt judge. Judge must be accountable to his decisions and working. It is not necessary that every time judge should feel hanging sword on his head. Process for removal of a judge should be to protect an honest judge but not a corrupt judge. The executive and legislature may be given powers to investigate the allegations against a judge but executive and legislative should not be made so powerful that honest judge may also feel fear in discharging their duties.

Judicial independence depends on the public acceptances of the judiciary as a fair, honest, just body. Sometimes the opinion of the judges is

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<sup>103</sup> Charles G. Geyh, "Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts" *Indiana Law Journal* (2003) Vol. 78 p.163.

not consistent with the wishes of the political leaders but that does not mean the judges should deviate from their duty of independence and accountability. In the democratic form of government there are three pillars that are executive, legislature and judiciary. All are the creatures of the Constitution. They should not grab the powers of one another. The limits of their powers have been defined in the Constitution of India. It is not expected that a pillar may grab the powers of others. Otherwise this would be a reason of clashes. The structure of judicial independence and accountability arguably becomes more coherent. We want individual judges who are independent enough to resist extraneous influences that could impair their ability to decide cases on the basis of law<sup>104</sup>.

Thus, we provide individual judges with considerable decision making independence by protecting their tenure and salary, constrained only by the blunderbuss of accountability devices, the impeachment process. Conversely, although we want the judiciary to remain a separate and in that sense "independent" branch of government that alone wields judicial power, conventional notions of checks and balances dictate that the three branches, including the judiciary, be interdependent. The judiciary's institutional independence is, therefore, more closely circumscribed by accountability-promoting mechanisms for legislative control of the judiciary's budget, structure, administration and jurisdiction. The net effect, as one pair of scholars has concluded, is a system of (more or less) independent judges, superimposed on a (more or less) dependent judiciary<sup>105</sup>.

Justice Krishna Iyer of the Supreme Court has expressed his dissatisfaction over the selection and appointment of judges. In his view, appointment of judges at times has been found arbitrary, unsatisfactory, obscurantist, vitiated by nepotism and favouritism<sup>37</sup>. Sometimes appointments are affected by regionalism, religious sentiments and political alignments. Quality and integrity was in question when the appointment of the judges was

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<sup>104</sup> Ibid

<sup>105</sup> Ibid.

solely in the hands of the executive. However, all appointments were not affected by these vices<sup>106</sup>.

There have been a good number of judges who have been maintaining high standards of integrity and impartiality. The process of the appointments of the judges with the opinion of collegium is also not supported by any law. This system has been adopted to maintain independence of the judiciary. Sometimes a question arises whether judges without any training in selection, deficient in competence, and lacking of principles should be appointed. It would not be safe to entrust them all powers at all<sup>107</sup>.

Even in Britain the great judges of the stature of Lord Halsbury were guilty of politics and personal preferences and other irrelevant consideration. The judges both in England and in India are under criticism because of their poor jurisprudence, conservative, pro-proprietariat influences and differences to the interest. It is very surprising that judges of upper class have high salary, perks and power. Generally, they are allergic to socialist, secular and democratic principles. Some of the judges are found to be devoid of their duties. Some are arrogant, ignorant and do not pronounce judgments at all. All delivered their judgments after inordinate delay taking the benefit of this fact as they cannot be removed except by impeachment, a difficult process<sup>108</sup>.

To improve the working of the judiciary some code of conduct covering judicial and private life should also be enacted to cover sitting and retired judges also. Thus, there arises a strong case for National Commission for the appointment, performance, and termination of tenure of judges. It is very unscientific that no public investigation is done in regard to their social, political, economic antecedents and cultural values. Judges like other professionals are also product of the society which is prejudiced to the weaker sections. Supreme Court and High Court judges, right from the beginning,

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<sup>106</sup> Justice VR Krishna Iyer., *Law & Life* (2008), Universal Law Publishing, New Delhi. P25-27.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

projected a tendency hostile to the lowliest and the have-note like the working class peasantry<sup>109</sup>.

A jurist described that the Supreme Court proved that it was conscience- keeper of the capitalist class. Nationalization of Banks and Land Reforms are the instances in which the Supreme Court gave the judgments in favour of the capitalist class. Supreme Court struck down a socially just measure by which the Union Government abolished the Privy Purse of the princess. Justice Krishna Iyer is of the opinion that conservative philosophy has been the impression about the higher judiciary from the very beginning<sup>110</sup>.

The judges forget that galloping inequality, which was the reality, dominated political and economic powers, was the necessity of the day. Social injustice cannot be eliminated without affirmative equalization processes like reservation. Prime Minister Jawahar Lal Nehru, therefore, complained to the Supreme Court that it should not work as Third Chamber of Parliament. Judges do not know that educationally, social and economically backward classes have no access to private schools and colleges. Justice Krishna Iyer was of the view that privately anti-socialist, secretly communal and morally dubious judges masquerading as progressive should not manage their entry into judiciary<sup>111</sup>.

In a democratic instrumentality, the judiciary should accept transparency and accountability in its structure and performance. Appointment of judges should be from persons of secular and having democratic values in accordance with the principle laid down in the Preamble. The candidature of a person to be appointed as a judge should be scanned as to his character, class, commitments and versatility. Appointment by secret method should be done away with. Due publication should be made in the

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

newspaper so that qualified members of the Bar of the country may get opportunity to know the vacancy and conditions of selection<sup>112</sup>.

An Appointment Commission consisting of Chief Justice or his members from State to State including Home Minister, a leading member of the Bar Council, Speaker of the House and Statesman of outstanding integrity, Professor of law or sociology should be the person to select the judge. Commission must tour, interview and be open to access to the entire academic and working classes and other sections of the general community. The process of appointments of judges must be open to the citizens so that they may take information under the right to information. The candidates should be secular, socialist, and professionally competent and beyond the reach of corruption. Selected candidates must inspire confidence in the public<sup>113</sup>.

Judicial independence ensures that powerful people must conform to law. Independence of the judiciary is not essential only for the judges, but for the people also. The term 'accountability' is a concept in ethics and governance with several meanings. As an aspect of governance, it has been central to discussions related to problem in the public sector, nonprofit and private worlds. In leadership roles, accountability is the acknowledgment and assumption of responsibility for actions, products, decisions, and policies including the administration, governance and implementation within the scope of the role or employment position and encompassing the obligation to report and explain and be answerable for resulting consequences<sup>114</sup>.

The law of human conduct has laid down considerable precedent that for the use of a device there also exists its abuse. It is evident that the absolute autonomy to the judiciary becomes a vassal of prerogative. The same has been succinctly stated by Justice Frankfurter, that men being what he is safely

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> <http://www.lawyersclubindia.com/articles/Judicial-Accountability-Bill-Need-and-Consequences-5276.asp#.UQN8MiC6apo> [Access on 25th Jan2013 at 12:20PM].

trusted with the complete immunity from outward responsibility in depriving others of their rights<sup>115</sup>.

The manner in which judges discharge their duties determine the image of courts and the creditability of judicial system itself. In India from time immemorial judges have been held in high esteem and revered as super humans but coming across incidents in Bihar (like killing of an under trial in the court itself and lynching a suspected thief to death) depicts that frustrated by the failure to get justice, people are slowly losing faith in judiciary and are taking law into their hands. This is highly deplorable. A need definitely is there to make judiciary accountable, as derogation of values in judiciary is far more dangerous than in any other wing of the government as judiciary has to act as the guardian of our constitution. Judicial accountability and answerability of the judges is not a new concept. Several countries in their constitutions have already provided for ensuring accountability of judiciary. This is to prevent concentration of power in the hands of a single organ of the state especially in countries where judicial activism interferes with and invades into the domain of other organs. But at the same time judicial independence is a pre- requisite for every judge whose oath of office requires him to act without fear or favour, affection of ill- will and to uphold the constitution and laws of the country<sup>116</sup>.

In India from time immemorial judges are considered to be the mainspring of justice. It is they who must respond to the cry of the society and the community that judiciary is there to serve the needs of people and to give justice to them. However the gravity of the words “your honour” appears to be diminishing at an alarming pace in recent times when we hear the stories of people who are frustrated by the failure to get justice .This shows that people are slowly and slowly losing faith in judiciary which is highly dreadful<sup>117</sup>.

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<sup>115</sup> Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S.123,171(1971), See also: Justice at Crossroads, Justice VR Krishna Iyer 1994, Deep & Deep Publications, New Delhi. P-235

<sup>116</sup> Supra note. 114.

<sup>117</sup> Ibid.

In a democratic country like India where powers are vested with politicians, judges and bureaucrats its accountability becomes a question of utmost importance to prevent the disaster. Accountability raises questions of quality of judgments, the accumulated arrears and consequent delay in judicial proceedings, inequalities and inequities in accessing justice, balance of power and good governance, uncertainty in law arising out of conflicting opinions and the ineffectiveness of mechanisms to deal with judicial corruption<sup>118</sup>.

An independent judiciary is a non-negotiable imperative. Insidious temptations, incurable vices and deep-rooted prejudices may menace that conscientious impartiality which is the essence of independence judiciary. Equal justice beyond pressure or purchase is the product; easy access and early finality is the process; and public hearing, intelligent application of the law and social sensitivity is the dynamics of the democracy of justice. The objective was not to slender or bring scandal on the justice of the king and so, the judges were made “only to make account to God and the king not to answer in the star chamber<sup>116</sup>”.

### **5.9. Juristic View In Regard to Judicial Independence**

In *Pulliam v. Allen*<sup>119</sup> the Supreme Court of United State reaffirmed that judicial immunity was not a bar to perspective injunctive relief against judicial officers acting in their judicial capacity. Pulliam went a step further and allowed an award of attorney fees and costs against a judge under the rights act. Pulliam traced the history of judicial immunity to the star chamber of early 17th century England. The objective was to preserve the king’s authority. The judges of the star-chamber led by Lord Coke declared the judges of the king’s Bench, immune from prosecution in other courts for their judicial acts which included any alleged corruption.

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<sup>118</sup> Ibid.

<sup>119</sup> *Pulliam v. Allen* 466 U.S. 522 (1984), (See also: Mona Shukla, *Judicial Accountability: Welfare and Globalization*, 2010, Regal Publication, New Delhi, p-23).

The objective of judicial immunity was redefined at a later date by the English courts which were followed in *Bradley v. Fishes*<sup>120</sup>, on the quoted ground judges. This provision of the law is not for the protection of law or benefits of a malicious or corrupt judges, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

In the case of *S. P. Gupta*<sup>121</sup>, a seven judge's bench of Supreme Court of India extensively considered the issues of judicial independence of judiciary in relation to the appointment and transfer of judges. The Supreme Court of India while deciding the case against the delinquent judge like Justice K. Veeraswami case<sup>122</sup>, laid down strict guidelines to protect the independence of the judiciary according to which no FIR can be registered against a judge or Chief Justice of High Court, or a judge of Supreme Court without the sanction of Chief Justice of India in the matter.

For maintaining independence of judiciary, judiciary must be accountable as others organs of the Constitution of India. Justice Krishna Iyer, emphasizing the need for an accountable mechanism in a democratic framework considered it to be fundamental, so that the dreams of Constitution makers envisioned in Part III, IV and IVA of the Constitution do not remain a mere illusion<sup>123</sup>.

### **5.10. Role of Right to Information (RTI) Act in the Independence of the Judiciary**

The independence of the judiciary from the executive and the legislature as well as independence of each and every judge within the judiciary is considered as necessary condition for a free society and a constitutional democracy. It ensures the rule of law and realization of human

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<sup>120</sup> *Bradley v. Fishes* US 335 (1872), (See also: Mona Shukla, *Judicial Accountability: Welfare and Globalization*,(2010), p-23)

<sup>121</sup> *S. P. Gupta v. UOI* (1981) supply 87.

<sup>122</sup> AIR 1991 3SCC 655.

<sup>123</sup> V.R. Krishna Iyer, *Limits of Judicial Conduct*, *The Hindu*, August 7, 2009, available at <http://www.thehindu.com/2009/08/07/stories/2009080754240900.htm> (Last visited on January 16, 2010).

rights and also the prosperity and stability of a society. Therefore, the Constitution provides for the independence not only of the Supreme Court but also of the High Courts and the Subordinate Courts. The Supreme Court has also held more than once that the independence of the judiciary is a basic structure of the Constitution and any attempt to curtail. It directly or indirectly even by an amendment of the Constitution is invalid. At the same time, it is true that independence of the judiciary should also be maintained and ensured from inside the judiciary. The purpose of the RTI Act is to make public authorities transparent and accountable. Being transparent and accountable does not mean interference with independence. Judge Jerome Frank of the U.S. Court of Appeals once said<sup>124</sup>:

“I am unable to conceive that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions... The best way to bring about the elimination of those shortcomings of our Judicial system, which are capable of being eliminated is to have all our citizens informed as to how that system now functions, mistake, therefore, to try to establish & maintain, through ignorance, public esteem for our courts”.

In fact, the purpose of the independence of judiciary as well as transparency and accountability by access to information through the RTI Act is one and the same. It is best to sub-serve the citizens of this country with accountability, transparency and without any unwanted obstruction (for that independence of judiciary is needed). Now, when purpose of both is the same and one, it is unimaginable that the RTI Act might interfere with the independence of the judiciary. Independence does not mean absence of accountability, responsibility and transparency<sup>125</sup>.

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<sup>124</sup> V.R. Krishna Iyer, “Contempt of Power & Some Questions,” The Hindu. Oct 2007. p. 12.

<sup>125</sup> Sec.8 of RTI acts provides for Exemption from disclosure of information, sec. 9 of RTI act provide for Grounds for rejection to access in certain cases.

The Supreme Court's holding for exemption is at odds with its role. The courts are meant to be sentinel of democracy, providing a check on the other organs of government. In that sense, it is supposed to stand up for citizen's rights against encroachment by the State. Whatever goes on in court is, of course, recorded and available to the public. The Supreme Court's logic that it must be exempt from RTI on the ground that its authority would be undermined holds little water. The Court must be the most accountable institution in any democracy because of its vital role as watchdog. In fact, judges must be held to standards that are higher than other government officials. This can be only if Right to Information Act is made applicable to Supreme Court. That will ensure that the court, like any other institution, is accountable to the people.

Generally, it is said that there is a close relation between judicial appointments and independence of the judges. Public confidence in the judiciary depends upon open and transparent procedure for the appointments of the judges. Transparency and openness in the appointment of the judges depends upon the criteria and mechanism that is adopted. The criteria and mechanism should not be complicated because it shall have direct impact on the public trust as well as judicial independence. It is a need of the time that judicial appointment should be fair and transparent so that judicial independence may be well maintained. There has been a long controversy regarding the appointment of the judges from the very beginning. The appointment should be so made as to make the judges accountable to their work. It is judicial accountability that may maintain the confidence of people in the court system. The judicial independence and accountability must be balanced.

Lord Woolf<sup>126</sup> said that the independence and impartiality being the hallmark of judiciary is not the property of the judiciary, but a commodity to

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<sup>126</sup> The CJ of England and Wales in a recent article on the subject after referring lecture of Prashant Bhushan made his comment (See also: Mona Shukla, (2010) Judicial Accountability: Welfare and Globalization, Regal Publication, New Delhi, p-23.)

be held by the judiciary in trust for the public. This independence and impartiality is expected from the judiciary alone<sup>127</sup>. Judiciary can protect the rights of the people and can grant equal justice without fear and favour. For completing this aim, the Constitution of India provides many privileges to the judiciary to maintain its integrity, independence and impartiality. The framers of constitution put the word justice, social, economic and political in the preamble of the Constitution of India for this object. From the judicial independence, it is expected that the people howsoever high must conform to the law. Judicial Independence is not meant only for the judges but for the people also. Judges have an important role to protect the liberty of the people. But nowadays judiciary has been engulfed in many evils like corruption etc. Therefore, the judges should be accountable for their acts also as other wings are. Judiciary should be independent but it should be under the accountability to protect the rule of law and keeping the trust of the public in judiciary. As we are generally familiar with this quote that “absolute power makes corrupt,” it is praiseworthy that Judicial Standard and Accountability Bill 2010 and the National Judicial Appointment Commission Bill 2014 have been passed by the Lok Sabha. Hope it would achieve those aims for which they been brought.

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<sup>127</sup> Judicial accountability and independence, NUJS Law Review 2 NUJS L. REV.779 (2009) available at <http://www.nujslawreview.org/articles2009vol2no4/shayonee.pdf> [Access on 29th Oct 2012 at 18:00PM]



*Judicial Appointments*

*In India*

### JUDICIAL APPOINTMENTS IN INDIA

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#### 6. Introduction

The judiciary of India is the pious pillar on which rests the noble edifice of democracy and rule of law. It is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of power conferred upon it by the constitution and the laws, thereby making the rule of law and realization of human rights possible. It also ensures prosperity and stability of society. The method of an appointment of the judges in India is an important aspect of judicial independence. The object of this chapter is to throw light on the constitutional framework of appointment of judges in higher judiciary of India. In fact, the procedure of appointment of judges in the higher judiciary has been a subject of intense conflict between the judiciary and the executive. Much of the conflict has stemmed from the need to preserve judicial independence. The appointment procedure in India consists of a 'consultative process' between the executive and judiciary and after enforcement of the Constitution this practice has been followed with some controversial episodes for more than four decades.

The 14th Report of the Law Commission of India regarding the appointment of the judges is worth recalling. "The services rendered by judges demands the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shillings, and pence and according to the quality of work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct<sup>1</sup>".

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<sup>1</sup> Subhash. C. Kashyap, 'The Citizens and Judicial Reforms under Indian Polity', (2003), p. 181.

### 6.1. Judicial Appointment: Historical background

The history of appointment process before independence gives details regarding the procedure for appointment of judges under the Government of India Act, 1919 and Government of India Act, 1935 was in the absolute discretion of the Crown and their tenure was governed by 'pleasure doctrine.'

At the Constituent Assembly, three proposals were given for the appointment of the judges of the Supreme Court. The first proposal was that the President should be empowered to appoint judges of the Supreme Court with the concurrence of the Chief Justice of the India. The second proposal was that the judges of the Supreme Court should be appointed by Parliament by confirmation of the two-third members of the Parliament<sup>2</sup>.

The third proposal was that the appointment of the judges of the Supreme Court should be made in consultation with the Council of the States (Rajya Sabha). All these proposals were ruled out by a Dr. B. R. Ambedkar. His opinion was that the involvement of the legislature in judicial appointments would be very cumbersome and it would lead to political pressure.

Dr. Ambedkar was also of the view that to give authority to the Chief Justice for the appointment of the judges was also not a good practice. He was also not ready to give much power to the President or the government of the day. Ultimate his opinion came forward with a suggestion that the President may appoint judges of the Supreme Court after consultation with the persons who are supposed to be well qualified to give proper advice in such matters<sup>3</sup>.

Section 101 and 102 of Government of India Act, 1919 and Section 200 and 220 of the Government of India Act, 1935 provided for the procedure of appointment of judges of higher judiciary before the present Constitutional provisions in this regard. The doctrine of pleasure owes its origin to common

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<sup>2</sup>Constituent Assembly Debates (Proceedings)-Volume VIII  
<http://164.100.47.132/LssNew/constituent/vol8p12.html> [Access on 20 Nov 2012 at 5:PM]

<sup>3</sup> Ibid.

law. The rule in England was that a civil servant can hold his office during the pleasure of the crown and the service will be terminated any time the crown wishes the same. Though this common law doctrine is adopted by our Constitution in article 310 but with some restrictions and it is not applicable to the tenure of high court and Supreme Court judges<sup>4</sup>.

In this way, article 124 (2)<sup>5</sup> was put in the Constitution of India for appointment of the judges of the Supreme Court by the President after the consultation with such of the judges of the Supreme Court and of the High Courts in the states, as the President deems it necessary. This procedure worked properly and fairly till 1993.

However, in 1993, the Supreme Court interpreted the word after “consultation” as, “with the concurrence of the court”. The government of the day was not allowed to seek a review of this decision by a larger bench.

This decision of the Supreme Court as to the role of the executive and the center and at the state levels became marginal. The decision on the appointment of the judges rests in fact with the judges themselves. President is only signing authority. He has no right to say no in any case. He cannot refuse the name suggested and recommended by the Chief Justice of India.

## **6.2. Procedure for the Appointment of the Judges of Supreme Court and High Court in India: Constitutional Provisions**

The method of appointment of the judges in India is rich and having diversity in character and issues. This chapter will briefly discuss three important phases relating to judicial appointments: Pre-constitutional discussions (1946-1950), the phase of executive-led appointments (1950-

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<sup>4</sup> Ibid.

<sup>5</sup> Art. 124(2) reads: ‘Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted...’

1993) and the current collegium mode of appointment of judges (1993-present)<sup>6</sup>.

Article 124(2)<sup>7</sup> and 217(1)<sup>8</sup> of Constitution of India provide procedure for appointment of judges in higher judiciary. Article 124(2) talks about two type of consultation. One being discretionary on the part of the President and the other being mandatory under the proviso he has a wide range of judges of Supreme Court and High courts to whom he may consult in this regard. He may consult one or ten or none judges for this purpose. But the proviso makes it mandatory that in the matter of appointment of a judge other than Chief Justice of India, the Chief Justice of India shall always be consulted. Under Article 217(1) the process of ‘consultation’ by the President is mandatory and this clause does not speak of any discretionary consultation<sup>9</sup>. In the Constitution of India, the provision for appointment of judges in the Supreme Court and the High Courts contained in Articles 124 and 217 remains the same as originally enacted but need for urgently change is being debated primarily on account of the manner in which the provision is seen to be worked<sup>10</sup>.

To enable the Supreme Court and High Courts to perform their functions impartially and fearlessly, the Constitution of India provides provisions to safeguard their independence. The judges of these courts are

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<sup>6</sup> Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, <http://nalsarijcl.in/wp-content/uploads/2012/06/5-Judicial-Independence-and-the-Appointment-of-Judges-to-the-Higher-Judiciary-in-India-A-Conceptual-Enquiry.pdf> [Access on 4 Jan 2013 at 2:06 PM].

<sup>7</sup> Art. 124(2) reads: ‘Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted...’

<sup>8</sup> Art. 217(1) reads: ‘Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.’

<sup>9</sup> Under article 217(1) the consultation is mandatory on the part of the President because all the three constitutional functionaries viz. the CJI, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the high court shall always be consulted.

<sup>10</sup> J.S.Verma, *The New Universe of Human Rights*, (2004), Universal Law Publishing Co. Pvt. Ltd, New Delhi, p. 307-308.

appointed by the executive after consultation with those most competent to advice on the subject. Once appointed, the judges hold office till they reach the age of superannuation fixed by the constitution and thus their tenure is independent of the will of the executive<sup>11</sup>.

In the first 25 years of the Constitution there was no serious comment made in any responsible quarter on the manner of exercise of the power of appointment. A convention had developed that without express use of such language, the opinion of the Chief Justice of India formed in consultation with the executive was given primacy.

The first matter to come up for adjudication was **Sakal Chand v. Union of India**<sup>12</sup> where the court upheld the transfer of the Chief Justice of Himachal Pradesh. However, a big controversy arose when, the executive began to claim primacy in the matter of appointments and transfers which led to the First Judge Case **S.P. Gupta v. Union of India**<sup>13</sup> wherein the Supreme Court itself upheld the executive's claim of primacy. That led to executive's supremacy in the matter of appointment as of right which threatened the independence of judiciary. Dissatisfaction with the working of the process led to the Second Judge Case **SCAOR v. Union of India**<sup>14</sup>, wherein the primacy of the opinion of the judiciary expressed through the Chief Justice of India came to be established emphasizing the role of the executive and the judiciary was participatory, the exercise being joint in which both have a role to play. However, recently some dissatisfaction is surfacing to this view also which led to the **Presidential Reference**<sup>15</sup> which reaffirmed the law laid down in the Second Judge Case. There is disquiet even now and a debate is on for the setting up of a National Judicial Commission. This would require amendment of the relevant provisions in the Constitution. Recently, the National Judicial Appointment Commission Bill, 2014 has been passed by the both Houses of

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<sup>11</sup> Subash C. Kashyap, *The Citizen Under Judicial Reforms: Under Indian Polity*, (2003), p. 181.

<sup>12</sup> 1978 (1) SCR 423.

<sup>13</sup> AIR 1982 SC 149.

<sup>14</sup> AIR 1994 SC 268.

<sup>15</sup> Presidential Reference No 1 of 1998 (1998 (5) Scale 629).

the Parliament. The National Judicial Appointments Commission Bill, 2014 will scrape the current collegium system of appointment of judges to higher judiciary in the country.

Law Minister Ravi Shankar Prasad said the government favours independence of judiciary but the "sanctity" and "supremacy" of Parliament is equally important as it reflects aspirations of the people. He said further that the Commission is proposed to be set up to have a "fair procedure" to appoint judges to higher judiciary while properly maintaining the "judicial dignity"<sup>16</sup>,

It is significant that Article 124 and 217 remain as enacted originally but the perception has been changing depending on the manner in which process has been seen to work from time to time. This kind of variation has occurred only because of the attitudinal differences of the men who have worked these provisions at different times. The point to remember is that these provisions assign a participatory role to both the executive and the judiciary and it was expected that the viewpoints of both would be taken into consideration, any confrontation between them would be avoided and both would discharge their role keeping in view the aim of making the best possible appointments from amongst those available to fill these high offices<sup>17</sup>.

The appointment of the judges are made by the President of India. In case of appointing of Chief Justice, the President has consultation with such of the judges of the Supreme Court and High Courts as he may deem necessary. In case of appointment of other judges, the President is required to consult the Chief Justice of India though he may also consult such other judges of the Supreme Court and High Courts as he may deem necessary<sup>18</sup>. The seat of Chief Justice of India is filled on conventional practice i.e. the senior most judge of the apex court would become Chief Justice of India. But in the year 1973 the Government suddenly departed from this established

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<sup>16</sup> The Hindu, 12<sup>th</sup> August 2014.

<sup>17</sup> Supra Note.10. at p. 308.

<sup>18</sup> Supra note. 11. at p. 182.

practice when Justice A.N. Ray was appointed Chief Justice of India in preference to his senior colleagues, Justices Shelat, Hedge and Grover. Again in 1977 Government appointed Beg J. as the Chief Justice of India, bypassing Khanna J. who was then senior most judge. But, later on Chandrachud J. (who was the senior most judge) was appointed as Chief Justice of India and the conventional practice was restored<sup>19</sup>.

Articles 124 and 217 of Constitution of India deal with the appointment of Supreme Court and High Court judges and the provision for the appointment of the judges seems to be very simple and clear, but in practice the appointments are very critical and sometimes become the subject of controversy and debate between the executive and judiciary. This controversy arises simply to show the supremacy of the appointing and recommending authority. Former Chief Justice of India Markandey Katju said that the Chief Justice of India shall not be appointed on seniority but on merits only. He said further that the Chief Justice of India is head of the judicial family, and an undeserving appointment can cause great harm which may last for several years<sup>20</sup>.

In Great Britain, the judges are appointed by the Crown which means the executive of the day, without any kind of limitation. In the USA, on the other hand, the President appoint the Supreme Court judges with the consent of the Senate. However, the framers of Indian Constitution saw difficulties in both methods and so they adopted a middle path. The English method appears to give a blank cheque to the executive while the American system is cumbersome and involves the possibility of subjecting judicial appointments to political influence and pressure. The Indian method neither give an absolute authority to the executive nor does it import influence of Parliament in the matter of appointment of judges<sup>21</sup>.

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<sup>19</sup> These two instances witnessed that how the executive dominated in the process of appointment of judges, which was more or less a participatory process with the consultation of judiciary.

<sup>20</sup> The Times of India, 24<sup>th</sup> August 2014.

<sup>21</sup> Supra note. 11.

The practice in India to appoint the senior-most judge of the Supreme Court as the Chief Justice was criticized by the Law Commission on the ground that a Chief Justice should not only be able and experienced judge but also a competent administrator and, therefore, succession to the office should be regulated by mere seniority. The government is however reluctant to give up the rule of seniority in appointing the Chief Justice lest it should be accused of tempering with the independence of. But a mechanical adherence to the rule at times results in the Chief Justice holding office only for a few months before he retires from the court<sup>22</sup>.

The Collegium system is that where the Chief Justice of India and a forum of four senior-most judges of the Supreme Court recommend appointments and transfers of judges. However, this system has no place in the Indian Constitution. The system was evolved through Supreme Court judgments in the Three Judges Cases<sup>23</sup>: In **First Judges case**, the Supreme Court declared that the “primacy” of the Chief Justice of India’s recommendation on judicial appointments and transfers can be refused for “cogent reasons.” The ruling gave the executive primacy over the judiciary in judicial appointments for the next 12 years.

In **Second Judges case** the Supreme Court held that the Chief Justice of India only need to consult two senior-most judges. “The role of the Chief Justice of India is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter,” In **Third Judges case** the Supreme Court lays down that the Chief Justice of India should consult with a plurality of four senior-most Supreme Court judges to form his opinion on judicial appointments and transfers.

In India, the High Court judges are appointed by the President under Article 217 (1) of Constitution of India. Article 217 (1) says that “every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the

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<sup>22</sup> Supra note. 11.

<sup>23</sup> ‘The Validity of the Collegium System’, The Hindu, 25 June 2014.

State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or acting judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.” A reading of this clause shows that while the appointment is made by the President, it has to be made after consultation with three authorities, namely, the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. (Of course, in the matter of appointment of Chief Justice, the consultation with the Chief Justice is not required).

The practice, which had developed over the last several decades and which was in vogue till the aforementioned 1981 decision of the Supreme Court (*S.P. Gupta*), the Chief Justice of the High Court used to make the recommendation which was considered by the Governor of the State (Council of Ministers headed by the Chief Minister) who offered his comments for or against the recommendation. The matter then went to the Central Government. At that stage, the opinion of the Chief Justice was sought and based upon such advice, the appointment was either made or declined, as the case may be. It may be noted that even clause (1) of Article 217 uses the expression ‘consultation’ and not ‘concurrence’.

The decision of the Supreme Court in *S.P. Gupta*<sup>24</sup> on the meaning of ‘consultation’ applied equally to this Article. After the decision in *S.P. Gupta*, the executive made quite a few appointments to the High Courts which gave rise to a good amount of dissatisfaction among the relevant sections including the Bar leading to the nine-Judge Constitution Bench decision of the Supreme Court in 1993 aforementioned. The decision laid down that the recommendation for appointment to the High Courts shall be made by the Chief Justice of the concerned High Court in consultation with his two senior-most colleagues. The opinion of the Chief Justice of India was given primacy in the matter and was to prevail over that of the Governor of the State or even

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<sup>24</sup> AIR 1982 SC 149.

that of the High Court, if inconsistent with his view. The President was of course to make the formal appointment just as in the case of a Judge of the Supreme Court. This position was affirmed in the **Third Judges case**<sup>25</sup>.

### **6.2.1. Significance of word “Consultation” under Articles 124 and 217**

‘Consultation’ and the concept of independence of judiciary: None of the constitutions<sup>26</sup> of the Commonwealth countries, nor the Constitution of U.S.A. provides for “consultation” with the head of the judiciary or any other member of the judiciary in the matter of appointment of judges. Only Constitution of India does and it could not have been without a purpose. Many of the leading members of the Constituent Assembly were lawyers of great repute. They knew the situations in India very well. Dr. Ambedkar, Alladi Krishnaswami Ayyar and K.M. Munshi, were the great political leaders. The question arises why did they depart from other countries and provided this innovative procedure, when even the Government of India Act, 1935 S. [220 (2) concerning the appointment of judges of High Courts] did not provide for such consultation? There can be no explanation for this innovation except that they were anxious to and concerned seriously with the concept of independence of judiciary<sup>27</sup>.

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<sup>25</sup> 1998 (7) SCC 139. (See Also: National Commission to Review the Working of the Constitution, <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>. [Access on 23rd Jan 2012 at 4:00PM])

<sup>26</sup> In United Kingdom judges of High Court and the Appeal Court (Supreme Court) are appointed by the Crown, on the advice of the Lord Chancellor. The Lord Chancellor occupies a position peculiar to that country, he is the head of the Judiciary, a member of the Cabinet and the Speaker of the House of Lords. In Australia, S.72 of the Constitution of Commonwealth of Australia provides merely that justices of the High Court (the Highest Court) shall be appointed by the Governor-General in Council in consultation with the Attorney-General (as provided by S.6 of the High Court of Australia Act, 1979) while judges of the State Supreme Courts are appointed by the Governors on the advice of the government wherein the Attorney-General of the States play an important role. In Canada, judges are appointed by the Cabinet (either federal or provincial) with a major role played by the Minister of Justice/the Attorney-General. In Ireland, judges are appointed by the President on the advice of the government. In Japan, by Emperor as designated by the Cabinet, in Switzerland, judges are elected by the Federal Legislature. In USA, as is well known, the President appoints them subject to confirmation by Senate. There is no uniformity in the procedures followed in different countries. The procedure in each country appears to have evolved over the years having regard to the peculiar constitutional development of each country. (See Also: National Commission to Review the Working of the Constitution, <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>. [Access on 23rd Jan 2012 at 4:00PM].)

<sup>27</sup> Supra note. 9.

This provision is attributable to their conviction that at our stage of development and having regard to the propensities of the executive (to control every organ of state and every institution of governance) they cannot be vested with the sole power of appointment to judiciary, a co-equal wing of government. The requirement of consultation with not only the Chief Justice of India but with certain other judges at the Supreme Court and High Courts level in Article 124 is an added indication of the concern the founding fathers had with the independence of the judiciary<sup>28</sup>.

They had before them the U.K., Australian, Canadian, Irish and other constitutions which did not provide for any such consultation with the head of judiciary either at federal or provincial level much less with other judges, but yet chose this particular formulation. Evidently, they did not trust the executive in India to make proper appointments and hence ‘entrenched’ the requirement of ‘consultation’ in the Constitution itself expressly. It is, therefore, perfectly consistent with the Constitution, for the Supreme Court to say, in its 1993 and 1998 decisions referred to hereinbefore, that the Chief Justice of India occupies a pre-eminent position and that the “consultation” contemplated by the said Articles should be a real and full consultation and further that since the judges would be in a better position to judge the competence and character of the prospective candidates, their opinion should prevail in the matter of appointment<sup>29</sup>.

The Constitution confers upon the President several powers as distinguished from the executive power of the Union which is carried on in the name of the President. Article 74 says that “in exercise of his functions” (the President) shall “act in accordance with such advice” i.e. advice tendered to him by the Council of Ministers with the Prime Minister at its head. Even after its amendment by the Constitution (Forty-second Amendment) Act, 1976, the said requirement (to “act in accordance with” the advice) is not all

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<sup>28</sup> National Commission to Review the Working of the Constitution,  
<http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>. [Accessed on 23<sup>rd</sup> Jan 2012 at 5:1 5PM.]

<sup>29</sup> Ibid.

pervading<sup>30</sup>. There are certain areas where the President can act without, or even contrary to, such advice. For example, when the President has to choose a Prime Minister after a general election (or whenever such an occasion arises), the President has to act in his own discretion; the advice of the Union Council of Ministers with the Prime Minister at its head has, and can have, no application to such a situation; indeed he cannot act in this matter on the advice of the outgoing Council of Ministers<sup>31</sup>.

When a Prime Minister suffers a no-confidence motion and then he advises the President to dissolve the House, the President is not bound by such advice. If the President finds that a viable alternative government can be formed, he is entitled to reject the advice of the Prime Minister, refuse to dissolve the House and swear in the alternative Prime Minister/Council of Ministers. It is clear that the requirement of acting on the advice of the Council of Ministers with the Prime Minister at its head cannot be said to admit no exceptions. It is the general rule but there can be exceptions. Articles 124 and 217, are another exception to the 'requirement' in Article 74 both because of the express language employed therein and also because of the concept of judicial independence which must necessarily be implied therein.<sup>32</sup> It is well established that the over-arching concept of judicial independence calls for an interpretation of the Constitution consistent with the said concept<sup>33</sup>.

### **6.2.2. Two Important Cases related to Appointment of Supreme Court and High Court Judges**

The method of appointment of High Courts judges was considered in detail is popularly called the **Second judges case**<sup>34</sup>. This was a bench of nine judges and the judgment is extremely lengthy. It has been severely criticized by the eminent Indian jurist, H M Seervai. Without going into its merits, it

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Chief Justice of A.P. v. L.V. Deekshitulu, A.I.R 1979 SC 193.

<sup>34</sup> Supreme Court Advocate on record Association v. Union of India, AIR 1994 SC 268.

would suffice to summarize the conclusion made by the Supreme Court in this case<sup>35</sup>.

- a. The process of appointment of the High Courts must be initiated by the Chief Justice of the respective high court.
- b. The Chief Justice must adhere to a time bound schedule so that the post of judges are not kept vacant for a long period.
- c. The proposal of the Chief Justice of the High Courts must be sent to all other constitutional functionaries. The other functionaries within 6 weeks from the receipt of the proposal, must convey their views to the Chief Justice of India. (it is not clear as to why the views cannot be conveyed to the Chief Justice of the High Court.
- d. If the particular constitutional functionaries doesn't express its opinion within the specified period, it would be considered as a deemed agreement with the recommendation made by the Chief Justice.
- e. The Chief Justice of India, after considering the recommendations and the views of the constitutional functionaries should confirm his final opinion and convey to the president, with in four week of the final action taken.
- f. The Chief Justice of India should take into account the views of his colleagues in Supreme Court who are likely to be conversant with the affairs of the concerned High Courts. It should be noted that these requirements do not change the procedure laid down. It must be considered by the collegium consisting of the Chief Justice of the India and two senior most Supreme Court judges.
- g. The process of appointment to the Supreme Court should be integrated, participatory and consultative process of all constitutional functionaries who must perform their duty collectively so as to meet the requirement constitutional object.

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<sup>35</sup> Santosh Paul, *Choosing Hammurabi: Debates on Judicial Appointments*, (2013), Lexis Nevis Publication, Haryana, India. p. 62-63.

- h. It is also open to the Chief Justice of India to recommend the initial appointment of a person to any high court other than the high court for which the proposal was initiated provided the other constitutional requirements are satisfied.
- i. If there are any objections for the appointment of a particular person it should be for good reasons which must be disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendations on these conditions
- j. In exceptional cases even a candidate recommended by the Chief Justice need not be appointed, if there are valid objections for his appointment. The objections can relate to his character, conduct, health or other factors. Similarly if his tenure is likely to be very short the appointment need not be made. In rare cases even if the opinion of the Chief Justice of High Court conflicts with that of the Chief Justice of India the appointment need not be made.

The judgment is highly confusing and it is very difficult to decipher clear propositions. The Supreme Court recommended that a Memorandum of Procedure should be prepared by the Government of India after consulting the Chief Justice of India, so that it could be followed for all future appointments. This memorandum was never prepared<sup>36</sup>.

The second case is the presidential reference made on 23 July 1998. The president of India referred nine questions for consideration by the Supreme Court. These questions related to three aspects<sup>37</sup>:

- i. Consultation between the Chief Justice of India and his brother judges in the matter of appointment of Supreme Court and High Courts and transfer of the latter;
- ii. Judicial review of transfer of judges
- iii. The relevance of seniority in making appointments to the Supreme Court.

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<sup>36</sup> Supra note. 34. at p.64.

<sup>37</sup> Ibid.

The principal laid down by the Supreme Court can be summarized as follows<sup>38</sup>:

1. Consultation with the Chief Justice of India does not mean consultation only with the Chief Justice. It requires consultation with a plurality of judges.
2. The Chief Justice of India has to form a collegium of four senior most puisne judges of the Supreme Court. This is necessary for appointment for judges of the Supreme Court or to transfer a High Court Chief Justice or a High Court judge.
3. For appointment of the High Court judges the Chief Justice has to consult two senior most judges of the Supreme Court. This collegium can also take into account the views of a Supreme Court judge from the particular High Court to which appointment is to be made. For example, if appointment is to be made to the Madras High Court, collegium of the three judges can consult the senior most judge of the Supreme Court from the Madras High Court. This will be necessary if he is not a part of Collegium. They can also take into account the views of other Supreme Court judges or Chief Justice of the High Court, this is to ensure that the best possible talent is brought to the Supreme Court bench.
4. Until 1998 the collegium consisted of the Chief Justice of India and two senior most judges. Thereafter it was changed to the Chief Justice and four judges of the Supreme Court.
5. The opinion of the collegium will have primacy in the matter of appointment. It is open to the executive to inform the collegium of its objections, however, if the Chief Justice and his companion judges are still of the view that there is no reason to withdraw their recommendation, then that appointment should be made as a matter of healthy convention. However, even two judges have serious

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<sup>38</sup> Ibid. p.64-66.

reservations about a particular appointment, then it should be not be made.

6. The Supreme Court can also consult other judges of the Supreme Court judges of the High Courts or even the Members of the Bar with regard to a particular appointment. The views of the member of the collegium would be made in writing and should be forwarded to Government of India along with recommendations of the Chief Justice. However when the Chief Justice consult other Supreme Court judges or member of the Bar these views should be summarized in a memorandum and forward to the Government of India.
7. If some member of the collegium have retired before a particular appointment is made and the Government of India has sent back adverse comment then the Chief Justice has to constitute a new collegium by adding the requisite new judges to form the collegium. In such an event there has to be unanimity in the appointment that is to be made.
8. The Chief Justice may in his discretion inform the person of the objections raised by the Government of India. The collegium can call for the reply of the prospective appointee and take into account his explanation before either withdrawing the nomination or confirming it.
9. Merit is the predominant consideration for appointment to the Supreme Court but seniority should be kept in mind. The Supreme Court has held that seniority can be overloaded in case of outstanding merit.
10. The collegium for approving the appointment of the High Courts judges is the Chief justice and two senior most puisne judges of the Supreme Court.
11. The chief justice should take into account the views of the Supreme Court judges who are likely to be conversant or familiar with the affairs of the concerned High Courts. They must also take into account the opinion of the Chief Justice of the particular High Courts this is entitled to the greatest weight.

### **6.2.3. The Procedure for the Appointment in Subordinate Judiciary**

The procedure of appointment in subordinate judiciary is governed by Articles 233 to 237 of the Constitution of India and the rules made under the proviso to Article 309. The district judges, who are at the highest position of the subordinate judiciary, are appointed by direct recruitment or by promotion. The selection of direct recruit district judges is made by the High Courts. The Governor appoints them on the basis of the recommendation of the High Courts. So far as promotion to the post of district judge is also made by the High Courts alone and formal orders being issued by the Governor.

The appointment of munsiff and magistrates is made by the Public Service Commission and the High Courts. In many states, a judge of the High Courts is nominated by the Chief Justice of that Court sits with the Public Service Commission for the purpose of selection. The power of selection is vested exclusively in the High Court in the some states<sup>39</sup>.

Again the appointment is made by the Governor on the basis of the recommendation made by the designated judge and the Public Service Commission or by the High Courts, as the case may be. So far as promotion from munsiff /magistrate to the intermediate higher level of subordinate judge /assistant sessions judge is concerned, it is made by the High Courts itself. In short, in the matter of selection for appointment, promotion and postings of subordinate judiciary, the High Courts is the real authority and the role of the State Government is formal in character. Indeed, with respect to subordinate judiciary, the disciplinary jurisdiction also vests in the High Courts, on whose recommendation, formal orders are issued by the Governor. In all other service conditions, High Court is the competent authority, subject, of course, to the rules, if any, made under the proviso to Article 309 of the Constitution<sup>40</sup>.

#### **6.2.3.1. The Controversies regarding the Appointment of the Judges**

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<sup>39</sup> Supra note. 34.

<sup>40</sup> Supra note. 27.

The procedure of appointment by government being a mere formality to subordinate judiciary. The method of appointment particularly in the actual manner in which appointments were made to the High Courts and the Supreme Court has been a subject matter of good amount of controversy, whether before the decision in S.P. Gupta or thereafter and even after the 1993 decision of the Supreme Court in **Supreme Court Advocates-on-Record Association**<sup>41</sup>. While the decision in the S.P. Gupta was criticized for upsetting the existing situation by vesting the power of appointment in the executive and thereby diminishing the importance of the Chief Justice of India and the judiciary. The 1993 decision in SCAORA is criticized for precisely the opposite reasons. It is said by the critics of the 1993 decision that in a democracy, accountability is an important consideration and the authority or authorities making such appointments should be accountable to the people<sup>42</sup>. In the matter of functioning, the executive must be involved in the process of appointment. The argument is that someone must be responsible for the appointment made and since Chief Justice of India or his colleagues are not accountable to the people, the concentration of power of appointment in them is undemocratic. The argument further is that the executive is accountable to the legislature, which in truth represents the will of the people the consumers of justice and that involvement of executive is the only way of infusing the element of democracy and accountability in the process relating to the appointment of judges of the High Courts and Supreme Court<sup>43</sup>.

The contrary argument in support of the existing method (ordained by the decisions of the Supreme Court in 1993 and 1998 aforementioned) is that in Indian conditions and culture, entrusting this power to, or involvement of the executive in the appointment process is bound to prove detrimental to the independence and integrity of the judiciary, as the experience during the years 1973 to 1977 and again during the period 1982 to 1993. The supersessions,

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<sup>41</sup> (1993) 4 SCC 441 (at p 685, 688, 692, 693).

<sup>42</sup> Supra note. 27.

<sup>43</sup> Ibid.

arbitrary and motivated transfer of judges of High Courts, the manner in which additional judges in High Courts were dealt with (either by extensions for short periods or by not confirming them), the several attempts at muzzling the judiciary during the period 1973 to 1977 (including the supersession of senior-most judges of the Supreme Court in the matter of appointment of Chief Justice of India) and the manner in which several appointments were made during 1981 to 1993 are all said to furnish proof of the fact that in our present stage of development, the domination or involvement of the executive in this process is not desirable<sup>44</sup>. It is said that democratic culture has not yet taken root in our country and that feudal tendencies are very much part of our thought and action. The attempt to control every institution, personalized rule, refusal to see the merit of diffusion of power of governance (a basic feature of democracy) are propensities which are not conducive to an independent and efficient judiciary. If the vesting of the power of selection of subordinate judiciary in the High Courts exclusively is not bad, how does the selection of Judges of High Courts and the Supreme Court become bad goes the argument<sup>45</sup>.

Though executive is the biggest litigant and the power vested in the Supreme Court and the High Courts by Articles 32 and 226 respectively is intended to act as a check upon the executive and that today the major portion of the work in every High Court and the Supreme Court is under these provisions; if so vesting the power of appointment, whether wholly or partially, in the executive is bound to prove prejudicial to this constitutional perspective. The U.K. example, it is said, is not relevant to this country at the present stage of development and in so far as U.S.A. is concerned, it cannot and ought not to be emulated in this country, more particularly after the recent episode (the un-edifying manner in which the judiciary in that country acted in the Bush-Gore election controversies)<sup>46</sup>.

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

### **6.3. Past Proposals for Reforms in the Process for Appointment of Judges in India- Since 1945**

There were several suggestions put forward and attempts at reform in the appointment process of judges in India in last several year. They are following<sup>47</sup>:

#### **6.3.1. Recommendations of Sapru Committee:**

In the year 1945, a Sapru Committee was constituted to look into this aspect of impending of independence of the country. The Sapru Committee recommended that the judges of the Supreme Court and of the High Courts should be appointed by the head of the state in consultation with the Chief Justice of the Supreme Court and in case of the High Courts in consultation with the High Court Chief Justice also and the head of the unit concerned<sup>48</sup>.

#### **6.3.2. Recommendations of the High Powered Committee Appointed by the Constituent Assembly**

A high powered committee appointed by the constituent assembly consisting of outstanding jurists of the country recommended a method for the selection of judges of the Supreme Court. The committee submitted its unanimous report. Its opinion was that the powers of appointment of the judges of the Supreme Court should not be left alone in the hands of the President. It suggested a method that the President should appoint the puisene judges of the Supreme Court in consultation with the Chief Justice of the Supreme Court. He may nominate a person whom he considers fit to be an appointed a judge of the Supreme Court and the nomination should be confirmed by a majority of at least seven judges out a penal of eleven judges keeping the Chief Justice of the High Courts and some members of both houses of center assembly and some of the law officers of the Union. The second opinion was that the Penal of eleven judges should recommend three names out of which the President may select a judge for appointment in

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<sup>47</sup> Ibid.

<sup>48</sup> B. Shiva Rao, 'The Framing of India's Constitution.' p. 590.

consultation with the Chief Justice. For the appointment of the Chief Justice of the Supreme Court, the consultation of the Chief Justice was not required. It has been held by the Supreme Court that senior most judge of the Supreme Court shall always be appointed as the Chief Justice of India<sup>49</sup>.

### **6.3.3. Shri B.N. Rao's Suggestions**

Shri B. N. Rao, the then constitutional advisor suggested that the appointment of the judges should be made by President with the approval of at least 2/3rd members of the council of states. The Chief Justice of the Supreme Court should be an ex- office member. The draft constitution was forwarded to the Federal Court for its view<sup>50</sup>.

### **6.3.4. Federal Court's Recommendation**

A conference of the judges of the Federal Court including its Chief Justice and the Chief Justice of the High Courts was held in March 1948 to consider the proposal given in the draft constitution regarding the appointment of the judges. It recommended that the appointment of the judges of the High Court should be made by the President on the recommendation of the Chief Justice of the High Courts after the consultation of the Governor of the State and with the concurrence with the Chief Justice of India<sup>51</sup>.

### **6.3.5. Basis adopted in Articles 124 and 217**

The Constituent Assembly considered all the proposals and put in Article 124 and Article 217 of the constitution of India. It chooses to put the word "consultation" in reference to the word "concurrence"<sup>52</sup>.

### **6.3.6. Fourteenth Report of the Law Commission of India**

The first Law Commission of India headed by Shri M. C. Setalvad<sup>53</sup> and other distinguished personalities examined the issue of the appointment of the judges at the length. The opinion of the commission was that overall the

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<sup>49</sup> Supra note. 27.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Distinguished Jurist and First Attorney General of India.

selection of the judges was not satisfactory. It was also of the opinion that there was executive influence in the appointment of the judges. The appointment was not made on recognizable principle.

It was also of the opinion that the appointment were made by political expediency, recognizable regional or communal sentiments. The appointments that were made were also not on merit. The commission felt that communal and regional consideration prevailed in the appointment of the judges. Executive influence from the highest quarter had also exerted in the appointment of the judges. The commission recommended that the appointment of the judges of the Supreme Court and of the High Courts should be made with the concurrence of the Chief Justice of the Supreme Court of India<sup>54</sup>.

Supreme Court of India had observed in the case of **Samsher Singh v. State of Punjab**<sup>55</sup> that the consultation with the highest dignitary of Indian justice will and should be accepted by the Government of India. Because the Supreme Court of India shall have an opportunity to examine the extraneous circumstances that enter into the verdict of the Ministers. The Supreme Court observed that last word in such matter must be that of Chief Justice of India.

### **6.3.7. Supreme Court's observation in Shamsher Singh's Case**

In the case of Shamsher Singh<sup>56</sup> the Bench observed that “in all conceivable cases, consultation with highest dignitary of Indian justice will and should be accepted by the Government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice, the last word in such sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the

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<sup>54</sup> Supra note.27.

<sup>55</sup> Samsher Singh v. State of Punjab, AIR 1974 SC 2192.

<sup>56</sup> Ibid.

order.” A most emphatic statement regarding the role of Chief Justice of India in all such matters.

#### **6.3.8. 80<sup>th</sup> Report of the Law Commission of India**

In the year 1977, at the instance of the then Prime Minister of India, the Ministry of Law, Justice and Company Affairs requested the Law Commission to examine the question of appointment of Judges of High Court and Supreme Court and to submit a report. The Law Commission headed by Shri H. R. Khanna J. went into the matter at length and recommended (by the time of submission of the Report Shri H.R. Khanna J. resigned and hence it was sent by a Member of the Commission) that while making a recommendation for appointment of a judge of a High Courts, the Chief Justice of the High Courts should consult his two senior-most colleagues and while forwarding the recommendation should incorporate therein the fact of such consultation and indicate the views of the two colleagues. The unanimous recommendation of this body, it was recommended, should normally be accepted by the executive<sup>57</sup>.

The Commission had proposed in its questionnaire, constitution of a high level panel (a consultative panel, called “Judges Appointment Commission”) consisting of persons known for their integrity, independence and judicial background to ensure dispassionate scrutiny and to eliminate extraneous considerations in the matter of these appointments (the panel was to consist of Chief Justice of India, Minister for Law and Justice and three persons each of whom has been the Chief Justice or a Judge of the Supreme Court) but it dropped the proposal in view of the opposition by most of the High Courts.

The Law Commission also recorded its views on transfer of High Court Judges, appointment of senior-most puisne judge as Chief Justice and so on – all of which need not be set out herein.<sup>58</sup>

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<sup>57</sup> 80th Report on Method of Appointment of Judges, (1979).

<sup>58</sup> Ibid.

### **6.3.9. 79<sup>th</sup> Report of the Law Commission of India**

In the Seventy-ninth Report of the Law Commission of India (on Delay and Arrears in High Courts and other Appellate Courts [1979]), it was recommended that in the matter of appointment of judges of the Supreme Court, the Chief Justice of India should consult his three senior most colleagues and should, in the communication incorporating his recommendation, specify the result of such consultation and reproduce the views of each of his colleagues so consulted. It appears that this procedure was followed between 1977 and 1979 but given up thereafter. Though the said recommendation applies equally in the matter of appointment to the High Courts, there is no material before us to show whether the said recommendation was ever followed and if so, for what period.

The opinion of three senior most colleagues and their recommendation should also be recorded in writing. This report was followed in between 1977 to 1979. But it was later on not followed and this policy was given up. Although the said recommendation was applies in matter of appointment of the judges of the High Courts. However, there is no evidence to show that the said recommendation was ever followed or not<sup>59</sup>.

### **6.3.10. Bar Council of India's suggestions for Collegium**

The Bar Council of India organized a national seminar of lawyers at Ahmedabad on 17th October, 1981. It opined that the role of executive in the matter of appointment to High Court and Supreme Court should only be formal and minimal. The initiative in the matter of selection and appointment of judges should invariably rest with the Chief Justice of India. For appointment to the Supreme Court, it recommended a collegium consisting of:

- i. The Chief Justice of India,
- ii. Five senior Judges of the Supreme Court, and

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<sup>59</sup> 79th Report on Methods of Appointment

- iii. Two representatives of the Bar representing the Bar Council of India and the Supreme Court Bar Association.

The recommendation should be binding on the President. In the matter of appointment to the High Court, it was recommended, the collegium should consist of the Chief Justice of the High Court and his two senior-most colleagues and two leading advocates to be nominated by the Bar Association of the High Courts as its representatives<sup>60</sup>.

#### **6.3.11.121<sup>st</sup> Report of Law Commission of India for Constitution of a National Judicial Service Commission**

The Law Commission again went into this matter at great length in the year 1987. Its recommendations are contained in the One Hundred Twenty first Report on a New Forum for Judicial Appointments submitted in July, 1987. After noticing the several recommendations made earlier and the developing trends in other countries, the Law Commission recommended the constitution of a National Judicial Service Commission. It opined “a broad based National Judicial Service Commission representing various interests with pre-eminent position in favour of the judiciary is the demand of the times<sup>61</sup>.” The Report recommended that the Judicial Service Commission should be composed of eleven persons, namely, the Chief Justice of India and three senior most Judges of the Supreme Court, the immediate predecessor in office of the Chief Justice of India, three senior most Chief Justices of the High Courts, Minister for Law and Justice, the Attorney General of India and an outstanding law academic. The report further opined that it must be left to such Commission to devise its own procedure for initiation of proposal for recommending individuals for appointment and that no hard and fast rule can be laid down in that behalf. It was observed that recommendation of such a Commission should be binding upon the President but it shall be open to the President to refer the recommendation back to the Commission in any given case along with information in his possession regarding the suitability of the

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<sup>60</sup> Supra note. 27.

<sup>61</sup> 121st Report of Law Commission of India.

candidate. If, however, after reconsideration, the Commission reiterates its recommendation, the President shall be bound to make the appointment<sup>62</sup>.

It was also recommended that the Chief Justice of the High Courts, to which appointment is proposed to be made, should be co-opted as a member of the Commission. Besides the Chief Justice of the High Courts, the Chief Minister of the State (wherein the High Court is situated) was also recommended to be co-opted. (This was on the premise that Governor is only a constitutional head who has to act upon the advice of the Chief Minister). It is evident that the Law Commission had in mind the appointment to High Courts only. It does not appear to have dealt with appointment to Supreme Court in this Report<sup>63</sup>.

In the year 1987, a National Judicial Commission submitted its recommendations regarding the appointment of the judges. It recommended that judicial service commission should be formed for the appointment of the judges. The commission may consists eleven persons namely, the Chief Justice of India, three senior most judges of the Supreme Court and three senior most judges of the High Courts, Minister of Law & Justice, Attorney General of India and outstanding eminent jurists. The commission was also of the view that the commission should be authorized to device its own procedure for initiating the proposal for recommendation for appointment of the judges. The object and reasons appended to the Bill stated the object of the said amendment was to obviate the criticisms of arbitrariness on the part of executive in such appointments and transfers and also to make such a appointments without any delay<sup>64</sup>.

### **6.3.12. Judicial Appointments: Views of Arrears Committee**

Committee about the views of arrears committee noticed the method of appointment of the High Court judges under the Government India Act 1919, Government of India Act 1935, and Expert Committee Report of 1947

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

recommended in the Judges Conference in the 1948. The constituent assembly debated the purports of Article 217 of the Constitution of India and principles content in S.P. Gupta's case and the norms observed that there a serious threat to the independence of the judiciary<sup>65</sup>.

The Law Commission, jurists, accommodation, and lawyers gave their serious thought on this matter. It was almost of unanimous opinion that there should be minimum say of executive. This power of appointment of the judges should be vested in Chief Justice of India. The appointment of the judges of the High Court has been in vogue for about four decades. So far as long established connivances were honoured and followed. The present system of the appointment of the judges of the High Courts worked satisfactorily<sup>66</sup>. However, it failed day by day due to systematic violation and virtual annihilation of the established connotations. Due to the failure of satisfactory appointment of the judges the necessity arose to evolve a new procedure for the appointment of the judges of the Supreme Court and the High Courts. However, a common opinion was there the role of executive in the matter of appointment of the judges should be diluted. So that the veto power of executive in these matter be abolished. The Arrears Committee of 1980 was also of the opinion that the word 'concurrence' of the Chief Justice of India should be replaced by the word 'consultation' in the matter of the appointment of the judges of the High Courts<sup>67</sup>.

The committee was conscience of the fact that the join conference of judges of the federal court and also a specific amendment moved to draft article 193 (now article 217 of the Constitution of India) providing for concurrence of the Chief Justice of India to be reacted. When this matter was regarding the judiciary came before it in constituent assembly for debate. Dr. Ambedkar expressed his views that the provision regarding consultation with the President of India and the Chief Justice of India was sufficient for time

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<sup>65</sup> Supra note. 27.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

being. The experience of Dr. Ambedkar about the working of Article 217 of the Constitution of India worked properly for two decades. Ultimately it was decided that in the matter of the appointment of the judges of the High Court and Chief Justice of India must consult with the Chief Justice of High Court and with other senior judges of the Supreme Court as may be necessary. The committee also recommended that the word 'further' be placed in between provided and 'that' in the Article 217 (1) of the Constitution of India. In India, the decision of the Supreme Court right from the year 1993 has reduced the role of the executive in the appointment of the judges to the minimum. The concept of life long appointment of judges may dilute drastically the judicial accountability in India<sup>68</sup>.

#### 6.4. Cases regarding the Appointment of Judges in India

In **S P Gupta v. Union of India**<sup>69</sup> (also known as the First Judges Case), the Hon'ble Supreme Court gave a literal meaning to the word 'consultation' appearing in Articles 124 and 217 of the Constitution. The court took the view that the opinion of the Chief Justice of India is merely consultative and the final decision in the matter of appointment of judges is left in the hands of the central executive. The challenge to the executive primacy thus failed in the First Judges case. The system then in vogue and the above judgment came under severe criticism on the ground that the appointments were prone to political influence and hampered the independence of judiciary<sup>70</sup>.

There was demand for amendment of the Constitution to curb the primacy of the executive in the appointment of judges. In its 121st report issued in 1987 the Law Commission advocated the setting up of a judicial commission for appointment of judges. The matter was again considered by a nine judge's bench in **Supreme Court Advocates-on-Record Association v.**

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<sup>68</sup> Ibid.

<sup>69</sup> S P Gupta v. Union of India, AIR 1982 SC 149.

<sup>70</sup> <http://www.livelaw.in/judges-appointment-executive-primacy-to-judicial-primacy-and-road-ahead/> [Access on 28Dec 2013 at 8:15 PM].

**Union of India**<sup>71</sup>, popularly known as the Second Judges case. In this case the majority gave up literal interpretation and adopted a wider meaning of the provisions in Articles 124 and 217. Particularly, the word ‘consultation’ was given a broad meaning. The Second Judges case overruled the view in S.P Gupta case by a sort of purposive interpretation resorting to the “constitutional philosophy” and “independence of judiciary<sup>72</sup>”.

In **Second Judges case**<sup>73</sup> “The opinion given by the Chief justice of India in the consultative process has to be formed taking into account the views of the two senior most judges of the Supreme Court.” and the opinion of the Chief Justice of India, for the purposes of Articles 124 (2) and 217(1), has primacy. In case of appointment of a Supreme Court judge the proposal is to be initiated by the Chief Justice of India and in the case of a High Court judge by the Chief Justice of that High Courts<sup>74</sup>. The operation of the collegium mode of appointment has, since the Second Judges’ Case which established it, created considerable public disquiet.

In **Re Presidential Reference case**<sup>75</sup>, known as the **Third Judges Case** again a 9 judge’s bench elaborated and clarified the Second Judges case. It was held that the opinion of the Chief justice of India has to be formed on the basis of consultation with the collegium, comprising of him and the four senior most Supreme Court judges and the opinion of all members of the collegiums in respect of each recommendation should be in writing. The plurality of Judges in the formation of the opinion of the Chief Justice of India is emphasized as a check against the likelihood of arbitrariness or bias. Thus

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<sup>71</sup> AIR 1994 SC 268.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> The case of Justice P.D. Dinakaran, recommended by the collegium as a judge of the Supreme Court despite consistent adverse reports against him including allegations of asparte of illegalities and the confirmation as permanent judge of Justice Ashok Kumar of the Madras High Court despite adverse reports and without consultation are illustrative examples of the shortcomings of the collegium process. See Fali S Nariman, ‘Before Memory Fades: An Autobiography’ (Hay House India, New Delhi 2010) 387; See also VR Krishna Iyer, ‘For a National Judicial Commission- I’ The Hindu (New Delhi 30 October).

<sup>75</sup> AIR (1993) 4 SCC 441.

by a process of ‘judicial invention’ what is called the ‘collegium’ system of appointment of judges came in to existence.

### **6.5. Lack of Transparency in Appointment System of Judges in India**

In our country, judges of higher judiciary enjoy a fixed tenure and they may be removed from the office only on the grounds of misbehaviour or incapacity after an impeachment motion passed by each House supported by a stipulated majority. Their tenure and difficult process of removal are also in tune with their independent functions. The appointment of judges of higher courts is kept secret in India. There is no transparency in the appointment of the judges in India. In United Kingdom applications are invited from the public at large. They are examined as to their ability and capability by a Commission consisting of judges of the country, jurists and politicians. In other countries, the transparent and fair procedure has been adopted in the appointment of the judges.

In India names of advocates having 10 years of practice are nominated by the Chief Justice of High Court with the consent of two senior judges of the High Court. This process is kept secret. In the appointment of judges of the Supreme Court, the names of judges of High Courts are recommended by Chief Justice of India in consultation with the four senior most judges. This process is also kept secret. In this aspect the example of the Chief Justice of Gujarat High Court<sup>76</sup> may be given. His name was not forwarded for elevation to the Supreme Court. His juniors were recommended for elevation. This process was kept secret. Sometimes kith and kin of judges of Supreme Court and High Courts are nominated for elevation<sup>77</sup>. There is no criteria for merit. There is no process for selection of meritorious advocates from all over India. This procedure has given rise to nepotism, favouritism, regionalism, and caste or religious bias. Had there been any open procedure for

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<sup>76</sup> Justice B Bhattacharya, <http://www.livelaw.in/justice-b-bhattacharya-not-elevated-to-sc-for-opposing-elevation-of-cji-kabirs-sister-to-cal-hc/>

<sup>77</sup> Something rotten in Allahabad High Court: Supreme Court, <http://articles.timesofindia.indiatimes.com/2010-11>.

appointment, the High Courts and Supreme Court would have been adorned with able and meritorious advocate. The judges from the lower judiciary are selected for elevation after 25 years of blotless service. They come from state level competitive examination.

They are not considered for elevation to the High Court before 25 or 30 years of their service. An advocate is a generally nominated for elevation after 15 or 20 years of practice. The present Chief Justice of Allahabad High Court, was elevated just after 14 years of practice simply because he is the son of former Chief Justice of India. There are several example in this regard. Absence in transparency in the governance of the country give rise to corruption. Equal opportunity should be provided to all for maintain of the rule of law. Only election are held in a democratic procedure. Executive and judicial functioning are opaque and that is why corruption is prevailing throughout in India.

Had there been any open competition for the appointment of the judges in India then the corruption would not have crept in the judiciary. The judiciary plays on this fear and enforces its hallowed solipsism. Justice P Sathasivam<sup>78</sup> said that the judiciary is not untouched by corruption. Judiciary is expected to work honestly, free of biased and prejudice opinion, nepotism, favouritism. The judicial process in India has become an instrument to harass the people especially the poor. Former Union Law Minister Shanti Bhushan also said that Supreme Court that at least eight of the 16 chief justices of India (CJIs) were "definitely corrupt"<sup>79</sup>.

In India, there is a problem of caste system and the higher judiciary is also affected by the caste system. Had there been any open competition then caste system would not have prevailed in the appointment of the judges.

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<sup>78</sup> Chief Justice of India, <http://www.dnaindia.com/analysis/standpoint-the-importance-of-a-judicial-appointments-commission-1887981> [Access on 29th Dec 2013 at 6:20 PM].

<sup>79</sup> 8 Chief Justices of India corrupt, says former Law Minister, <http://www.ndtv.com/article/india/8-chief-justices-of-india-corrupt-says-former-law-minister-52586> [Access on 29th Dec 2013 at 6:25 PM].

There is peculiar process in the appointment and removal of the judges of the High Courts. The judges of lower court come through a state level competition. They are dismissed from their service by the Governor of state on the mere recommendation of the Chief Justice of High Court of the state. The judges of the Supreme Court and High Courts are appointed by themselves. The President of India is simply asked to put his seal and signature on the recommendies of the Supreme Court. The judges of the Supreme Court and High Courts are not removed or dismissed by themselves. The dismissal process is very complicated and that is impeachment<sup>80</sup> by two-third majority of the members of the Parliament present and voting. This process is against the natural justice.

In every field, the appointing authority is given the power to dismiss also. In the case of judiciary, the dismissal power has been given to Parliament. The dismissal of a judge of higher judiciary is impossible atleast in present circumstances. The judges of High Courts and Supreme Court are answerable to none.

They strike and declare a law as unconstitutional. It is to be noted that Parliament represents the people of the nation and two or three judges do not represent the nation. They get benefit of impeachment.

Justice V. Ramaswami's case is a best example in this regard. The first case that came before the Parliament related to the inquiry against Justice V. Ramaswamy former judge of the Supreme Court. Speaker of the House appointed Justice P.V. Sawant Committee on 12th March 1991. The committee gave its report on 20th July 1992. The committee held some charges proved against Ramaswamy. However before any action on the report of the committee. The 9th Lok Sabha was dissolved. The motion for removal of Justice Ramaswamy was lapsed.

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<sup>80</sup> Article 124 (4) of the Constitution of India says that 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 misbehaviour or incapacity.

This plea of lapse was rejected by Supreme Court. Therefore, the motion for removal of Justice Ramaswamy came again before Parliament for discussion and voting. The motion however, could not serve requisite majority, it therefore, failed.

The 14<sup>th</sup> Report of the Law Commission of India regarding the appointment of the judges is worth recalling. “The services rendered by judges’ demands the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shillings, and pence and according to the quality of work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct<sup>81</sup>.

The executive power to appoint judges is wrested from the cabinet and exercised by the collegium. This is a novel conquest unique in any democracy. The selection of judges is an expert job but judges, senior or junior, are untrained and without investigating tools and unfit for this non-judicial technical operation. Never appoint a judge who is without socialist, secular, democratic burning convictions and who is not free from class bias<sup>82</sup>.

### **6.5.1. Suppression of Judges**

The practice of appointment of the Chief Justice of India on the basis of seniority was broken in 1973 when Mr. Justice A.N. Ray was appointed as the Chief Justice of India superseding three judges of the Supreme Court. In 1977 Justice M.H. Beg was appointed as the Chief Justice of India superseding Justice H.R. Khanna. The appointment of a judge as a Chief

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<sup>81</sup> Supra note. 11. at p.181.

<sup>82</sup> VR.Krishna Iyer, Needed, transparency and accountability, The Hindu, February 19, 2012

Justice of India superseding senior judges has been criticized as being against the judicial independence<sup>83</sup>.

The Law Commission has expressed the view that in the appointment of the Chief Justice of India not only the seniority but the administrative ability should also be taken into account. Actually for the maintenance of judicial independence the role of executive in the appointment of judges should be passive and formal. It has been rightly suggested that for the appointment of the judges of the Supreme Court should be a collegium consisting of the Chief Justice of India, five senior judge of the Supreme Court and two representatives of the Bar representing the Bar Council of India and the Supreme Court Bar Association. The recommendation should be binding on the government, though it may ask for reconsideration of specific cases on justifiable grounds. For the appointment of the judges of the High Court also, there should be collegium consisting of the Chief Justice of India, two senior-most judges of the Supreme Court, the Chief Justice of High Court and two senior members of the Bar and its recommendation should ordinarily be accepted<sup>84</sup>.

### **6.5.2. Transfer of Judges**

According to Article 222 of the President may, after consultation with the Chief Justice of India, transfer a judge from one High Court to any other High Court. Transfer may be made even without the consent of the judge so transferred<sup>85</sup>. However, this transfer must be made in the public interest and after full and effective consultation with Chief Justice of India<sup>86</sup>.

In **SC Advocates on Record Association**, the Supreme Court has made it clear that opinion of the Chief Justice of India has not mere primacy but is determinative in the matter of transfer of the judge of the High Court.

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<sup>83</sup> Law Commission XIV Report (1958) I.39-40.

<sup>84</sup> National Seminar on Judicial appointment and transfer held at Ahmedabad in (1980) Journal of Bar Council of India, Vol. VIII. (See also Prof. Kailash Rai, The Constitutional Law of India, Central Law Publication Allahabad, p.366)

<sup>85</sup> Union of India vs Sankalchand AIR 1977 SC 2328 and S.P. Gupta vs. Union of India AIR 1982 SC; SC Advocates on Record Association vs. Union of India AIR 1994, SC 268.

<sup>86</sup> Ibid.

The majority opinion in **S.P. Gupta v. Union of India**<sup>87</sup> in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers has not been held to be correct view<sup>88</sup>.

The consent of the transferred judge or Chief Justice of India is not required for either the first or any subsequent transfer from High Courts to another. Any transfer made on the recommendation on the Chief Justice of India should not be deemed to be punitive and such transfer is not justiciable on any ground. The court has also expressed his views as to the matter to be taken into account by the Chief Justice of India in formulation of the opinion as to the transfer of a judge of the High Court. In the formulation of his opinion, the Chief Justice of India, in the case of transfer of a judge other than the Chief Justice is expected to take into account the view of the Chief Justice of High Court from which the judge is to be transferred, any judge of the Supreme Court whose opinion may be of significance in that case as well as the views of atleast one other senior Chief Justice of a High Court or any other person whose views are considered relevant by the Chief Justice of India<sup>89</sup>.

The personal factors relating to the concerned judge and his response to the proposal including his preference of places of transfer should be taken into account by the Chief Justice of India before forming his final opinion objectively, on the available material in the public interest for better administration of justice. The court made it clear that apart from the constitutional requirement of transfer being made by only the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground including the reasons for the transfer of their sufficiency. The opinion of the Chief Justice of India formed in the aforesaid

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<sup>87</sup> AIR 1982 SC 149.

<sup>88</sup> SC Advocates on Record Association vs. Union of India AIR 1994, SC 268.

<sup>89</sup> Prof. Kailash Rai, 'The Constitutional Law of India', Central Law Publication Allahabad, p.366-367

manner is sufficient safeguard and protection against any arbitrariness or bias as well any erosion of the independence of the judiciary<sup>90</sup>.

The Supreme Court<sup>91</sup> made it clear that there is nothing in Article 222 to require the consent of a judge or Chief Justice for his first or even a subsequent transfer. However, the transfer must be in public interest. The power of transfer must be exercise only in public interest and not by way of punishment.

In re Presidential Reference<sup>92</sup> the Supreme Court held that before recommending the transfer of a puisne judge of one High Court to another High Court, also as a puisne judge, Chief Justice of India must consult a plurality of judges. He must take into account the views of the Chief Justice of the High Court from which the judge is to be transferred, any judge of the Supreme Court whose opinion may have significance in the case and atleast one other senior Chief Justice of a High Court or any other person whose views he considers relevant<sup>93</sup>.

The court<sup>94</sup> has observed that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also Chief Justice of the High Court in which the transfer is to be effected. The Chief Justice of India should also take into account the views of one or more Supreme Court judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place.

## **6.6. Judicial Review in Appointments of the Judges in India**

In re **Presidential References**<sup>95</sup>, Supreme Court held that the judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Courts is available if the recommendation

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<sup>90</sup> Ibid at p.367.

<sup>91</sup> AIR 1994 SC 268.

<sup>92</sup> AIR 1999 SC 1.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid. p.18.

concerned is not a decision of the Chief Justice of India and his senior-most colleagues which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to the High Courts. Judicial review is also available if, in making the decisions of the views of the Senior-most Supreme Court judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment to a High Court, the views of the Chief Justice and senior judges of the High Court and of the Supreme Court judge's knowledge about the High Court have not been sought or considered by the Chief Justice of India and his two senior-most puisne judges. Judicial review is also available when the appointee is found to lack eligibility<sup>96</sup>.

## **6.7. Legislative Efforts to bring Transparency in Appointment System of the Judges in India**

### **6.7.1. National Judicial Commission**

For the taking improvement in the appointment of judges the composition of the National Judicial Commission is seriously flawed. The National Judicial Commission does not refer to consultation with the Chief Justice of High Court or senior High Courts judge in case where appointment has to be made to the respective court. This bill may also not see the light of the day because of the lack of a majority in parliament by ruling Government. It is rumored that the opposition does not accept the Bill in its present form. Therefore the method of appointment to the Supreme Court and High Court is likely to continue as per the two decisions referred to earlier. Responding to the necessity of a National Judicial Commission, former Chief Justice A.S. Anand stated:

“The answer of the nine Judges bench to the Presidential Reference which provides for wide consultations by the collegiums meets the

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<sup>96</sup> Ibid.p.19.

requirement of wide consultations. It must be given a fair chance to prove its worth<sup>97</sup>.”

### **6.7.2. Judicial Standard and Accountability Bill, 2010**

The Judicial Standards and Accountability Bill will set judicial standards and make judges accountable for their lapses. It will also mandate that judges of the High Courts and the Supreme Court declare their assets and liabilities, including those of their spouses and dependents.<sup>98</sup> The Union Cabinet has approved the draft Judicial Standards and Accountability Bill, 2010 that provides for setting up a five-member oversight committee to deal with complaints against members of the higher judiciary. Official sources said judges would also be required to declare their assets and file an annual return of assets and liabilities. All these details will be put up on the websites of the Supreme Court and high courts. It will further require judges not to have close ties with any member of the Bar, especially those who practice in the same court. “The enactment of the Bill will address the growing concerns regarding the need to ensure greater accountability of the higher judiciary by bringing in more transparency, and will further strengthen the credibility and independence of the judiciary,” Information and Broadcasting Minister Ambika Soni told reporters after a meeting of the Union Cabinet.

### **National Judicial Appointment Commission (NJAC) Bill, 2014**

To bring the changes in present collegium system of appointing of judges the Lok Sabha and Rajya Sabha passed National Judicial Appointment Commission Bill 2014 and 121<sup>st</sup> Constitutional Amendment Bill. This Bill will pave the way for scrapping the collegium system of appointing Supreme Court and High Court judges. In this way, Rajasthan Legislative Assembly become the first state to ratified National Judicial Appointments Commission Bill by voice vote. Law and Justice Minister Ravi Shankar Prasad has stated

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<sup>97</sup> T.R. Adhyarujina, ‘Judicial Accountability: India’s methods and Experience,’ Cyrus Das, Judges and Judicial Accountability Kaanagasabai Chandra, Commonwealth Law Association,(2000), p.123.

<sup>98</sup> Judicial Accountability in India, <http://legalservicesindia.com/article/article/judicial-accountability-in-india-538-1.html> [Accessed on 9th Dec 2011 at 5:09 PM].

that the government does not have any policy to interfere in the functioning of the judiciary<sup>99</sup>.

The constitution (67th Amendment) Bill 1990 proposed the formation of a National Judicial Commission for the appointment of Supreme Court and High Courts judges and for the transfer of judges from one High Court to another High Court. The main reason to pass this bill was to prevent any arbitrariness in the appointment. The National Judicial Commission Bill was based on the recommendation in the 121st Law Commission Report. It was to consist of the Chief Justice of India, two senior Supreme Court judges, Chief Justice and two judges of High Court wherein appointment were to be made. The Bill was never passed<sup>100</sup>.

To prevent the corruption in judiciary and arbitrariness in appointing system of the judges government has decided to end this collegium system. The National Judicial Appointment Commission Bill will replace the existing Collegium system. The collegium system involves a panel of judges headed by the Chief Justice of India which select the judges.

Chief Justice of India RM Lodha has come forward to defend the collegium system of appointment of judges, he said that there was a concerted campaign to defame the judiciary. He further said:

"If the collegium has failed, then its products (the judges) too are failures and the judiciary as a whole has failed the country. As an institution the collegium had its limitations in selecting persons. But to carry on a campaign just because of allegations against one or two judges is unfair<sup>101</sup>."

#### **6.7.2.1. Key Points of National Judicial Appointment Commission Bill, 2014**

The proposal for a National Judicial Commission has been resurrected by the Constitution (98th Amendment) Bill 2003 and once again contemplates

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<sup>99</sup> The Hindu, Newspaper dated 14 August 2014, p.1.

<sup>100</sup> The Times of India 11th August p.1.

<sup>101</sup> Nav Bharat, 13th August 2014 at p1 & 12.

the formation of a National Judicial Commission. The bills propose that the Chief Justice of India will head six-member National Judicial Appointments Commission, other members of which would be the law minister, two senior Supreme Court judges and two eminent people.<sup>102</sup> A collegium comprising the prime minister, the chief justice of India and the leader of the single largest party in the Lok Sabha will select the two eminent people. One eminent person will be nominated from among the Scheduled Castes, Scheduled Tribes, OBCs, minorities or women. The bill states that the commission will seek the views of the governor and chief minister of the state concerned in writing before appointing or transferring a judge of that high court. One of the provisions of the bill that if two members of the commission do not agree on a candidate, he or she will not be appointed was opposed by quite a few members who claimed that this will lead to a veto system<sup>103</sup>.

The Bill provides for the procedure to be followed by the National Judicial Appointment Commission for recommending persons for appointment as Chief Justice of India and other judges of the Supreme Court, and Chief Justice and other Judges of High Courts<sup>104</sup>.

#### **6.7.2.1.1. Procedure for Selection of Supreme Court judges**

##### **6.7.3.1.1.1 Chief Justice of India**

The National Judicial Appointment Commission shall recommend the senior most judge of the Supreme Court for appointment as Chief Justice of India. This is provided he is considered fit to hold the office.

##### **6.7.3.1.1.2. Supreme Court Judges**

The National Judicial Appointment Commission shall recommend names of persons for appointment of judges of the Supreme Court on the basis of their ability, merit and other criteria specified in the regulations. The

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<sup>102</sup> Judges' collegium system on its way out,  
[http://www.daijiworld.com/news/news\\_disp.asp?n\\_id=255658](http://www.daijiworld.com/news/news_disp.asp?n_id=255658) [Access on 13th August 2014 at 10:00PM].

<sup>103</sup> Ibid.

<sup>104</sup> <http://www.prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/>  
Accessed on 27<sup>th</sup> Sept 2014 at 10:54 PM].

National Judicial Appointment Commission shall not recommend a person for appointment if any two of its members do not agree to such recommendation.

**6.7.3.1.2. Procedure for Selection of High Courts Judges**

The National Judicial Appointment Commission is to recommend a judge of a High Court to be the Chief Justice of a High Court on the basis of seniority across High Courts judges. The ability, merit and other criteria of suitability as specified in the regulations would also be considered.

**6.7.3.1.2.1. Appointment of other High Courts Judges**

Nominations shall be sought from Chief Justice of the concerned High Court for appointments of High Courts judges. The Commission shall nominate names for appointment of High Courts judges and forward such names to the Chief Justice of the concerned High Courts for his views. In both cases, the Chief Justice of the High Courts shall consult two senior most judges of that High Courts and any other judges and advocates as specified in the regulations. The National Judicial Appointment Commission shall elicit the views of the Governor and Chief Minister of the state before making recommendations. The National Judicial Appointment Commission shall not recommend a person for appointment if any two members of the Commission do not agree to such recommendation.

**6.7.3.1.3. Transfer of Chief Justices and High Court Judges**

The National Judicial Appointment Commission is to make recommendations for transfer of Chief Justices and other judges of the High Courts. The procedure to be followed will be specified in the regulations. Power of the President to require reconsideration. The President may require the National Judicial Appointment Commission to reconsider the recommendations made by it. If the National Judicial Appointment

Commission makes a unanimous recommendation after such reconsideration, the President shall make the appointment accordingly.

#### **6.7.3.1.4. Reference to Commission for Filling up of Vacancies**

When a vacancy arises in the Supreme Court or High Courts, the central government will make a reference to the National Judicial Appointment Commission. Existing vacancies will be notified to the National Judicial Appointment Commission within thirty days of the Act entering into force. When a vacancy arises due to the completion of term, a reference will be made to the National Judicial Appointment Commission, six months in advance. For vacancies due to death or resignation, a reference must be made to the National Judicial Appointment Commission within thirty days of its occurrence.

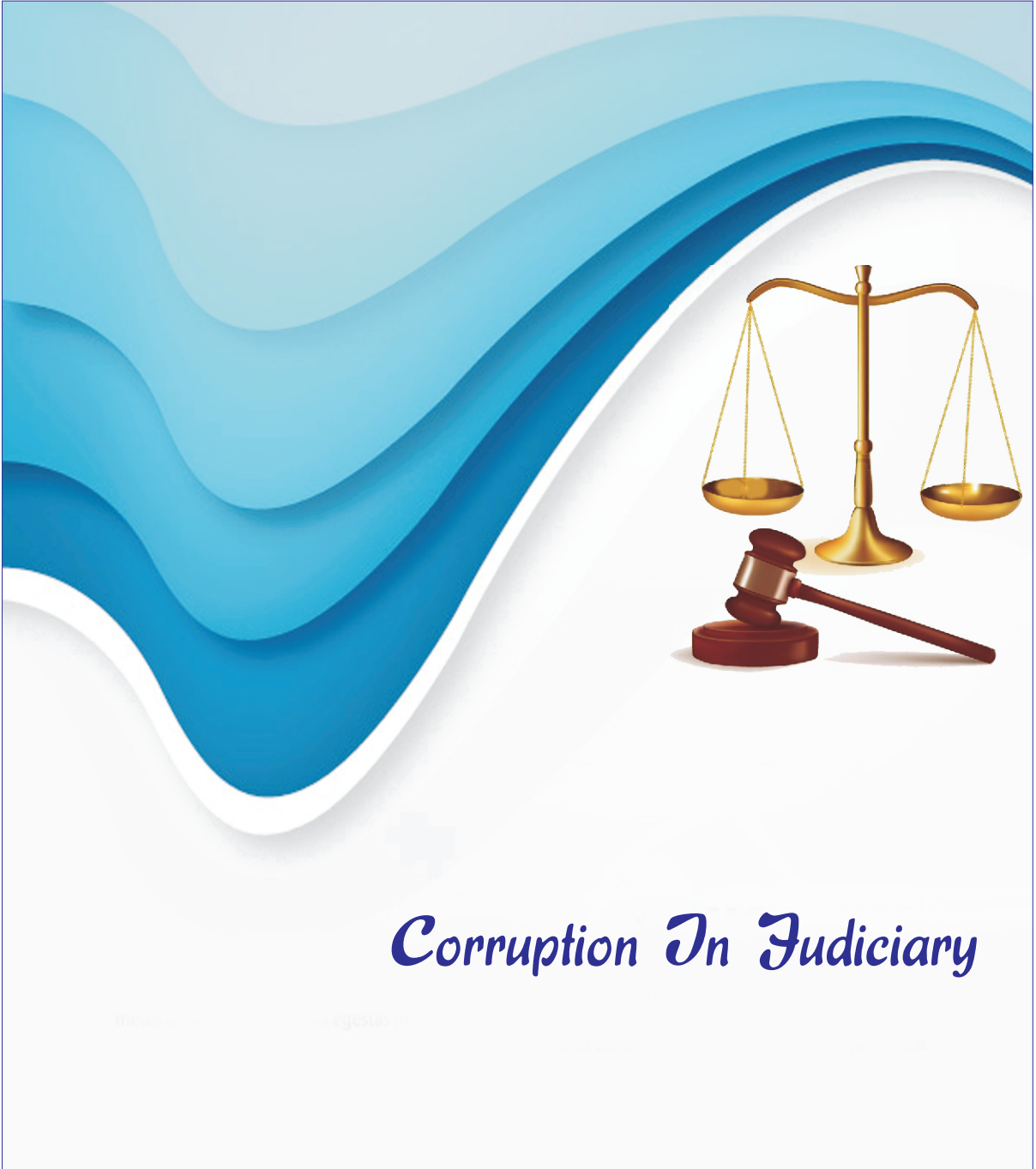
Law Minister Ravi Shankar Prasad at the time of presenting the bill in parliament stated that the process of consultation has been made more meaningful. A large section of people do not have representation in the judiciary as of now". Further he said that there should be a database of lawyers from reserved categories. The need for a new law is not the thinking of only our government. It is a collective exercise which has been in the offing for the last 20 years," Earlier Congress leader Mallikarjun Kharge had asked the government to make a provision to make representation of scheduled castes and scheduled tribes mandatory in the judicial commission<sup>105</sup>.

The independence of the judges has a close relationship with judicial appointments. It is true that an important requirement of sustaining public confidence in the judiciary is openness and transparency in making judicial appointments. Openness and transparency in making judicial appointments essentially depends on the criteria and mechanism for judicial appointments. It should be not so complicated because the method of appointment of judges has a direct impact on public trust as well as judicial independence. Therefore,

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<sup>105</sup> Ibid.

the processor of appointment should be fair and transparent to maintain the independence of judiciary. It is hoped that National Judicial Appointment Commission would bring more transparency and accountability in procedure of appointment of the judges.



# *Corruption In Judiciary*

www.researchgate.net/publication/321111111

### CORRUPTION IN JUDICIARY

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#### 7. Introduction

Corruption is an old evil. It has been prevalent in society from the immoral time. Corruption destroys, spoils and ruins a society or a country from the root. Its main cause is greed. Corruption is, in real sense, a lack of integrity and honesty. A corrupt society is characterized by immorality and lack of fear. It is an abuse of power vested in person engaged in public and private businesses. In fact, corruption is the misuse of public power for personal gain. Corruption may be in the form of misappropriations of public goods, bribery, nepotism, and communalism. It is also effecting the formulation of laws or regulations for private gain. To abuse his position by a public servant comes in the definition of corruption. Corruption has fully engulfed the judiciary. According to the Transparency International (TI) report, globally, almost 46 percent surveyed countries realized that their judiciary is corrupt.

Former Chief Justice of India P. Sathasivam has also observed that the judiciary is not untouched by corruption. He was of the view that when we take the oath as judge, we swear to be fair and impartial in all our judicial functions.

However, on some occasions in the past, few judges have wilfully dishonored the oath by adopting to corrupt practices. The solution for eliminating this disorder lies in the hands of the litigants. The litigants must take the responsibility for bringing into light such occurrence by making a grievance petition before the Chief Justice of respective High Courts and also to the Chief Justice of India. If a prima facie case is made out through the

preliminary enquiry, then the judge should not feel hesitant to adopt the prescribed procedure under the mandate of Constitution<sup>1</sup>.

Nowadays, corruption has been involved into all the faces of the society. There is lack of many mechanism to check the corruption menace unchecked arbitrariness. Its results is that widespread evil of corruption and delinquent environment. Absence of accountability is also leads to corruption. Justice Krishna Iyer has also observed that an accountable mechanism in a democratic framework may reduce corruption to some extent. Thus, the object of Constitution framers envisioned in Part III, IV and IVA of the constitution do not remain a mere illusion<sup>2</sup>. Therefore, the need of accountability cannot be ignored. The accountability of the judges shall assumes a greater responsibility when judiciary is called upon the answer the corruption.

This chapter explores many facets of corruption in the judicial systems and how this decrease the value of independence of the judiciary and the effect of prevention of corruption laws on judiciary. It will further discuss about the constitutional and statutory provisions which give immunity to judges. It will also examine the efforts done by the legislature to prevent the flow of corruption in judiciary. And this chapter will raise the issue as to whether the existing prevention of corruption law is sufficient to curb this abuse in judiciary or a fresh legislation is needed.

### **7.1. What is Corruption?**

Corruption is an age-old phenomenon. The word corruption means destruction, ruining or spoiling a nation. Selfishness and greed are at the root of it. It also implies lack of integrity and honesty<sup>3</sup>. The word 'corruption' is directly connected to the 'integrity'. The concept of public agent 'integrity' is

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<sup>1</sup> Judiciary not untouched by corruption' <http://www.thehindu.com/opinion/interview/judiciary-not-untouched-by-corruption/article4866406.ece> Access at 6:55PM on 27th Nov 2013)

<sup>2</sup> V.R. Krishna Iyer, Limits of Judicial Conduct, The Hindu, August 7, 2009.

<sup>3</sup> Corruption in the Indian Judiciary, <http://www.studymode.com/essays/Corruption-In-The-Indian-Judiciary-519767.html> [Access on 15April 2012 at 1:59PM].

introduced and upheld by the 2003 UN Convention against Corruption<sup>4</sup>. Key articles from the Convention are given following:

Article 5(1) Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability<sup>5</sup>.

Article 8(1) In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system. (2) In particular, each State Party shall endeavor to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions<sup>6</sup>.

Article 11(1) Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary<sup>7</sup>.

(2) Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service<sup>8</sup>.

A corrupt society is characterized by immorality and lack of fear or respect for the law. When it stops valuing integrity, virtue or moral principles

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<sup>4</sup> UN Convention against Corruption' (also known as the Mérida Convention) was adopted by General Assembly Resolution no. 58/4 on 31 October 2003, and entered into force on 14 December 2005. See also: [http://www.kas.de/wf/doc/kas\\_22459-1522-1-30.pdf?110411094618](http://www.kas.de/wf/doc/kas_22459-1522-1-30.pdf?110411094618) Access on 2Jan 2013 at 4:54PM p.3)

<sup>5</sup> Supra note.3. at p.3

<sup>6</sup> Ibid.

<sup>7</sup> Ibid

<sup>8</sup> Ibid.

it starts decaying. It is only the abuse of public power for private and personal gain. Corruption may be in the form of many different guises: bribery, misappropriations of public goods, nepotism (in favour of family members for jobs and contracts), and influencing the formulation of laws or regulations for private gain<sup>9</sup>.

Corruption not only occurs in the cases where government officials take money for their personal gain but it also reflects in those cases where the systems do not work well. The common people have only a way to pay bribe for accomplishing their work. The state of economy also plays an important role in corruption. Inequality in wealth distribution, exploitation by employers, and low wages and salaries provide ideal breeding ground for corruption. A license-permit regime or scarcity of basic commodities adds fuel to the fire. India is a textbook example of how license-permit Raj can vitiate political as well as economic atmosphere of the nation<sup>10</sup>.

## 7.2. Kinds of Corruption

There are two Kinds of corruption<sup>11</sup>:

7.2.1. **Administrative Corruption:** Corruption that affects the implementation of policies, such as getting a license even if you don't qualify for it.

7.2.2. **Political Corruption:** Political corruption is that which affects the formulation of laws, regulations, and policies, such as revoking all licenses, and gaining the sole right to operate some public utility with monopoly.

## 7.3. Causes of Corruption

The reasons behind the leading of corruption are many and complex. Some are given below<sup>12</sup>:

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<sup>9</sup> Understanding Corruption and Promoting Transparency, socialissuesindia.files.wordpress.com/2011/09/corruption\_article.pdf[ Access on 12 April 2012 at 2:00PM].

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

1. Emergence of political elite who believes in interest-oriented rather than nation-oriented programs and policies.
2. Corruption is increasing in the society very rapidly because of the change in the value system and ethical qualities of men. The old ideals of morality, service and honesty are regarded as anachronistic.
3. Very low tolerance capability of people towards corruption. The fully lack of intense public outcry against corruption and the absence of strong public forum to oppose corruption gives freedom to corruption to reign over people.
4. Increasing population, widespread illiteracy and the poor economic infrastructure lead to endemic corruption in public life.
5. Low salaries of government officials compel them to resort to the road of corruption. Graduates from IIMs with no experience draw a far handsome salary than what government secretaries draw.
6. Complex procedures and laws alienate common people to ask for any help from government.
7. Corruption is always on at its high level in election days. Big industrialists fund politicians to meet high cost of election and ultimately to seek personal favour. Bribery to politicians buys influence, and bribery by politicians buys votes. In order to get elected, politicians bribe poor illiterate people, who are slogging for two times meal.

#### **7.4. Nature of Corruption In India**

The government of India has three organs, the legislative, the executive, and the judiciary and the constitution provide separation of powers to each branch as they perform their functions independently. The legislators or law makers are elected representatives of the people their duty is to frame clear, simple and effective laws. The executive branch consisting of ministers, bureaucrats, and the whole government machinery is expected to implement

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<sup>12</sup> Sparsh Patel, An Essay: Corruption in India, <http://tjcomcollege.org/An%20Essay%20corruption%20in%20India.pdf>, p.1. [Access on 2nd March 2013 at 4:07PM.]

the laws framed the legislative assemblies. The ultimate responsibility for running the administration rests with the elected representatives of the people which are the ministers. These ministers are accountable to the legislatures which are also elected by the people<sup>13</sup>.

The last organ judiciary, acts as an impartial watchdog but it does not have the power to make any law. It can only interpret the laws passed by the law-makers under the constitutional framework and give its verdicts accordingly. But when corruption spreads in society, the governance begins to degrade implying loss of integrity and efficiency both<sup>14</sup>.

#### **7.4.1. Corruption in the Legislative Branch**

The behavior of Indian legislators both at the Center and in the States leaves a lot to be desired. Every time they act motivated by personal gain, they betray their constituencies that elected them. Corruption in the assemblies as seen from this perspective implies floor crossing, cash-for-vote, taking money or other benefits to ask questions, framing rules under the influence of big corporate houses at the cost of common people, etc<sup>15</sup>.

When the government is running on thin majority, potential defectors can take the government to ransom. The collapse of the Janata Party Government (1977-80), fall of V. P. Singh and Chandrashekhar Government (1990-91), turning his minority Government into majority by Narsimha Rao by buying JMM MPs, split in Telugu Desam Party (1994), defection of Ajit Singh with his supporters to Congress (1993), defection of S. S. Vaghela from BJP, maneuvering defection by Kalyan Singh to keep the BJP led Government in power in Uttar Pradesh are some of examples to prove that a sizeable number of our politicians are not immune to corruption. The another example is the 2008 case of cash for vote scandal where some BJP MPs claimed to have been offered cash to vote Manmohan Singh's government.

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<sup>13</sup> Supra note. 9. at p. 13.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid. at. p. 13.

The supposed mastermind, Amar Singh, and two BJP MPs are in Jail and case is being investigated<sup>16</sup>.

Criminalization of politics is another facet of corruption. In the current parliament, there are over a quarter MPs with criminal records, many with serious charges, against them. It also highlights an area where electoral reform is urgently needed so that criminals don't enter in the parliament or state assemblies<sup>17</sup>.

#### **7.4.2. Corruption in the Executive**

Ministers are at the top of the hierarchy of the executive branch. The popular case of corruption was the 2G spectrum scam which sent A. Raja, telecom minister to jail along with another DMK law-maker. Sukhram was another minister in the nineties in the same ministry to go to jail. Fodder scam in Bihar is another scandal for which Laloo Yadav is being tried. But such kinds of exposures and trials are rare in India, often only the smaller fishes get caught<sup>18</sup>.

#### **7.4.3. Corruption in Judiciary of India**

The report of Transparency International's Global Corruption Barometer 2013 says that 45 percent of surveyed households in India considered judiciary to be 'corrupt' or 'extremely corrupt' and 36 percent of households who had contact with the judiciary in 2012 reported to have paid a bribe.

Corruption in the judiciary not only decreases the courts' credibility as corruption fighters, but it also shakes the faith of the public in the courts' impartiality. The corruption is an evil that destroys all the judicial functions, such as dispute resolution, law enforcement, etc. The corruption has completely rooted out the accountability function that the judiciary is entrusted within democratic systems.

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid. p. 13-14.

Corruption has been rampant in judiciary. There are many causes for its spreading in Indian judiciary. Some reasons are giving below<sup>19</sup>:

1. Judiciary of India depends on inputs and other material facts to decide the merits of a case. These are thoroughly analyzed by judges and judgment is pronounced. An old saying goes “garbage in, garbage out.” If the judges allow false testimony to be recorded as evidence, can true justice really be delivered in such cases?
2. The Indian judicial officers are very smart. When dishonest lawyers tell their clients to make false statements or submit false affidavits, a judges can see through this game being played in their courts. However, one rarely notices courts ordering the registration of a case of perjury. Inaction against wrong doers will invariably encourage others to commit such illegal acts in the courts. Serious consideration needs to be given to the fact that the initiation of criminal cases against perjurers would result in long-term gains. Fear of registration of cases for perjury will discourage false litigants / witnesses thus leading to a reduction of cases in courts.

The former Chief justice of India S. P. Bharucha, once stated that 20 percent of those manning the judiciary are corrupt. Removing corrupt judges in the subordinate judiciary is easy because it is under the disciplinary control of the High Courts. But it is difficult where the higher judiciary is concerned because the impeachment process is unworkable<sup>20</sup>.

Corruption in judiciary includes all phases of inappropriate influence that may harm the impartiality and may enter in the justice system, including lawyers and administrative support staff. The issue of corruption is not only a matter of relations between judicial personnel and ‘court users’. It is also about internal relations in the judiciary. It is not necessary that gain should be in the form of material. Even it may be in the form of sexual favour, or the

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<sup>19</sup> Corruption in the Indian Judiciary, <http://www.sabhlokcity.com/2010/01/corruption-in-the-indian-judiciary/> [Access on 18 Jan 2011 at 5:09PM]

<sup>20</sup> The Hindustan Times, 17th February 2002.

offered 'furtherance of political or professional ambitions'. It may also ignore something undesired, in the form of threats. Biased decision-making is a matter of the personal integrity of judicial personnel and the protection of judicial independence.

The lawyers and litigants allege that corruption has been rampant in the lower courts and it has become an intrinsic part of the system. The primaries of the corruption cancer are spreading very fast in the judiciary of India. The corruption has engulfed in judiciary at all levels and now it has almost become an imperative necessity to go for a major surgical operation as minor cosmetic surgery will not be able to alleviate the fast sinking criminal justice administrative system in the country. Everyone accepts this fact and litigants take it for granted that every time they visit the courts compound, they should be prepared to shell out a minimum of fifty rupees<sup>21</sup>.

Corruption has been always there in a society but now it is spreading in the judiciary very speedily. Corruption spreads in judiciary because of delay in justice, poor implementation of laws, and the people has no redressal mechanism. It is well known that there is no machinery to check the legislatures, ministers and bureaucrats, from their arbitrary actions. The corruption is continuously spreading and involved in all branches. The third organ that is the judiciary, acts impartially as a watchdog to check that people are governed by law. Judiciary of India has no any power to frame any law, it can only interpret the laws passed by the legislature under the constitutional framework. But nowadays, judiciary is interfering in the acts of legislature and executive through public interest litigant. Through public interest litigant, judiciary is using its activist power in the shades of contempt of court and public interest litigant. Judges have no fear for their biased and impartial acts. There is no answerability for their decisions and acts. These reasons are also increasing the corruption in the judiciary.

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<sup>21</sup> Subhash C. Kashyap, "The Citizens and Judicial Reform: Under Indian Polity, (2003), p.222.

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The judges say that they are the most harassed because they are over worked and are an underpaid link in the criminal justice system. Every judge has on his roster around fifty cases every day, cases which might be several years old, cases which might be petty and cases where the counsels are interested in delay rather than judgment. A senior session judge once stated that “how can a judge, after a morning of long list of bails, hear witnesses, record their evidence in another fifty odd cases.<sup>22</sup>” The innocent citizens are also responsible for the increasing corruption in the judiciary. They are always ready to pay bribe for getting decision in their favour.

Delay in justice provides sufficient time to criminals to manipulate the witnesses and to destroy the evidence to pay the bribe. In our country the number of pending cases is counted in millions and it can take 20 years for a decision<sup>23</sup>. Delay in justice without any sufficient reasons disturbs the whole judicial functions and forms injustice. Justice delayed means justice denied. The ineffective preventive action, slow and ineffective trials, slow and improper investigation and outdated laws, lack of implementation of laws and complex procedure of the courts are the main reasons for leading corruption in the judiciary of India.

There are many laws which are for the protection of in the judiciary. However, the nature of the work is such that corruption cannot be checked. The discretionary power of the judges also leads to corruption. Laws cannot prevent the corruption due to the lack of morality in the public and private sectors and even in the citizens. The spirit of nationality and morality of the citizens of a country can eradicate corruption from the public life.

Legal fraternity has a great responsibility to ensure the proper functioning of the judicial process to achieve the true object of justice for all. The legal profession has to be rationalized and channelized to harness the forces for which end it has a changing role to meet the current societal needs. The judges have a duty to perform which is even more onerous to keep the

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<sup>22</sup> Ibid. p. 223.

<sup>23</sup> Ibid. p. 222.

judicial ship afloat on even keel. It must avoid making any adhoc decision without the foundation of a juristic principle, particularly, when the decision appears to break new ground. The judgment must be logical, precise, sober, and clear and rendered with restraint in speech avoiding to say more than that which is necessary in the case<sup>24</sup>. Judicial process is a target to deliver justice and tries to do justice. Judicial process is a function of balancing interests<sup>25</sup>.

Corruption is the misuse of entrusted power for personal gain. The judicial corruption relates to acts or omissions that constitute the misuse of public authority for the private benefit of court personnel, and results in the improper and unfair delivery of judicial decisions. In the presence of corruption in the Indian judiciary, the citizens are not afforded their democratic right of equal access to the courts, nor do the courts treat them equally. The merits of the case and applicable laws are not paramount for corrupt judges<sup>26</sup>.

Justice Clifford Wallace<sup>27</sup> once stated that “judicial corruption certainly exists, I know of no country that is completely free of corruption with its insidious effect of undermining the rule of law. Attempt to solve judicial corruption, however can themselves weaken the rule of law if judiciary comes under the influence or control of the legislative or executive branch”.

Indian corruption study, 2005, Volume 1 (Eleven public services) Corruption in Judiciary, by Centre for Media Studies, made a scientific study of the possibility of corruption at different levels in judicial hierarchy which rated that more than 33% of the people bribed judiciary to the extent of Rs. 3817 crore in just one year<sup>28</sup>. In the year of 2000 a Chief Justice of India was accused of using his position to force the lower judiciary to hold in favour of

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<sup>24</sup> J.S. Verma, “New Dimension of Justice,” (2000). p.8-9.

<sup>25</sup> Ibid. p.8.

<sup>26</sup> Supra note 19.

<sup>27</sup> Harish R. Gadhia, “Judicial Accountability- Re-visioning the Role of Judiciary” (2009), P-Journal-34.

<sup>28</sup> Ibid. p. 35.

his wife and mother-in-law in a case. In the year of 2002-2003 case like sex for acquittal and cash for job come to notice<sup>29</sup>.

India is ranked at 26th of 131 countries on indicators of judicial independence in the Global Competitiveness Report 2007- 2008. Political interference in judicial decisions involving powerful individuals, just as in investigation, is a sure possibility. In India, the appointment of judges is not always free from political interference. Recent Global Integrity Report also rates judicial accountability as weak<sup>30</sup>.

The judges of High Courts and Supreme Court can only be removed from office through impeachment in the parliament. Due to very tough procedure of impeachment, it seems impossible to remove a judge from his post. This makes fighting corruption in higher judiciary rather impractical. The impeachment of Justice Saumitra Sen in the Rajya Sabha is a rare event. There are other cases of corruption at higher level such as that of Justice Dinakaran of Sikkim High Court and Justice Nirmal Yadav of the Uttarakhand High Court. The Judges (Inquiry) Act, 1968, prescribes judicial inquiry followed by impeachment. In the case involving Supreme Court Judge Justice V. Ramaswamy, the inquiry indicted him but the impeachment motion fell through in Parliament in 1992<sup>31</sup>.

There has been a wide-spread corruption scandal – Rs 23 crore Ghaziabad PF scam – involving a Supreme Court judge (now retired), 7 Allahabad High Court Judges, 12 judges from the subordinate courts, and 6 retired high Court judges. The key accused died in jail mysteriously in October 2009. The charge of Supreme Court lawyer, Shanti Bhusan that many former Chief Justices of India were corrupt has given a new twist to judicial corruption. The Supreme Court is seized of the matter. The huge backlog of

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<sup>29</sup> Ibid. p. 36.

<sup>30</sup> Supra note. 9.

<sup>31</sup> Ibid.

cases (there are over 3 crore pending cases), slow and complicated court procedures are another course of corruption in the judiciary<sup>32</sup>.

#### **7.4.4. Causes of Corruption in Court**

The number of cases pending is huge in the Indian judicial system. Delay in justice provides a sufficient time to criminal to manipulate the witness and destroy the evidence to pay the bribe. In our country the number of pending cases is counted in millions and it can take 20 years for a decision<sup>33</sup>.

##### **7.4.4.1. Delay in Justice**

Delay in justice without no any sufficient reasons disturbs the whole judicial functions and forms injustice. Justice delayed means justice denied. The ineffective preventive action, slow and ineffective trials, slow and improper investigation and outdated laws, lack of implementation of laws and complex procedure of the courts are also become the main reasons for leading corruption in the judiciary of India.

##### **7.4.4.2. Inaccessibility**

The judicial system is become so dilatory, costly, and out of the access of the poor and common citizens of India. The public of India are losing their trust from the judiciary. The court's proceeding is so tough out of understanding of the litigants and the dishonest advocates take disadvantages and make money from the litigants.

##### **7.4.4.3. Misuse of power**

There are another examples of Metropolitan Magistrates issuing bailable arrest warrants against individuals of whose identities he has no idea, in return for an inducement. A Metropolitan Magistrate in Ahmedabad issued

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<sup>32</sup> Ibid.

<sup>33</sup> Supra note. 21.at p. 222.

bailable arrest warrants against the President of India in return for an inducement of Rs. 40,000<sup>34</sup>.

The judges offer a favour in exchange for personal gain in the some cases. In Rajasthan, there were reports of a judge who offered judicial favour in exchange for sexual favours from a litigant. Some of these instances have been reported by the media, but no action has resulted<sup>35</sup>.

#### **7.4.4.4. A difficult impeachment process**

The first information report (FIR) cannot be lodged against a judge, and criminal investigation also cannot be initiated without prior consent of the Chief Justice of India. Appointed judge of the High Courts or Supreme Court cannot be removed from his office except by a complicated impeachment process. In the case of 1990s, Justice V Ramaswami, when the Congress was in power, a motion seeking to impeach Justice V Ramaswami could not be passed by parliament as Congress members of parliament abstained from voting. There have been no other attempts at impeachment in India<sup>36</sup>.

Article 124(4) of the constitution of India makes it clear that a judge of the Supreme Court cannot 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 present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Proceeding for impeachment of a judge of the Supreme Court are of judicial nature. Abstention from voting in the House on the motion of impeachment against a judge of the Supreme Court cannot be deemed to be vote in support of the motion<sup>37</sup>.

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<sup>34</sup> Corruption in Judiciary,  
<http://www.livemint.com/Specials/gtKxByVZpA6u7QGcKKpKjP/Corruption-in-Judiciary.html>  
[Access on 14th April 2014 at 2:07PM.]

<sup>35</sup> Supra note. 19.

<sup>36</sup> Ibid.

<sup>37</sup> Lily Thomas v. Speaker, Lok Sabha (1993) 4 SCC 23.

#### 7.4.4.5. Why People Pay Bribes

Bribery is common in the judicial system<sup>38</sup>. Transparency International Report 2012 said that the most common reason for giving bribe in India in general is to “speed things up<sup>39</sup>.” The citizens of India have been harassed from the policy and action of the executive and legislature. Finally they are moving towards the court in the hope of fair and honest justice. But now it seems that the people of India are losing their faith in the judiciary. Delay in disposal of cases have been a major cause behind this problem.

The large amount of money becomes the need for the disposal of the case without any certainty of success. Court process is too expensive, even it is out of the access of the poor and depressed people. Judiciary adjudicates the cases against the state and central government which are filed by the aggrieved people of India. The judiciary of India has now a days become a subject of criticism due to going beyond its jurisdiction and interest in the policy of government. This creativity of judiciary is called judicial activism<sup>40</sup>.

In India, the number of judges are approximately 13 or 14 judges per one million people in India<sup>41</sup>. The Supreme Court in **All India Judges' Association and others v. Union of India and others**<sup>42</sup>, directed the government to increase the number of judges from the existing 10.5 judges per million to 50 judges per million. But this directive has not yet been fully implemented due to a "lack of infrastructure, including the number of judges and facilities of judges to function," as well as a lack of cooperation and funding from provincial governments<sup>43</sup>. The large number of pending cases is "suffocating the system which in turn promotes corrupt practices<sup>44</sup>." The

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<sup>38</sup> Outlook 9<sup>th</sup> July 2012.

<sup>39</sup> Transparency International Report 2011, 2012

<sup>40</sup> Preeti Anand, “Challenge to the Judiciary in the 21st Century”. All India Reporter, (2011) Vol. 98: Part 1169.

<sup>41</sup> Outlook 9 July 2012.

<sup>42</sup> 1992 AIR 165; 1991 SCR Supl. (2) 206

<sup>43</sup> See Report of AHRC 21 Jan. 2013 available at India: Independence of and corruption within the judicial system, including the scale of corruption at different levels (2009-April 2013), <http://www.refworld.org/docid/51ab45674.html>. [Accessed on 28th Sept 2014 at 5:45 PM]

<sup>44</sup> Indian Currents, A Weekly News Magazine, New Delhi, 10<sup>th</sup> March 2013.

Asian Legal Resource Centre (ALRC) states that the judiciary, lacking governmental support to address the backlog of cases, is "incapable of delivering justice<sup>45</sup>."

The lack of awareness of the people of India also makes judiciary compel to take action against the arbitrary decisions of the governmental authorities. As the people of India are still having regards towards the judiciary in spite shortage of the courts and the sheer number of judges. There is a high number of vacancies in the judiciary. According to Indian Currents, only 14,295 of 17,945 judge positions are occupied<sup>46</sup>. India Today<sup>47</sup> said that nearly 32 percent of judge positions are vacant in the High Court.

The question has been raised on the efficiency and credibility of the judiciary. The amounting arrears of cases, increasing population, less awareness of public of India about their legal rights have also been the major causes of failure of justice. Judiciary therefore should be independent, transparent and accountable<sup>48</sup>. If there would be any mechanism to check the delay in disposal of the cases, it will certainly increase the reputation and respect of the judiciary in the eye of the classes of India. Judiciary should be enthusiasm to provide speedy justice to the poor and depressed people of India. Even the judiciary is the safeguard of the fundamental rights of the people of India<sup>49</sup>.

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<sup>45</sup> India: Independence of and corruption within the judicial system, including the scale of corruption at different levels (2009-April 2013), <http://www.refworld.org/docid/51ab45674.html>. [Accessed on 28th Sept 2014 at 5:45 PM]

<sup>46</sup> Supra note. 38.

<sup>47</sup> India Today, Magazine 29 Aug. 2011.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

### **7.5. Some Instances of Corruption in Indian Judiciary since Independence : 1947 – 2012**

Corruption has rotten the whole system of governance in India. No organ is spared from this menace, and judiciary is no exception to it. Some of the instances which disgraced the judiciary are<sup>50</sup>:

In 1949: Mr. Justice Sinha was found of "guilty of improper exercise of judicial functions, the cumulative effect of which was to lower the dignity of his office and undermine the confidence of the public in the administration of justice."

In 1979: Chief Justice of India K. Veeraswami permitted Central Bureau of India to file case of dis-proportionate of Income / wealth against Chief Justice Madras High Court Mr. K. Veeraswami. Thirty years elapsed. Sheltered by Courts' easy-go-tactic.

1991-93: Mr. Justice V. Ramaswamy: Sawant Committee Report had held he is guilty of several charges. Supreme Court of India also upheld guilty of 3-4 charges; & recommended to Parliament for further action. Parliamentarians failed in their duty to impeach the sitting judge of Supreme Court Mr. Justice V. Ramaswamy; not rising to the Heights of eminent constitution makers; but chose to have unholy alliance with corruption in judiciary vis-a-vis legislature & government.

In 1995 : A.M. Bhattacharjee , the Chief Justice of the Bombay High Court was forced to resign in 1995 after it was found that he had received Rs.70 lakh as book advance from a publishing firm known to have links with the underworld.

In 1996, Ajit Sengupta : The Calcutta High Court judge made it a routine to issue ex parte, ad interim stay orders on anticipatory bail pleas from

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<sup>50</sup> Corrupt Judges of India, [http://creative.sulekha.com/corrupt-judges-of-india\\_245123\\_blog](http://creative.sulekha.com/corrupt-judges-of-india_245123_blog) [Access on 17th March 2013 at 1:20 PM].

smugglers having links with the Mumbai underworld. He was arrested in 1996 for FERA violations after retirement

Justice A.M. Ahmadi: When he was Chief Justice of India (October 1994-March 1997), his daughter, a lawyer in the Delhi High Court, caused eyebrows to be raised for getting "special" treatment from certain judges. When some members of the bar sought a resolution banning lawyer relatives of judges from staying in the same house, the Chief Justice of India got members to defeat the motion.

In 2000 Justice A.S. Anand: (a) He was accused of using his position to get the subordinate judiciary to rule in favour of his wife and mother-in-law in a suit that had been barred by limitation for two decades. (b) Supreme Court, while he was Chief Justice of India, directed a CBI probe after a dispute arose over his age in 2000. The investigation report was not made public. This arose due to scan copy published in Ram Jethmalani's "Big Egos, small men.

In November 2002, Sunita Malviya, a Jodhpur-based doctor, alleged that a deputy registrar of the Rajasthan High Court had sought sexual favours for himself and for Justice Arun Madan to "fix" a case in her favour.

Cash-For-Job: Three judges of the Punjab and Haryana High Court sought the help of disgraced PPSC chief R.P. Sidhu to ensure that their daughters and other kin topped examinations conducted by the commission.

Three Judges Mysore Sex Scandal: November 3, 2002, three judges of the Karnataka High Court, along with two women advocates, allegedly got involved in a brawl with a woman guest at a resort. The police arrived but reportedly didn't take action. Judges are N.S. Veerabhadraiah, V. Gopalagowda & Chandrashekaraiiah.

The three-judge inquiry committee appointed by the Chief Justice of India filed its report and they got clean chit.

March 2003 - Delhi High Court Judge resigns: Suspected of collusion with Property Developers. Raids by CBI on corrupt higher officials in Delhi Development Authority (DDA), found Draft Judgment-N-Court Records.

### **7.5.1. Some Recent Examples of Corrupt Judges**

Some of the recent instances which disgraced the judiciary are<sup>51</sup>:

Justice Soumitra Sen of Calcutta High Court: He was charged with the allegations of misappropriation of large sums of money, which he had received in his capacity as Receiver appointed by the High Court of Calcutta. He also misappropriated the facts relating to the investigation.

Justice P. Dinakaran of Sikkim High Court (former CJ Karnataka High Court): Misappropriation of assets.

Justice Nirmal Yadav of Uttarakhand High Court (former judge Punjab and Haryana High Court): Accused in the Rs 15Lakh cash-at-door-scram<sup>52</sup>

Provident fund scam: one of the biggest judicial scam in the history. More than 15 Judges of Ghaziabad court and also few of them from High Court are charged with embezzlement of more than Rs. 7 crore.

Justice Mehtab Singh Gill: He figures in the tapes released by the Punjab Vigilance Bureau in June 2009. Accused to taking payments for fixing judgments<sup>52</sup>. These are only some of the reported cases of corruption in judiciary, many of them still goes unreported. The main reason for this is the sword of contempt, through which judiciary has got unbridled authority without any accountability towards it.

An independent and impartial judiciary is one that is honest, and not corrupt. Corruption compromises the independence, impartiality and effectiveness of judicial institutions. It is common ground that corruption is prevalent in nearly all segments of society, the political sphere, the public and

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<sup>51</sup><http://legalservicesindia.com/article/article/judicial-accountability-democracy-943-1.html> [Accessed on 21<sup>st</sup> May 2013 at 3:09 PM].

<sup>52</sup> <http://www.livemint.com/r/livemint/Period1/oldpdf/8f771b83-> Political Corruption [Accessed on 25<sup>st</sup> May 2013 at 6:12 PM]

the private sectors. Sources of corruption finance are myriad. Corruption has seeped into judicial institutions, in particular the judiciary, the most hallowed of democratic governance institutions. Somewhat tardily, the prevalence of that scourge in that third branch of government has now become accepted by highest judicial and state officials<sup>53</sup>.

In fact, systematic corruption deals with the use of public office for personal or private benefit that is entrenched in such a way that, without it, an organization or institution cannot function as a supplier of goods or services. The probability of detecting corruption decreases as corruption becomes more systemic. The growth and decline of systemic corruption is also subject to the laws of human behaviour<sup>54</sup>.

Corruption erodes the trust of public from the judiciary and seriously affects its independence, impartiality, integrity and competence. It brings about inequitable results, compounds inequality and denies to the poor fair justice. Equally it inhibits investment, both local and foreign, that are essential for economic growth. Corrupt practices in the judiciary are enhanced by (a) the concentration of internal organizational roles in the hands of a few decisions makers within the court, (b) the multitude and complexity of procedural steps compounded by a lack of procedural transparency within the courts; (c) the uncertainty related to the prevailing laws, and regulations; (d) limited possibilities of alternative dispute resolution mechanisms; and (e) the presence of organized crime groups that demand corrupt practices from public officials<sup>55</sup>.

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<sup>53</sup> See, J. Tumwesigye, "Corruption and its Curses", Conference of the International Women Judge, Entebbe, Uganda, (2004). (See also: 'Justice for The Poor', p.360)

<sup>54</sup> E. Buscaglia, "Judicial Corruption in Developing Countries: Its Cause and Economic Consequences" <http://www-hoover.stanford.edu/bios/buscaglia.html>

<sup>55</sup> Ibid. See E. Buscaglia, M. Dakalias, "An Analysis of the Causes of Corruption in the Judiciary" and sources cited therein Gambetta (1993), Legal and Judicial Reform, World Bank, 1999, [www.worldbank.org](http://www.worldbank.org); P. Langseth, "Strengthening Judicial Integrity against Corruption", UNODCCP, Vienna, March 2001.

## **7.6. Legislative Efforts to Combat Corruption in Judiciary**

### **7.6.1. Prevention of Corruption Act, 1988 (POCA)**

Its main thrust is to prohibit public servants from accepting or soliciting illegal gratification in the discharge of their official functions. In addition, bribe-givers and intermediaries may be held liable under POCA for bribing public officials. However, prosecution under POCA requires prior approval of high authorities which severely limits its usefulness particularly where there is collusive activity within government branches<sup>56</sup>.

The Right to Information (RTI) Act 2005 represents one of the country's most critical achievements in the fight against corruption. Under the provisions of the Act, any citizen may request information from a "public authority" which is required to reply within 30 days.

The Act also requires every public authority to computerize its records for wide dissemination and to proactively publish certain categories of information for easy citizen access. This act provides citizens with a mechanism to control public spending. Many anti-corruption activists have been using the RTI to expose corruption. Lack of legal protection against whistleblowers, however, puts them in risky situation and many RTI activists have lost their lives in last six years.

In India, the legislature, has passed many Bills for securing the transparency and accountability in the judiciary by enacting legislations.

### **7.6.2. Restatement of Values of Judicial Life: Code of Conduct.**

The conference of Chief Justices of all HCs was held on 3rd and 4th December, 1999, where all the Chief Justices unanimously resolved to adopt the "Restatement of Values of Judicial Life". This would serve as a guide to be observed by the judges, essentially for an independent, strong and

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<sup>56</sup> Prevention of Corruption Act, 1988

respected judiciary in the impartial administration of justice. Some of codes that must be followed are<sup>57</sup>:

- Judges should not conduct election to any office of club, society or other associations
- A judge should not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
- A judge should not speculate in shares, stocks or the like.

### **7.6.3. Judges (Inquiry) Act, 1968**

The legislature exercised its power provided under article 124 (5) and enacted the Judges (Inquiry) Act, 1968 (hereinafter as Judges Act). The object of this Act is to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a High Court<sup>58</sup>.

Section 3 of the Judges Act is relevant for this purpose. It provides procedure for investigation into misbehavior or incapacity of judge by Committee:-

1. If notice is given of a motion for presenting an address to the President praying for the removal of a judge signed,-
  - a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;
  - b) in the case of a notice given in the Council of States, by not less than fifty members of that Council; then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or admit the same.
2. If the motion referred to in sub- section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and

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<sup>57</sup> Restatement of Values of Judicial Life (Adopted by Full Bench of Supreme Court on May 7, 1997). [http://www.judicialreforms.org/files/restatement\\_of\\_values\\_jud\\_life.pdf](http://www.judicialreforms.org/files/restatement_of_values_jud_life.pdf) [ Accessed on January 17, 2010 at 3:00PM]

<sup>58</sup> Judges (Inquiry) Act, 1968.

constitute, as soon as may be, for the purpose of making an investigation into the grounds on which the removal of a judge is prayed for, a Committee consisting of three members of whom-

- a) one shall be chosen from among the Chief Justices and other judges of the Supreme Court;
- b) one shall be chosen from among the Chief Justices of the High Courts; and
- c) one shall be a person who is, in the opinion of the Speaker or , as the case may be, the Chairman, a distinguished jurist:

Provided that where notices of a motion referred to in sub- section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted, unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman:

Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

3. The Committee shall frame definite charges against the Judge on the bases of which the investigation is proposed to be held.
4. Such charges together with a statement of the grounds on which each such charge is based shall be communicated to the judge and he shall be given a reasonable opportunity of presenting a written statement of defense within such time as may be specified in this behalf by the Committee.
5. Where it is alleged that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Committee may arrange for the special examination of the judge by such Medical Board as may be appointed for the purpose by the Speaker or, as the case may be, the Chairman or,

where the Committee is constituted jointly by the speaker and the Chairman, by both of them, for the purpose and the judge shall submit himself to such medical examination within the time specified in this behalf by the Committee.

6. The Medical Board shall undertake such medical examination of the judge as may be considered necessary and submit a report to the Committee stating therein whether the incapacity is such as to render the judge unfit to continue in office.
7. If the judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the Committee stating therein the examination which the judge has refused to undergo, and the Committee may, on receipt of such report, presume that the judge suffers from such physical or mental incapacity as is alleged in the motion referred to in submission (1).
8. The committee may, after considering the written statement of the judge and the medical report, if any, amend the charges framed under sub-section (3) and in such case; the judge shall be given a reasonable opportunity of presenting a fresh written statement of defense.
9. The Central Government may, if required by the Speaker or the Chairman, or both, as the case may be, appoint an advocate to conduct the case against the judge.

But the existing Judges Act is criticized for enhancing the role of the judiciary in investigating charges against officers of the higher judiciary. The Committee has given unfettered power to regulate its process. Subsequently, unsuccessful removal process of Justice V. Ramaswami revealed the flaws of the Act. In one line it can be submitted that this piece of legislation is nothing more than the legislative drafting of the existing constitutional framework for removal of judges.

#### **7.6.4. 98th Constitution Amendment Bill: National Judicial Commission**

Because of the above stated reasons need for a new law was desired in this field and to fulfil this purpose the Constitution (98th Amendment) Bill, was introduced in the Lok Sabha in, which seeks to create a National Judicial Commission by including Chapter IV A in Part V of the constitution<sup>59</sup>.

The Commission would make recommendation for appointment of judges in higher judiciary and transfer of High Courts judge, and thus, provide an institutionalized mechanism for appointment and transfer of judges in higher judiciary. The recommendation made by the Commission for appointment and transfer of judges in higher judiciary would be binding on the President, and this would reduce chances of friction between the executive and the Commission. This Commission would draw a code of ethics for judges in higher judiciary. It would be empowered to conduct inquiries in case of misconduct and deviant behaviour of a judge, either on the basis of complaints made or suo moto. This Commission would help ushering in judicial accountability<sup>60</sup>.

#### **7.6.5. Judicial Standards and Accountability Bill 2010**

The Judicial Standards and Accountability Bill tries to lay down enforceable standards of conduct for judges. It also requires judges to declare details of their and their family members' assets and liabilities. This Bill creates mechanisms to allow any person to complain against judges on grounds of misbehaviour or incapacity. All these details will be put up on the websites of the Supreme Court and high courts. It will further require judges not to have close ties with any member of the Bar, especially those who practice in the same court.

The Bill will replace the Judges Inquiry Act retains its basic features, contemplates setting up of a national oversight committee, to be headed by a

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<sup>59</sup> Legal Regime on Prevention of Corruption in Judiciary  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1492822](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492822) [Access on 16th March 2013 at 1:20PM]

<sup>60</sup> 98th Constitution Amendment Bill.

former Chief Justice of India, with which the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. At present, there is no legal mechanism for dealing with complaints against judges, who are governed by 'Restatement of Values of Judicial Life,' adopted by the judiciary as a code of conduct without any statutory sanction.

Many recent judgments of both the High Courts and the Supreme Court have enhanced the regard of the judiciary, paving the way for citizen friendly legislation and protection of Human Rights. It is increasingly realized that the fearlessness of these judicial pronouncements is predicated on the constitutionally mandated judicial independence from the executive which should in no instance be undermined. We can see the Bill on following grounds:-

**7.6.5.1. Statutory Mechanism**

**7.6.5.2. Appraisal of the Bill**

**7.6.5.3. Critical Issues**

**7.6.5.1. Need for a Statutory Mechanism**

The need for a statutory mechanism to address complaints of the public in this regard has been felt to bring greater transparency in the judiciary. The judges (Inquiry) Act, 1968 which “The Judicial Standards and Accountability Bill, 2010” seeks to replace lay down a procedure for removal, for proved misbehaviour or incapacity, of Judges of the High Courts and the Supreme Court by way of address of the House of Parliaments to the President<sup>61</sup>.

The Act does not require proceedings of investigation to be conducted behind closed doors. There is, however no legal provision at present for dealing with complaints filed by the public against judges of the High Courts and the Supreme Courts.

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<sup>61</sup> T. Padma, The Judicial Standards and Accountability Bill, 2010- A Critique, Supreme Court Journal, 2012, p. 9.

### **7.6.5.2. Appraisal of the Bill:-**

The Judicial Standards and Accountability Bill, 2010 as introduced in parliament seeks to (a) lay down judicial standards, (b) provide for the accountability of judges, and (c) establish mechanisms for investigating individual complaints for misbehaviour or incapacity of a judge of the Supreme Court or High Courts. It also provides to regulate the procedure for such investigation; and for the presentation of an address by the parliament to the President in relation to proceeding for removal of a judge and for matters connected with such matters<sup>62</sup>.

The Bill was introduced in the Lok Sabha 1st December, 2010 and was then sent to the parliamentary standing committee on personnel, law and justice, who made a crucial recommendation that, seeks to 'restrain' judges from making unwarranted comments against other constitutional bodies or person. Thereafter, once again the Bill was passed by the Lok Sabha on 29th March, 2012 and will be taken up for debate in the Upper House. The Bill establishes the National Judicial Oversight Committee, the Complaints Scrutiny Panel and an Investigation committee.

#### **7.6.5.2.1. Scrutiny Panels**

On receiving a complaint, the committee will forward it to a system of scrutiny panels. In the case of a complaint against a Supreme Court judge, the scrutiny panel will consist of a former Chief Justice of India and two sitting Supreme Court judges, and in the case of a complaint against a High Court judge, the panel will have a former Chief Justice of the High Court and two of its sitting judges. The members of the Supreme Court panel will be nominated by the Chief Justice of India, and that of the High Courts panels by the Chief Justice of the High Courts concerned. The scrutiny panels will have the powers of a civil court. For instance, they can call for witnesses and evidence. They will be required to give their report within three months to the oversight committee.

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<sup>62</sup> Ibid. p. 10.

#### **7.6.5.2.2. Oversight Committee**

In the case of a complaint against a Chief Justice, the oversight committee itself will conduct the scrutiny. On receiving the report from the scrutiny panels, the oversight committee will set up a committee to further investigate the case.

#### **7.6.5.2.3. Investigation Committee**

Like the scrutiny panels, the investigation committee will have the powers of a civil court; it will have the power to frame definite charges. If the charges are not proved, the investigation committee can dismiss the case. Otherwise, it will give a report to the oversight committee, which can issue an advisory or warning or recommend minor punishment if the charges are not too serious. If the charges are serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal.

The Bill mandates that judges should not have close association with individual members of the Bar and not allow any member of their immediate family to appear before them in courts. Judges should not contest any election to any office of club, society or other association, except those associated with the law or any court. Further, they should not have any bias in judicial work or judgments on the basis of religion, race, caste, sex or place of birth.

#### **7.6.5.3. Analysis of the Bill**

The issue of Judicial Standards must be seen in the context of Art 124(4) of the Constitution which provides for the process of impeachment of a judge on the grounds of “proved misbehaviour or incapacity.” The Bill, cleverly disguised as being permissible under Art 124(5), is an example of the most blatant violation of constitutional safeguards and is a cure that is surely worse than the disease. Article 124(5) does not empower Parliament to create any other forum for recommending impeachment proceedings, or allow complaints to be made by any person, or to make a judge liable for minor

penalties. What can be done only by a hundred or more members of the Lok Sabha or fifty or more members of the Rajya Sabha (i.e. initiation of impeachment proceedings) can now theoretically be done by only one person<sup>63</sup>.

It is true that judicial commissions exist in other countries like the U.S. and Canada, but their reach does not extend to the apex court. Also, adopting such structures from other countries without having regard to the unique conditions existing in ours, is untenable and fraught with the danger of destabilizing our delicate constitutional balance<sup>64</sup>.

### **1. National Judicial Appointment Commission Bill 2014**

National Judicial Appointment Commission Bill 2014 was introduced in the Lok Sabha on August 11, 2014 by the Minister of Law and Justice, Mr. Ravi Shankar Prasad. Parliament has passed the National Judicial Appointment Commission Bill and Constitutional 121th amendment Bill, 2014 by full majority formulating a base of as to the appointment of judges of High Courts and Supreme Court. The proposed amendment envisages a procedure for the appointment of the judges through commission. This proposed amendment shall be incorporated as Article 124(a), 124(b) and 124(c) of the Constitution of India. The name of the commission is National Judicial Appointment Commission. The Commission shall consist of six members headed by the Chief Justice of India with two other judges of the Supreme Court as members of the Commission. Law Minister shall also be one of the member of the commission. There shall be two more members of distinguished personalities appointed by the Prime minister with the consultation with the Chief Justice of India.

There is also a provision that two dissenting opinion shall be considered and in such cases that persons shall not be appointed as a judge in whose favour two members do not agree.

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<sup>63</sup> The Hindu, 29<sup>th</sup> March 2011.

<sup>64</sup> Ibid.

Thus the appointment has been made by the full majority of the commission. The President may agree or not agree with the recommendation of the commission. He may send back the name of the recommendies to the commission for reconsideration. However, the President shall be bound to sign on the recommendation of the commission if the commission detoes the same names. As soon as the President puts his signature the appointment of judges shall become final.

The Bill provides for the procedure to be followed by the National Judicial Appointment Commission for recommending persons for appointment as Chief Justice of India and other judges of the Supreme Court, and Chief Justice and other judges of High Courts.

#### **7.6.6. Right to Information Act**

American judge Louis Brandeis once stated that “sunlight is the best disinfectant and electricity is the best policeman”.

The Right to Information Act, may be a best tool for an accountable and transparent judiciary by checking the power. The one judge of the Supreme Court has observed on the proposed amendments in to the RTI Act and stated that “transparency or openness is an accepted principle of democracy and good governance. A distinguished American judge Louis Brandeis once also stated that “sunlight is the best disinfectant and electricity is the best policeman”.

The public power is vested in “we the people of India” and the exercise of the power must be subject to legitimate scrutiny by the people who are the source of that power. The public of India have a participatory role in a republican democracy as they are “the keepers of the Constitution”. In such circumstances there is no justification for such any amendment to the RTI Act being proposed which seeks to unreasonably and unconstitutionally restrict the people right to know what their public servants are doing on their behalf.”

The reaction of the judiciary, as far as the application of the Act on itself is concerned, strongly recommending that it should be left out of its ambit, seems preposterous. If the amendments suggested by Supreme Court are enacted by Parliament, they will strike at the roots of the safeguards contained in the Act: all public authorities, including courts, are subject to the jurisdiction of an independent appellate body.

This Act may be a step towards enforcing the accountability of the judiciary directly through the people of India while an effective and specific Act is not made by the Parliament in this regard.

Once Justice Krishna Iyer said that “there is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made, and a sort of anarchy prevails.

#### **7.6.7. Key Points of Contempt of Courts (Amendment) Act, 2006**

This Act may be called the Contempt of Courts (Amendment) Act, 2006. This Act will replace the Contempt of Courts Act 1971.

According to the provisions of this Act the contempt will not be not punishable in certain cases:

- i. no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;
- ii. the court may permit, in any proceeding for contempt of court, justification by truth as a valid defense if it is satisfied that it is in public interest and the request for invoking the said defense is bona fide.

#### **7.6.8. The Role of Media**

Tamaso Ma Jyotirgamaya meaning ‘from darkness towards light’ is the complete rationale for freedom of speech and expression. On the other hand, judicial function being an essential component of sovereign power to ensure safety of civil society and social harmony is no less significant. The judiciary

and the media are the third and fourth pillars respectively of a democratic set up. Both are indispensable for the smooth functioning of the system.

Justice Krishna Iyer in the case of **Baradakant Mishra v. Registrar of Orissa**<sup>65</sup> court express the view that Supreme Court and the High Courts “must vigilantly protect the free speech even against judicial umbrage- a delicate but sacred duty whose discharge demands tolerance and detachment of higher order.” Until recently right of the media to inform and educate the public in a fair manner in all the matters of public importance and right of the courts to preserve the dignity of the judiciary and administer law without undue pressure and interference has remained in balance. Justice Shiva Kirti Singh expressed in his Article<sup>66</sup> that “no liberty can be absolute because absolute liberty invariable turns into license to harm public interest”.

In **Brij Bhushan and another v. State of Delhi**<sup>67</sup> and **Romesh Thappar v. State of Madras**<sup>68</sup> the Supreme Court has disallowed precensorship on journal and affirmed that Article 19 is sufficiently wide to include the freedom of mass media. The founding fathers of Indian Constitution struck a balance by guarantying the freedom of speech and expression in a very wide language but at the same time by imposing reasonable restrictions under Article 19(2) and such freedom under various heads (a) the interests of the sovereignty and integrity of India, (b) the security of the State, (c) friendly relations with foreign States, (d) public order, (e) decency or morality (f) or in relation to contempt of court, (g) defamation or incitement to an offence .

As Nani Palkhivala has asserted, to talk about democracy without the freedom of the press is a contradiction in terms. A free press is not an optional extra in democracy. If the press does not function as the watchdog of

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<sup>65</sup> 1974 1 SCC 374.

<sup>66</sup> Justice Shiva Kirti Singh, ‘freedom of Media vis-a-vis Independence of judiciary’ (2010), CNLU Law journal Vol. (1)

<sup>67</sup> 1950 SCR 605.

<sup>68</sup> AIR 1950 SC124.

democracy, it has no reason for existence<sup>69</sup>. Jawahar Lal Nehru, strongly advocated the freedom of the press. He said ‘to my mind, freedom of press is not just a slogan... but it is an essential attribute of democratic process<sup>70</sup>. It is true that the media has its own negative sides but one cannot fail to give credit to its positive aspect, for instance in the investigating role it played in the Jessica Lal case. The way it brought the truth out was indeed incredible. The negative aspects can be solved through a common ethics for media with regard to honesty and fairness<sup>71</sup>.

Judicial reforms issues were also raised by the NGO’s. Some that were discussed are<sup>72</sup>:

- a. Weak governance and corruption in judiciary
- b. Lack of laws to govern magistrate.
- c. Lack of judges and lawyers
- d. Low salary of judges and prosecutors.

### **7.7. Lokpal and Lokayuktas Act, 2013**

The historic Lokpal and Lokayuktas Act, 2013 was passed by Indian Parliament paving the way for establishment of a Lokpal (Ombudsman) to fight corruption in public offices and ensure accountability on the part of public officials, including the Prime Minister, but with some safeguards. The Lokpal, an executive authority, is not accountable to anyone. Some important features of the Lokpal and Lokayuktas Act, 2013 are following<sup>73</sup>:

Lokpal will consist of a chairperson and a maximum of eight members, of which 50% will be judicial members 50% members of Lokpal shall be from SC/ST/OBCs, minorities and women. Selection of chairperson and members of Lokpal through a selection committee consisting of Prime

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<sup>69</sup> Nani Palkivala, ‘Press Must Not Be A Poodle’ Indian Express, New Delhi, 6 August 1995.

<sup>70</sup> Madhav Godbole, “Public Accountability & Transparency: The Imperatives of good governance” Orient Longman Pvt. Ltd., New Delhi, p. 351.

<sup>71</sup> Mona Shukla, ‘Judicial Accountability: an Aspect of Judicial Independence’ in Judicial Accountability, Regal Publications, New Delhi, (2010), p. 36.

<sup>72</sup> Judicial Accountability in India, [http://ccsinternship.files.wordpress.com/2011/03/247\\_judicial-accountability-in-india\\_isha-tirkey.pdf](http://ccsinternship.files.wordpress.com/2011/03/247_judicial-accountability-in-india_isha-tirkey.pdf) on [25th Dec 2012 at 12:39 PM].

<sup>73</sup> The Times of India 18th December 2013.

Minister, Speaker of Lok Sabha, leader of opposition in Lok Sabha, Chief Justice of India or a sitting Supreme Court judge nominated by Chief Justice of India. Eminent jurist to be nominated by President of India on basis of recommendations of the first four members of the selection committee "through consensus". Lokpal's jurisdiction will cover all categories of public servants. All entities (NGOs) receiving donations from foreign source in the context of the Foreign Contribution Regulation Act (FCRA) in excess of Rs 10 lakh per year are under the jurisdiction of Lokpal Centre will send Lokpal Bill to states as a model bill, states have to set up Lokayuktas through a state law within 365 days.

Lokpal will have power of superintendence and direction over any central investigation agency including CBI for cases referred to them by the ombudsman. A high-powered committee chaired by the Prime Minister will recommend selection of CBI director. The collegium will comprise Prime Minister, leader of opposition in Lok Sabha and Chief Justice of India PM has been brought under purview of the Lokpal, so also central ministers and senior officials. Directorate of prosecution will be under overall control of CBI director. At present, it comes under law ministry. Appointment of director of prosecution to be based on recommendation of the Central Vigilance Commission. Director of prosecution will also have a fixed tenure of two years like CBI chief.

Transfer of CBI officers investigating cases referred by Lokpal with the approval of watchdog. Bill incorporates provisions for attachment and confiscation of property acquired by corrupt means, even while prosecution is pending. Bill lays down clear timelines for preliminary enquiry and investigation and trial. Provides for special courts Public servants will not present their view before preliminary enquiry if the case requires 'element of surprise' like raids and searches. Bill grants powers to Lokpal to sanction prosecution against public servants.

CBI may appoint a panel of advocates with approval of Lokpal, CBI will not have to depend on government advocates. The civil society version brings the judges under its jurisdiction. Complaints can be initiated by Lokpal itself or from the public directly. The Lokpal will comprise of 11 members which will be broad based.

Therefore, the Lokpal should only take matters relating to politicians and bureaucrats and not judges. For the judges an entirely different, independent and exclusive mechanism should be there. And if the judges are included, then the public shouldn't be allowed directly to initiate action, the grievance should be processed by the committee, this will then manage frivolous cases from infringing independence of judiciary.

#### **7.8. Role of Civil Society in judicial Accountability**

The merits of accountability are being well recognized in the society today and this is taking the shape of campaign against corruption and for judicial accountability. It is a well-accepted fact that it is the common man who is the main consumer of all judicial decisions; therefore they have the full right to have a clean judiciary<sup>74</sup>.

#### **7.9. Media & NGOs Role in making judiciary Accountable**

Media is considered to be the forth pillar of democracy. Earlier media had always been silent because of the threat of the Contempt of Court Act, but with the amendment of this act, it seems that the freedom of expression will not be infringed. It is true that the media has its own negative sides but one cannot fail to give credit to its positive aspect, for instance in the investigating role it played in the Jessica Lal & in other cases. Supreme Court in **Express Newspaper v. Union of India**<sup>75</sup> held that freedom of the press is included in that wider guarantee, it is necessary to plead for the freedom of the press in the country. The way it brought the truth out was indeed incredible.

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<sup>74</sup> Supra note. 62.

<sup>75</sup> AIR 1958 SC 578 at 614.

Therefore, the relationship between the media and the judiciary needs to be carefully managed by both the institutions<sup>76</sup>.

### **7.10. Role of Private Arbitration**

This is recognized as an effective method whereby parties who are involved in a dispute, upon an agreed rules and regulations, try to reach a settlement. A qualified arbitrator who is a licensed professional and expert in that area is hired to solve the issue. The parties involved also decide that after the completion of the resolution it may further not be appealed. This saves them from the prolonged litigation experience<sup>77</sup>.

In India, arbitration involving commercial disputes is being recognized as an effective method. Equitable solutions are reached more quickly than litigation, at less costs and it allows parties to adopt whatever procedures they choose for the resolution of the disputes. The courts in India have offered full support and encouragement for arbitration; they do not review the merits of an award in arbitration, unless requested by any party and only under restricted grounds of challenge laid down in the Arbitration Act<sup>78</sup>.

### **7.11. Law Commission Report No. 230, August 2009**

This report has come up with certain recommendations. Some of which are discussed below<sup>79</sup>:

- Increase in number of working days: considering the huge number of pendency which has been discussed above it becomes necessary to increase the number of working days. This introduction must be done at all levels of judicial hierarchy and it must begin from the apex court.
- Speedy justice is a right of every litigant and this has been guaranteed in Article 21 of the Constitution. In fact it has been rightly said that ‘justice delayed is justice denied’. Therefore effective steps have to be

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<sup>76</sup>Supra note. 62.

<sup>77</sup> Supra note.62.

<sup>78</sup> Ibid.

<sup>79</sup> 230 Law Commission Report.

taken; an attempt has been made by Gujarat state and Delhi to have evening courts.

- Alternative dispute resolution (ADR): with new demands emerging, sometimes the existing ones fail, the ADR has emerged out of this vision. Provisions have been made in the Legal Service Authorities Act for settling cases through Lok Adalats these are voluntary mediating agencies where by lawyers, retired judges and social activists can take up pending cases in the lower courts and secure a settlement.

#### **7.12. International Standards and Norms on Accountability**

Main International Standards to address standards and norms for judges, prosecutors and law enforcement officials are outlined below.

##### **7.13.1. UN Convention against Corruption, 2003**

##### **7.13.2. Basic Principles on the Independence of the Judiciary, 1985.**

##### **7.13.3. UN Guidelines on the Role of Prosecutors, 1990**

##### **7.13.4. UN Codes of Conduct for Law Enforcement Officials, 1979**

**7.13.5. Judicial Integrity Group-** The first meeting of the Judicial Group on Strengthening Judicial Integrity (or the Judicial Integrity Group, as this body has come to be known) was held at the United Nations Office in Vienna on 15 and 16 April 2000. At this meeting, the Judicial Integrity Group took two decisions. First, it agreed that the principle of accountability demanded that the national judiciary should assume an active role in strengthening judicial integrity by effecting such systemic reforms as are within the judiciary's competence and capacity. Second, it recognized the urgent need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative branches of government. The participating judges emphasized that by adopting and enforcing appropriate standards of

judicial conduct among its members, the judiciary had the power to take a significant step towards earning and retaining the respect of the community<sup>80</sup>.

**7.13.6. The New Delhi Code of Minimum Standards of Judicial Independence 1982:** The New Delhi Code provided for necessary safeguards of judicial independence on the following aspects:

- A. Personal and Substantive Independence
- B. Judicial Conduct
- C. Collective Independence
- D. Internal Independence
- E. Judges and the Executive
- F. Security of Judicial Tenure
- G. The Legislature and Judges
- H. Standards of Judicial Selection<sup>81</sup>.

**7.13.7. Mount Scopus International Standards 2008**

The Mount Scopus International Standards describe the importance of maintaining constitutional safeguards of judicial Independence and securing judicial independence from numerous aspects including: collective independence of the judiciary, internal independence of the judge vis-a-vi his colleagues and his administrative superiors, the significance of insuring reflective judiciary. World conferences of independence of judiciary at Montreal, 1993 dealt with independence and accountability of international judges. And other important issues for discussing were selection, training, promotion, transfers, and privileges.<sup>82</sup>

In last, it may be conclude that the foul smell of corruption is increasingly enveloping the temples of justice, popularly referred to as courts. Almost everyone is aware of the level of the corruption in the lower stream of

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<sup>80</sup>[http://en.wikipedia.org/wiki/International\\_Association\\_of\\_Judicial\\_Independence\\_and\\_World\\_Peace\\_Conferences](http://en.wikipedia.org/wiki/International_Association_of_Judicial_Independence_and_World_Peace_Conferences) [Access on 16th March 2013 at 1:45PM].

<sup>81</sup> [http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf). [Access on 16th March 2013 at 12:50PM].

<sup>82</sup> Sura note. 69. at p. 37.

justice. But, the screamers about instances of corruption in the higher judiciary appear to have forced the government and the Chief Justice of India to look afresh for an effective antidote. One of the most frequently used words in India is 'corruption' which signifies a range of things. There is a great danger that such instances can erode the faith that people have in the judiciary. The judge is accountable to no one. The judiciary versus the executive or legislature is a battle which is not new but in present times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash-point. A need definitely is there to make judiciary accountable, as derogation of values in judiciary is far more dangerous than in any other wing of the government as judiciary has to act as the guardian of our constitution. So the question arises that the laws which have been passed by the legislature, are sufficient to curb the corruption in the judiciary? Whether it being successful in bringing the more transparency and accountability in the judiciary of India?



# *Judicial Activism And Judicial Accountability*

## CHAPTER 8

# JUDICIAL ACTIVISM AND JUDICIAL ACCOUNTABILITY

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### 8. Introduction

Our country is blessed by a proud tradition of jurisprudence and our people have been benefited from the wisdom and sense of fair play of successive generation of legal luminaries<sup>1</sup>. Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.<sup>2</sup> In fact, the doctrine of judicial activism really belongs to constitutional interpretation, statutory construction, and separation of powers.

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." Judicial activism means active role played by the judiciary in promoting justice. Judicial Activism to define broadly, is the assumption of an active role on the part of the judiciary<sup>3</sup>.

Failure on two wings of the constitution of India e.g. legislative and executive to provide 'good governance' makes judicial activism an imperative. Dispense of justice on a population of over a billion does not sound like and it never will be an easy task. It is obviously very difficult in India. The judiciary directs the executive and legislature to act in such a manner that is for the welfare of the citizens of the country. This act of judiciary that is intervention in the day today administration is known as judicial activism which is necessary to protect the interest of citizens.

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<sup>1</sup> Supreme Court shall not Disown Social Justice-Justice V. R. Krishna Iyer by Avni Nagaria, 2013, Universal Law Publication, New Delhi. p. 1.

<sup>2</sup> [http://en.wikipedia.org/wiki/Judicial\\_activism](http://en.wikipedia.org/wiki/Judicial_activism) Access on 23rd May 2012 at 2PM

<sup>3</sup> Chaterji Susanta, "For Public Administration' Is judicial activism really deterrent to legislative anarchy and executive tyranny?, The Administrator, Vol. XLII, April-June 1997, p9, (at p. 11).

Judiciary played an important role by extension of the concept of judicial activism and public interest litigation. In the recent time, the decisions of the Supreme Court and the High Courts in the socio economic reconstruction of the society by progressive interpretation and affirmative action have been acclaimed<sup>4</sup>.

### **8.1. Meaning and Concept of Judicial Activism in India**

Judicial activism means that instead of judicial restraint, the Supreme Court and other lower courts become activists and compel the authority to act and sometimes also direct the government regarding policies and also matters of administration. Judicial process reproduces itself in the performance of judging the judge. Judicial activism in India has given extra-ordinary to Indian appellate judiciary. These arise because justices are loath to lose their new found power. At the same time, they are neither able to create relatively stable normative niches sheltering activism nor able to exercise them as progressively as at least some activist justice want<sup>5</sup>.

Judicial activism has arisen because of the failure of the executive and legislatures in performing their actions. Secondly, it has arisen also due to the fact that there is a doubt that the legislature and executive have failed to deliver the goods. Thirdly, it occurs because the entire system has been plagued by ineffectiveness and inactiveness<sup>6</sup>.

The term "judicial activism" was first time used by Arthur Schlesinger Jr. in his article "The Supreme Court: 1947," published in Fortune magazine in 1947. Though the history of judicial activism dates back to 1803, when concept of judicial review was evolved by Chief Justice Marshall in celebrated case of **Marbury v. Madison** The emergence of judicial review gave birth to a new movement which is known as judicial activism<sup>7</sup>. Judicial

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<sup>4</sup> B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan, Raju Ramchandran, "Supreme But Not Infallible", Oxford University Press, New Delhi p. 193.

<sup>5</sup> Sathre, S.P, Judicial Activism in India (2002) Oxford University Press, New Delhi p. x, xii, xiii, xiv.

<sup>6</sup> Judicial Activism a pilgrim of Judiciary All India Reporter, May 2011, Vol.98 part 1169, Journal 17-21, Judicial Activism a Pilgrim of Judiciary.

<sup>7</sup> Kanchan Jha, Judicial Activism in India, (1980).

Activism means "a philosophy of judicial decision making whereby judges allow their personal views about public policy among other factors to guide their decision"<sup>8</sup>. Chief Justice Marshall, decided the case **Marbury v. Madison** and observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to say what the law is". He concluded if there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law<sup>9</sup>.

Two important concepts of judicial review and judicial activism were thus born. The term 'judicial activism' is intended to refer to, and cover, the action of the court in excess of, and beyond the power of judicial review. Judicial activism does interference in the legislative and executive fields because of their non-activity. Judicial activism is a way through which relief is provided to the disadvantaged and aggrieved citizens. Judicial activism is providing a base for policy making in competition with the legislature and executive. Judicial activism is the rendering of decisions, which are in tune with the temper and tempo of the times<sup>10</sup>.

## **8.2. Development of Judicial Activism in India**

It is not easy to know about the origin of judicial activism in India. Since the judiciary has come to be recognised as an independent and separate organ of the government under the Government of India Act 1935 and subsequently under the Constitution of India. It would be prudent to scan the period subsequent to 1935 for tracing the origin.

However there are a few instances even prior to that period where certain selected judges of High Courts established under the Indian High Courts Act, 1861 exhibited certain flashes of judicial activism. In 1893,

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<sup>8</sup> Black Law Dictionary, 8th Edn.

<sup>9</sup> Supra note 6.

<sup>10</sup> Ibid.

Justice Mahmood of the Allahabad High Court delivered a dissenting judgment which showed the seed for judicial activism in India<sup>11</sup>.

“The power of judicial review gave birth of judicial activism in India<sup>12</sup>”. The concept of judicial activism as evolved by Justice Krishna Iyer aroused a storm of criticism. The business of the judge is just to interpret the law, nothing more. His judicial activism betrayed, they said, of the nature of judicial process. But the fruits and facts are otherwise. Justice Krishna Iyer’s judicial activism is in tune with the theory propounded by our founding father’s vision for Nav Bharat<sup>13</sup>.

Emergence of judicial activism was hindering governance in the country and impacting growth in Asia's third largest economy. "Nowhere in the world, we would have seen ideal balance between legislature and judiciary. But in India, we have seen intensifying judicial activism, which had impacted the balance of governance<sup>14</sup>.

Judicial activism emerges to address specific political and social problems that are not solved within the existing system. Gross violations of human rights and poor implementation of laws in India have led many judges to seek innovative mechanisms to solve these problems. The judiciary of India, has also been influenced by examples from other parts of the world where individual judges have displayed creative interpretations of the law (Holland 1991). Indeed, even the term public interest litigation appears to have originated in the US where ‘issues of health and consumer exploitation were taken up by public spirited lawyers<sup>15</sup>,

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<sup>11</sup>Bankrishna,"When seed for judicial activism was sowed" the Hindustan Times (New Delhi) 1st April 1996, p.9.

<sup>12</sup> See: Anil Diwan, “Judicial Activism and Democracy”.

<sup>13</sup> Avni Nagaria, Supreme Court shall not Disown Social Justice-Justice V. R. Krishna Iyer (2013), Universal Law Publication, New Delhi. p. 13.

<sup>14</sup> Finance minister P Chidambaram said at The Economic Times Awards for Corporate Excellence See also: Judicial Activism <http://articles.timesofindia.indiatimes.com/keyword/judicial-activism> [Access on 19th December 2013 at 5:00 PM]

<sup>15</sup> Taking Justice Outside the Courts: Judicial Activism in India, (2001) The Howard Journal Vol. 40 (2), p.148–165.

The concept of judicial activism has become a platitude in Indian political discussion. It has been approved by the public of India, but it has also generated quite a few misgivings about the role of the executive and the legislature on one side and the judiciary on the other. This is because of a number of unfortunate developments in recent times in the country and also due to the lack of adequate appreciation of the distinct roles of these institutions under the Constitution and the mutuality of their relationships. The entire problem has acquired an emotional overtone. Accountability of the various arms of our constitutional system is the fulcrum of the very scheme of our Constitution and the thinking that preceded it, during the freedom movement as well as during the debates in the Constituent Assembly<sup>16</sup>.

After the Constitution (Twenty fifth Amendment) Act, 1971, the expectations of the public soared high and the demands on the courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions have increased. Beginning with the Ratlam Municipality case the sweep of PIL had encompassed a variety of causes<sup>17</sup>.

In fact, the judicial activism has given us some very good case laws and path breaking judgments, which brought revolutionary changes in the society, to deny judicial activism to the courts is to nullify the judicial process and to negate justice. Take away judicial activism and tyranny will step in to fill the vacant space<sup>18</sup>. It is rightly stated by Justice Hidayatullah that “The first principle to observe is that the wisdom of the law must be accepted. A little incursion into law-making interstitially, as Holmes put it, may be permissible. For other cases the attention of Parliament and/or Government can be drawn to the flaw<sup>19</sup>.”

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<sup>16</sup> Dr. Bhure Lal, *Judicial Activism and Accountable*, (2004), Siddhartha Publication, New Delhi, p-52.

<sup>17</sup> *Judicial Activism in India*, <http://azgaralimd.blogspot.in/2012/12/judicial-activism-in-india.html> [Access on 19 December 2013 at 2:38 PM].

<sup>18</sup> D. P. Madon, Conference Paper, the Third International Conference of Appellate Judges, p.207 (at p.210).

<sup>19</sup> Justice M. Hidayatullah, *Highways and Bye-Lanes of Justice*, (1984) 2 SCC J-1 (at p. 5).

To provide the green belts and open spaces for maintaining ecological balance, menacing stone-crushing activities near residential complexes, earmarking a part of the reserved forest for Adivasis to secure their livelihood, compelling the municipal authorities of the Delhi Municipal Corporation to perform their statutory obligations for protecting the health of the community, compelling the industrial units to set up effluent treatment plants, devices for controlling air pollution and clean environment, directing closure of recalcitrant factories to save the society from the effect of environmental pollution and quashing of a warrant of appointment for the office of Judge, High Court of Assam and Guwahati are some of the later significant cases displaying judicial activism<sup>20</sup>.

In fact, In India, the theory of judicial activism came into existence in the leading case of *Sajjan Kumar v. State of Rajasthan* (1954), *Golaknath v. State of Punjab* (1967), *Keshwanand Bharti v. State of Kerala* (1973), and *Minarva Mills v. Union of India* (1980). Judicial activism was explained and recognized by the Supreme Court in **Golaknath's case**<sup>21</sup> wherein "the court laid down the judicial principle of prospective overruling by giving wider beneficial interpretation of Article 13 of the Constitution of India<sup>22</sup>." Through these Articles, the Supreme Court as well as High Courts have redressed several social, environmental and other issues. The Golak Nath case is an example of judicial activism. The Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process<sup>23</sup>.

The power of parliament to amend any provision in Part-III of the Constitution was taken away. In landmark case of **Keshvananda Bharati**, the Supreme Court held that by Article 368 of the Constitution, Parliament has amending powers. But the amendatory power does not extend to alter the

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<sup>20</sup> Supra note 13.

<sup>21</sup> I.C. Golaknath & others. Vs State of Punjab & another, 1967 SCR (2) 762.

<sup>22</sup> Ibid.

<sup>23</sup> Supra note. 16. at p. 38-39.

basic structure or framework of the Constitution. The basic features of the Constitution being : (i) Supremacy of the Constitution; (ii) Republican and Democratic form of government; (iii) Secularism; (iv) Separation of powers between the legislature, the executive and the judiciary; and (v) Federal character of the Constitution. Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the basic features of the Constitution are now beyond the reach of Parliament. After making these observations certain reasons can be generalized which lead to judicial activism. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to them either by a constitution or any other organic law<sup>24</sup>.

- i) Near Collapse of responsible government.
- ii) Pressure on judiciary to step in aid.
- iii) Judicial enthusiasm to participate in social reform and change.
- iv) Legislative vacuum left open.
- v) The constitutional scheme.
- vi) Authority to make final declaration as to validity of a law.
- vii) Role of Judiciary as guardian of fundamental rights.
- viii) Public confidence in the judiciary etc.

Judicial activism is a way through which relief is provided to the disadvantaged and aggrieved citizens. Judicial activism is providing a base for policy making in competition with the legislature and executive. Judicial activism is the rendering of decisions, which are in tune with the temper and tempo of the times<sup>25</sup>.

Judicial activism can be compared with legislative activism. It may be of two types: (i) activist law-making; and (ii) dynamic law-making. Activist law-making implies the legislature taking the existing ideas from the

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<sup>24</sup> Role of Judiciary in the Democratic System of India (judicial activism under the supreme court of India): golden research thoughts (Sept 2012).

<sup>25</sup> <http://www.preservearticles.com/2011092714143/short-essay-on-judicial-activism-in-india.html> [Access on 16th April 2014 at 2:10 PM]

consensus prevailing in the society. Dynamic law-making surfaces when the legislature creates an idea outside the consensus and before it is formulated, propagates it<sup>26</sup>. Dynamic law-making always ordinarily carries with it legitimacy because it is the creation of the legislators who have the popular mandate. Judges cannot play such a dynamic role; no idea alien to the constitutional objectives can be metamorphosed by judicial interpretation into a binding constitutional principle<sup>27</sup>.

To whom the judiciary is accountable is the next question. The answer to this is found in the Constitution itself. A judge of the Supreme Court or a High Court can be impeached on the ground of proved misbehaviour or incapacity and the power in this regard is vested in Parliament vide Articles 124(4) and 217(1)(b). When a judge is impeached, Parliament acts as a judicial body and its members must decide the guilt or otherwise of the judge facing the indictment objectively uninfluenced by extraneous considerations<sup>28</sup>.

When such a judicial function is discharged by Parliament, it is highly debatable whether political parties can issue whips directing their members to vote in a particular manner. An interesting case study in this regard is the impeachment proceedings against Justice V. Ramaswamy which ended unsuccessfully<sup>29</sup>.

Judicial activism in India has become a matter of debate and controversy. Attempts have been made to curb the power of courts as well as access to them<sup>30</sup>. Several indirect methods were being used to discipline the judiciary in the past, such as super session of judges<sup>31</sup> or transfer of inconvenient judges. It has often been said that the courts usurped the functions allotted to the other organs of Government. However, the defenders

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<sup>26</sup> Supra note. 17.

<sup>27</sup> Supra note. 25.

<sup>28</sup> <http://www.oocities.org/bororissa/jud.html> [Access on 9th Feb2013 at 2:00 PM]

<sup>29</sup> Supra note. 24.

<sup>30</sup> S.P. Sathe, 'Curbs on PIL: UF Government's Evil Designs' Economic and Political Weekly, 1 March 1997 p. 441

<sup>31</sup> N.A. Plkiwala (ed.), "Judiciary Made to Measure" (M.R. Pai, 1973).

of judicial activism say that the courts have performed their legitimate functions. Former Chief Justice of India, A.M. Ahmadi once stated that judicial activism is a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern<sup>32</sup>. In the case of a statute, a court has to find out what was really intended by the authors and in the case of a constitution, a court has to sustain its relevance to changing social, economic and political scenarios and as Cardozo says, give to its words 'a continuity of life and expression'<sup>33</sup>.

### **8.3. Judicial Review & Judicial Activism**

Judicial review is not an expression exclusively used in constitutional law. Literally, it means the revision of the decree or sentence of an inferior court by a superior court. Under general law, it works through the remedies of appeal revision and the like, as prescribed by the procedural laws on the land, irrespective of the political system which prevails<sup>34</sup>. Judicial review in India stands on a more solid basis than in United States because it is not based on any judicial dogma, but is provided for by the constitution itself<sup>35</sup>.

Judicial Review means a form of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. Judicial Review has, however, a more technical significance in public law, particularly in countries having written Constitutions. In such countries it means that courts have the power of testing the validity of the legislative as well as other governmental actions. The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on one hand and the judiciary on the other hand provides the

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<sup>32</sup> A.M. Ahmadi, 'Judicial Process: Social Legitimacy and Institutional Validity' (1996) 4 SCC (Jour) p. 1-10.

<sup>33</sup> Cardozo, 'The Nature of the Judicial Process', p. 94.

<sup>34</sup> Soli. J. Sorabji, Law & Justice An Anthology, (2003) Universal Law Publishing Co. Pvt. Ltd. p. 377-387.

<sup>35</sup> Noor Mohammed Bilal, Dynamism of Judicial Control and Administrative Adjudication p.197.

means by which mistakes committed by one are corrected by the other and vice versa<sup>36</sup>.

The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of the statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly<sup>37</sup>.

This power of judicial review and its need was indicated by Chief Justice Marshall in *Marbury v. Madison*. He said<sup>38</sup> that it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. The judges have been alive to this reality and, while discharging their duties, have tried to develop and expound the law those lines while acting within the bounds and limits set out for them in the Constitution. Judicial activism is a pious work in a democratic set up. Judicial activism though may not be sometimes justified but it has become necessities of the day due to the wrongful act of the executive and the legislature<sup>39</sup>.

The phenomenon of judicial activism is not peculiar to our country. At different times not only in the United States of America but in other commonwealth countries there have been controversies and debates on the

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<sup>36</sup> Supra note. 34.

<sup>37</sup> Supra note. 17.

<sup>38</sup> Supra note. 24.

<sup>39</sup> Supra note. 6.

subject. A great deal of legal and political literature has also developed in this field and is of considerable interest from a comparative standpoint<sup>40</sup>.

### **8.3.1. Judicial Review as a part of the Basic Structure**

The evolution of the courts in India under the British rule and the progressive application of the British common law to India by enactment of laws, have left their indelible mark on legal history of India during last 200 years. But the creation of the Federal Court was the most outstanding contribution of the British on the eve of their leaving this country on India attaining Independence<sup>41</sup>.

The Constitution Act of 1935 envisaged a federal form of government, with clearly defined spheres of legislation as between the federating units and the Centre. It was necessary to create an All India Court to adjudicate upon in the conflicting claims of those units in the matter of legislation and to interpret the Constitution with particular reference to the three lists, which sought to demarcate the Central from the Provincial ambit of legislative jurisdiction.<sup>42</sup>

Nevertheless, Federal Court, for the first time, gave the vision of truly all India Supreme Court of the future. The federal scheme of the Government of India Act of 1935 was indeed the fore runner of the federal system of an independent India. It is a fact that the Constitution of the Republic of India owes to that Act more than any other constitutional document<sup>43</sup>. The Supreme Court is a substantially different institution when compared to the Federal Court. Under Art. 32 of the Constitution the Supreme Court is made the protector of all the Fundamental Rights embodied in the Constitution. And the court has to guard these rights against every infringement at the hands of either the Union Government or the State Government by declaring the significance and operation of these rights from time to time. It protects the

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<sup>40</sup> Supra note. 16. at p. 5.

<sup>41</sup> M.V. Pylee, (1996), 'Federal Court of India', Vikas Publication House Delhi, p. 328.

<sup>42</sup> Ibid.

<sup>43</sup> [http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09_chapter%202.pdf) [Access on 2 Aug 2014 at 11:43 AM]

citizens from unconstitutional laws and arbitrary acts which has been performed by the legislature and administrative executive authorities<sup>44</sup>.

Constitution of India has given the power to Supreme Court as the protector and guarantor of fundamental rights under Art. 32(1). Where, therefore, the infringement of a fundamental right has been established, the Supreme Court cannot refuse relief under Art. 32 on the ground<sup>45</sup>. In this way, in the leading case of *Keshvananda Bharathi*, the Supreme Court of India the propounded the basic structure doctrine according to it the legislature can amend the Constitution, but it should not change the basic structure of the Constitution. S.M. Sikri, C.J mentioned five basic features<sup>46</sup>:

1. Supremacy of the Constitution.
2. Republican and democratic form of Government.
3. Secular character of the Constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution.

S.M. Sikri, C.J observed that these basic features are easily discernible not only from the Preamble but also from the whole scheme of the Constitution. Further he added that the structure was built on the basic foundation of dignity and freedom of the individual which could not by any form of amendment be destroyed. It was also observed in that case that the above are only illustrative and not exhaustive of all the limitations on the power of amendment of the Constitution<sup>47</sup>. Supreme Court of India in the case of **Indira Nehru Gandhi v. Raj Narain**<sup>48</sup> held that judicial review in election disputes was not a compulsion as it is not a part of basic structure.

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<sup>44</sup> Supra note. 41.

<sup>45</sup> Anupchand Kapur, 'The Indian Political System', (1982) S. Chand & Company, New Delhi, p.303.

<sup>46</sup> Gurram Ramachandra Rao, *India: Judicial Review in India*, <http://www.mondaq.com/india/x/20649/Constitutional+Administrative+Law/Judicial+Review+in+India> [Access at 6:50PM on 7<sup>th</sup> May 2013].

<sup>47</sup> Supra Note 46.

<sup>48</sup> 1975 Supp SCC 1.

In **S.P. Sampath Kumar v. Union of India**<sup>49</sup>, P.N. Bhagwati, C.J., relying on **Minerva Mills Ltd**<sup>50</sup> declared that it was well settled that judicial review was a basic and essential feature of the Constitution. If the power of judicial review was absolutely taken away, the Constitution would cease to be what it was. Court further declared that if a law made under Article 323-A(1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure and hence outside the constituent power of Parliament.

In **Kihoto Hollohan v. Zachillur**<sup>51</sup> another Constitution Bench, while examining the validity of para 7 of the Tenth Schedule to the Constitution which excluded judicial review of the decision of the Speaker/Chairman on the question of disqualification of MLAs and MPs, observed that it was unnecessary to pronounce on the contention whether judicial review is a basic feature of the Constitution and para 7 of the Tenth Schedule violated such basic structure. Subsequently, in **L. Chandra Kumar v. Union of India**<sup>52</sup> a larger Bench of seven Judges unequivocally declared: "that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure".

### 8.3.2. Expansion of Judicial Review through Judicial Activism

In **Maneka Gandhi**<sup>53</sup> case the Supreme Court brought the ambit of constitutional provisions to enforce the human rights of citizens and sought to bring the Indian law in conformity with the global trends in human-rights-jurisprudence. This was made possible in India, because of the procedural innovations with a view to making itself more accessible to disadvantaged

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<sup>49</sup> (1987) 1 SCC 124 at 128.

<sup>50</sup> (1980) 3 SCC 625.

<sup>51</sup> 1992 Supp (2) SCC 651, 715, para 120.

<sup>52</sup> (1997) 3 SCC 261.

<sup>53</sup> 1978 AIR 597, 1978 SCR (2) 621.

sections of society giving rise to the phenomenon of Social Action Litigation/Public Interest Litigation<sup>54</sup>. During the Eighties and the first half of the Nineties, the Court have broken their shackles and moved much ahead from being a mere legal institution, its decisions have tremendous social, political and economic ramifications.

SAL, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration<sup>55</sup>. The sanctity of locus standi and the procedural complexities are totally side-tracked in the causes brought before the courts through SAL. In the beginning, the application of SAL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions<sup>56</sup>.

The activist role of Supreme Court has been criticised in some quarters as being violative of the doctrine of separation of powers. As Justice Cardozo puts it, "A Constitution states or ought to state not rules for the passing hour but principles for an expanding future<sup>57</sup>." It is with this view that innovations in the rules of standing have come into existence.

### **8.3.3. Limitation on the Power of Judicial Review**

The magnification of the field of vision of judicial review is seen both with reverence and suspicion; reverence in as much as the judicial review has become a creative element of interpretation that serves potentially unlimited powers to judiciary to check the actions of legislative and executive branches of government.

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<sup>54</sup> A.B.S.K. Sangh (Ryl) v. Union of India, AIR 1981 SC 298; Janata Dal v. H.S. Chowdhari, (1992) 4 SCC 305; Simranjit Singh Mann v. Union of India, (1992) 4 SCC 605; Upendra Baxi v. State of U.P., (1983) 2 SCC 308; Upendra Baxi II v. State of U.P., (1986) 4 SCC 106.

<sup>55</sup> D. Satya Narayana v. N.T. Rama Rao, (1988) 1 ALT 178.

<sup>56</sup> S.P. Gupta v. Union of India, 1981 Supp SCC 87; People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235; Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161.

<sup>57</sup> Benjamin N. Cardozo, 'The Nature of Judicial Process', (1997) Universal Law Publishing Co. Pvt. Ltd.

Somebody says that if there is any limitation on judicial review other than constitutional and procedural<sup>58</sup> that is a product of judicial self-restraint. As Justice Dwivedi empathically observed, "Structural socio-political value choices involve a complex and complicated political process. This court is hardly fitted for performing that function. In the absence of any explicit Constitutional norms and for want of complete evidence, the court's structural value choices will be largely subjective. Our personal predilections will unavoidably enter into the scale and give colour to our judgment. Subjectivism is calculated to undermine legal certainty, an essential element of rule of law<sup>59</sup>."

In the matter of constitutionality, the Courts sometimes apply an interpretational device called 'reading down'. The essence of the device is that "if certain provisions of law construed in one way would make them consistent with the constitution, and another interpretation would render them unconstitutional, the court would lean in favour of the former construction<sup>60</sup>." But all this depends on the outlook and values of the judge<sup>61</sup>.

Judicial review of administrative action on the grounds of checking validity is not so strong in the case of administrative action as well as in the case of statutes. Even, the legislature expressly leaves a matter to the discretion of an administrative authority the courts have adopted an attitude of restraint. They have said we cannot question the legality of the exercise of discretionary power unless and until it is an abuse of discretionary power that also includes mala fide exercise of power, exercising the power for an

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<sup>58</sup> The Supreme Court used the following procedural limitation to judicial Review: 1. Doctrine of laches in order to quash the petitions at the threshold for delay, See e.g. *Aflatoon v. Lt. Governor, Delhi*, AIR 1974 SC 2077; *M.K. Krishnaswamy v. Union of India*, AIR 1973 SC 1168; *R.S. Deodhar v. Maharashtra*, AIR 1974 SC 259; See also *Sunil Gupta*, "Of Judicial Vicissitudes and Self-Contradictions", (1982) 3 SCC (Jour) 13.2. Res Judicata, See also *Gulab Chand v. State of Gujarat*, AIR 1965 SC 1153; *Daryao v. Uttar Pradesh*, AIR 1961 SC 1457; *A.R. Choudhury v. Union of India*, AIR 1974 SC 532; *Niranjan Singh v. State of M.P.*, AIR 1972 SC 2215; *Workmen of Cochin Port Trust v. Board of Trustees*, AIR 1978 SC 1283.

<sup>59</sup> *Keshvananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>60</sup> Per *Sinha C.J.* in *Kedar Nath v. Bihar*, AIR 1962 SC 955.

<sup>61</sup> See the observation made by Chief Justice Chandrachud in *All Saints High School v. Andhra Pradesh*, AIR 1980 SC 1042 at 1050.

improper motive, decision based on irrelevant considerations and in some cases unreasonable exercise of power and non-exercise of discretion.

Judicial activism has become an exception in the control of discretionary power. There is a need of strong reasons to justify it. In the lack of that strong reasons the interventionist strategy may provoke the other branches of Government may retaliate and impose further limitations on the scope of judicial review.

In the landmark case of **Minerva Mills v. Union of India**<sup>62</sup>, it was observed by the Supreme Court that the clauses of Art. 31-C as introduced by the Constitution (42nd Amendment) Act, 1976, which required to take away the power of judicial review were unconstitutional. However, judicial review was not held to be part of the basic structure of the Constitution by the majority in this decision, although Bhagwati J in his minority decision traced the power of judicial review to Article 32 and 226 and observed it to be a part of the basic structure of the Constitution, and if taken away by a constitutional amendment would amount to ‘subversion of the Constitution’.

Politicians who claim that the judiciary is overreaching its powers should understand that the constitution has vested the power of review in the judiciary only to guard against the violation of constitutional provisions. There should be checks and balances among the three organs of government. The constitution has given the judiciary the power to scrutinize the actions of the legislature to determine whether any of them violates the fundamental rights of the citizens. Parliament derives its powers only from the constitutions of which the judiciary is the custodian. In a parliamentary form of government, the legislature and the executive works in coordination. So there is every possibility of the legislature becoming despotic based on the principle of majority rule. Judicial Review may be viewed as one of the fundamental rights of the citizen. The Constitution is supreme as the judiciary

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<sup>62</sup> AIR 1980 SC 1789.

is its interpreter and protect any act of the other two organs may be subject to judicial review<sup>63</sup>.

## **8.4. Public Interest Litigation**

### **8.4.1. Meaning of Public Interest Litigation**

Public interest litigation means any public spirited citizen can move or approach the court for the public cause (or public interest or public welfare) by filing a petition in the Supreme Court under Art.32 of the Constitution or in the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973<sup>64</sup>.

Public Interest litigation (PIL) in India has been described by the Supreme Court as a strategic arm in the area of legal aid movement and which is intended to bring justice within the reach of poor masses, who constitute the low visibility area of humanity<sup>65</sup>. Prof. S.K. Agarwala<sup>66</sup> remarks that "Public Interest law has been uniquely American development." The definition of Public Interest Litigation is "a litigation at the instance of a public spirited citizen espousing cause of others<sup>67</sup>.

The Indian judiciary has struggled in eighties to bring law into the service of the section of poor and oppressed. Through the doctrine of public interest (or Social Action) litigation (PIL) and the enforcement of fundamental rights under the Constitution, the courts have tried to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content<sup>68</sup>.

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<sup>63</sup> [http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09\\_chapter%202.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09_chapter%202.pdf) [Access on 2nd August 2014 at 2:11PM] p. 136.

<sup>64</sup> Pritam Kumar Ghosh, 'Judicial Activism and Public Interest Litigation in India' (2013) GJLS Vol.(1) No.1

<sup>65</sup> In PUDR Vs. Union of India; AIR 1982 SC 1473.

<sup>66</sup> S. K. Agarwala, 'Public Interest Litigation in India – A critique' (1985) at p. 2

<sup>67</sup> See order 1 Rule 8 of C.P.C.

<sup>68</sup> Public Interest Litigation in India HeinOnline-37 Am. J. Comp. L. 496 1989, p. 497.

Justice Bhagwati was held in the leading case of **S.P. Gupta**<sup>69</sup>,

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction.

### **Evolution of Public Interest Litigation in India**

The seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in **Mumbai Kamgar Sabha v. Abdul Thai**<sup>70</sup> and was initiated in **Akhil Bharatiya Shoshit Karmachari Sangh (Railway) v. Union of India**<sup>71</sup>, wherein an unregistered association of workers was permitted to institute a writ petition under Art.32 of the Constitution for the redressal of common grievances. Krishna Iyer J., enunciated the reasons for liberalization of the rule of locus standi in **Fertilizer Corporation Kamgar Union v. Union of India**<sup>72</sup> and the idea of 'Public Interest Litigation' blossomed in **S.P. Gupta and others v. Union of India**<sup>73</sup>.

#### **8.4.2. Objectives of Public Interest Litigation**

Public interest litigation is an easy way to provide justice to the people through the legal process. To provide the legal redress to common people of India was the real aim of behind the origin of public interest litigation. The concept of locus standi has been taken by public interest litigation. Supreme Court of India became active participant in the dispensation of justice. Rule of locus standi was so expansive to the deprived and poor citizens.

Public Interest Litigation has close links with the relaxation of "Locus Standi" and makes easy access to justice. It protects the countless and

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<sup>69</sup> AIR 1982 SC 149.

<sup>70</sup> AIR 1976 SC 1455.

<sup>71</sup> AIR 1981 SC 298.

<sup>72</sup> AIR 1981 SC 344.

<sup>73</sup> AIR 1982 SC 149.

unrepresented mass of India, who are in no position to protect their rights due to poverty, illiteracy, social, economic and political issues. As regard the civil remedies they recognised the 'locus standi' of only the aggrieved person, to seek a remedy in a civil court. A minor concession is made under the code of civil procedure, providing for class or representative action<sup>74</sup>.

Justice Krishna Iyer, a pioneer judge, who developed the concept of the public interest litigation in India as the product of creative judicial engineering. According to the eminent judges "The jurisdiction of the Indian Supreme Court is the widest in the world; the challenges of India's social changes are the sharpest; the Dynamics of a functional jurisprudence is the creative expression of judicial response to the crisis of hunger for justice. Public Interest Litigation is the off spring of these social forces. This burgeoning process, seminal and innovative, makes the court a catalyst to social justice, a defendant of the constitutional faith and the protagonist in the drama of human rights for the common man<sup>75</sup>.

In India Public Interest Litigation is an innovative strategy which has been invented by the Supreme Court for the purpose of providing easy access to the weaker sections of Indian humanity and it is a powerful tool in the hands of public spirited individuals and social action groups for combating exploitation society, their social and economic entitlements. It is a highly effective weapon in the armory of the law for reaching social justice to the common man<sup>76</sup>.

### **8.4.3. Role of Press in the Development of Public Interest Litigation in India**

The press has also given its important contribution in the development of Public Interest Litigation in India by highlighting the repression unleashed by the state against the people and by exposing the courts behaviour during the emergency of 1975-1976. The first dramatic opportunity to initiate this

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<sup>74</sup> V.N. Shukla, 'Constitution of India' (1992) p. 226.

<sup>75</sup> V.R. Krishna Iyer, 'Justice at Crossroads' (1994) p. 105-107.

<sup>76</sup> State of H.P. vs. Parent of a student of medical college, AIR 1985 SC 910 (914).

new kind of constitutional litigation in India was probably provided by the Supreme Court Advocate Mr. Kapila Hingorani, who filed a writ based on a series of article in 'Indian Express' A national daily, exposing the plight of Bihar under trial prisoners, most of whom has served long-pre-trial detention<sup>77</sup>.

In the year of 1980, two law professors filed a writ petition before Supreme Court, by sending a letter addressed to the editor, Indian Express, describing the inhuman condition of detention in Agra protective home for women, which was considered as a writ petition on the ground violation of Article 21<sup>78</sup>.

The leading cases of **Sunil Batra v. Delhi Administration**<sup>79</sup>, **Bar Council of Maharashtra v. M.V. Dhabolkar**<sup>80</sup>, **Municipal Council of Ratlam v. Vardhichand**<sup>81</sup> etc. are related to the development of public interest litigation in India. Justice Iyer once stated that "Access to justice to every 'bona fide' seeker is a democratic dimension of remedial jurisprudence even as public interest litigation in India, class action, pro bono proceedings are<sup>82</sup>."

#### **8.4.4. Changes in foundation**

In 1982, the concept of public interest litigation in India was given by a seven judges special bench of the Supreme Court in landmark case of **S.P. Gupta v. Union of India**<sup>83</sup> which is also known as the Judges Transfer Case No. 1. Bhagwati J delivered the leading opinion of the Court on this issue and reasoned. He referred to the traditional rules of locus standi under which judicial redress would only be available to those who had suffered a violation of a legal right or legally protected interest by the action of the state. Breach of such a legal right was a condition precedent for invoking the jurisdiction of

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<sup>77</sup> (1980) 1 SCC 91 & others.

<sup>78</sup> Dr. Upendra Baxi vs. State of U.P. (1981) 3 Scale 1136.

<sup>79</sup> AIR 1980 SC 1579.

<sup>80</sup> AIR 1975 SC 2092 (1975) 2 SCC 703.

<sup>81</sup> AIR 1980 SC 1622 Cri. L.J. 1075.

<sup>82</sup> AIR 1980 at p. 861.

<sup>83</sup> AIR 1982 SC 149.

the Court, and the protection of personal or proprietary interests narrowly so defined provided the central judicial theme. However, as Bhagwati J observed, this approach arose in an era 'when private law dominated the legal scene and public law had not yet been born'<sup>84</sup>.

Justice Krishna Iyer in the leading case of “**Fertilizer Corporation, Kamgar Union v. Union of India**”<sup>85</sup>, enumerated the following reasons for liberalization of the rule of Locus Standi:-

1. Exercise of State power to eradicate corruption may result in unrelated interference with individuals' rights.
2. Social justice wants liberal judicial review for administrative action.
3. Restrictive rules of standing are antithesis to a healthy system of administrative action.
4. Judicial Activism is essential for participative public justice<sup>86</sup>.

#### **8.4.5. Public Interest Litigation in India: A Need of Society**

##### **8.4.5.1. Public Interest Litigation: An Innovative Step towards Judicial Activism**

Freedom from the slavery of the British Rulers was not meant only independence to the political suzerainty. The purpose of the struggle of freedom was also to remove social economic and political disparity prevailing in the Indian Society. We got political freedom on 15th August 1947 but we did not get social economic and political parity. To achieve social economic and political justice the preamble were put in the Constitution of India. The framers of the constitution expected that our political leaders will see that the principles led down in the preamble of the Constitution of India shall be fulfilled<sup>87</sup>.

The Supreme Court of India is the protector of the constitutional rights then there should not be any reason to deny it the power to adopt activist

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<sup>84</sup> Ibid.

<sup>85</sup> A.I.R 1981 SC 344

<sup>86</sup> Ibid.

<sup>87</sup> Public Interest Litigation: A need of society, jour 38-47, All India Reporter, March 2011, vol.98, part 1167.

approaches as are adopted in an American Courts. The power to issue certain writs like Habeas Carpus etc. for enforcement of human rights has been given to the Supreme Court. Therefore, in order to achieve the mission the judiciary has to exercise and evolve its jurisdiction with courage, creativity and circumstances and with vision, vigilance and practical wisdom. Judicial activism and self-restraints are facts of that courageous activity and pragmatic wisdom. The Supreme Court with judicial activism has interpreted the law to further the constitutional goal of social economic progress<sup>88</sup>.

Judicial activism gave rise to mushroom growth to the public interest litigation. In India, Supreme Court and High Court covered the cases of under-trials in jails, the torture of prisoners in jails, the blinding of under-trials in jails, the plight of rickshaw puller, pavement dwellers right to live on pavement, right to human dignity of inmates of Agra Home, trafficking in women, plight of ASIAD labour, issues of bonded labour, and so on. The judiciary was keeping in a view the problems of the citizens of India<sup>89</sup>.

#### **8.4.5.2. Guidelines laid down by Judiciary in some leading Cases of Public Interest Litigation**

In **Dr. Upendra Baxi v. State of UP**<sup>90</sup>, the Supreme Court entertained a letter sent by two professor of Delhi University seeking enforcement of the constitutional rights of the inmates of a Protective Home at Agra who were living in inhuman and degrading conditions in utter violation of article 21 of the Constitution. Again, in the case of **Mrs. Veena Sethi v. State of Bihar**<sup>91</sup> the Supreme Court treated a letter addressed to a judge of Supreme Court by the Free Legal Aid Committee at Hazaribagh, Bihar a writ petition.

In **People's Unions of India for Democratic Rights v. Union of India**<sup>92</sup>, (ASIAD case), also a letter was dealt with as a writ petition by the

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<sup>88</sup> Supra note. 82.

<sup>89</sup> Subhash C. Kashyap, 'The citizen and Judicial reforms', (2003), universal law publishing co. Pvt LTD, p.18-19.

<sup>90</sup> 1983(2) SCC 308.

<sup>91</sup> AIR 1983 SC 339.

<sup>92</sup> AIR 1982 SC 1423.

Supreme Court, against the respondents for ensuring the observance of certain labour laws relating to workmen engaged in construction work in ASIAD at New Delhi projects.

Similarly in **Bandhua Mukti Morcha v. Union of India**<sup>93</sup> an organisation dedicated to the cause of release of bonded labourers informed the Supreme Court through a letter that they conducted a survey of the stone quarries situated in Faridabad District of Haryana and found that there were a large number of labourers working in such quarries under “inhuman and intolerable conditions” and many of them were bonded labourers. The petitioners entreated that a writ be issued for proper implementation of the various provisions of the constitution and statutes with a view to ending the misery, suffering and helplessness of those labourers. The court treated the letter as a writ petition and appointed a commission consisting of two advocates to visit these stone quarries, make an enquiry and report to the court on the matter.

In **Sheela Barse v. Union of India**<sup>94</sup>, the distinction between private litigation and public interest litigation was made. A journalist, Ms. Sheela Barse, took up the plight of women prisoners who were confined in the police jails in the city of Bombay. She asserted that they were victims of custodial violence. The Court took cognizance of the matter and directions were issued to the Director of College of Social Work, Bombay. He was ordered to visit the Bombay Central Jail and conduct interviews of various women prisoners in order to ascertain whether they had been subjected to torture or ill-treatment. He was asked to submit a report to the Court in this regard. Based on his findings, the Court issued directions such as the detention of female prisoners only in designated female lock-ups guarded by female constables and that accused females could be interrogated only in the presence of a female police official.

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<sup>93</sup> Bandhua Mukti Morcha v. UOI, AIR 1984 SC 803.

<sup>94</sup> Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96.

Public interest litigation acquired a new dimension the case of **Sunil Batra v. Delhi Administration**<sup>95</sup>, It was initiated by a letter that was written by a prisoner lodged in jail to a Judge of the Supreme Court. The prisoner complained of a brutal assault committed by a Head Warden on another prisoner. The Court treated that letter as a writ petition, and, while issuing various directions, opined that “technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found”.

In the case of **Municipal Council, Ratlam v. Vardichand**<sup>96</sup>, the Court recognized the locus standi of a group of citizens who sought directions against the local Municipal Council for removal of open drains that caused stench as well as diseases. The Court, recognizing the right of the group of citizens, asserted that if the “centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men.” In the leading case of **Parmanand Katara v. Union of India**<sup>97</sup>, the Supreme Court accepted an application by an advocate that highlighted a news item titled "Law Helps the Injured to Die" published in a national daily, The Hindustan Times.

The petitioner brought to light the difficulties faced by persons injured in road and other accidents in availing urgent and life-saving medical treatment, since many hospitals and doctors refused to treat them unless certain procedural formalities were completed in these medico-legal cases. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law. In many other instances, the

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<sup>95</sup> (1978) 4 SCC 494.

<sup>96</sup> (1980) 4 SCC 162.

<sup>97</sup> (1981) Supp. SCC 87.

Supreme Court has risen to the changing needs of society and taken proactive steps to address these needs.

In the case of **S.P. Gupta v. Union of India**,<sup>98</sup> the judgment recognized the locus standi of bar associations to file writs by way of public interest litigation. In this case, it was accepted that they had a legitimate interest in questioning the executive's policy of arbitrarily transferring High Court judges, which threatened the independence of the judiciary. Explaining the liberalization of the concept of locus standi, the court opined:

“It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go unredressed and justice is done to him.”

In **People's Union for Democratic Rights v. Union of India**<sup>99</sup>, a petition was brought against governmental agencies which questioned the employment of underage labourers and the payment of wages below the prescribed statutory minimum wage-levels to those involved in the construction of facilities for the then upcoming Asian Games in New Delhi. The Court took serious exception to these practices and ruled that they violated constitutional guarantees. The employment of children in construction-related jobs clearly fell foul of the constitutional prohibition on child labour and the non-payment of minimum wages was equated with the extraction of forced labour.

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<sup>98</sup> AIR 1982 SC 1473.

<sup>99</sup> (1986) 2 SCC 176.

In the case of **Shriram Food & Fertilizer case**<sup>100</sup> where the Court issued directions to employers to check the production of hazardous chemicals and gases that endangered the life and health of workmen. It is also through the vehicle of PIL, that the Indian Courts have come to adopt the strategy of awarding monetary compensation for constitutional wrongs such as unlawful detention, custodial torture and extra-judicial killings by state agencies<sup>101</sup>.

For the protection of environmental, many landmark decisions have been given in actions brought by renowned environmentalist M.C. Mehta. He has been a tireless campaigner in this area and his petitions have resulted in orders placing strict liability for the leak of oleum gas from a factory in New Delhi<sup>102</sup> directions to check pollution in and around the Ganges river<sup>103</sup>, the relocation of hazardous industries from the municipal limits of Delhi<sup>104</sup>, directions to state agencies to check pollution in the vicinity of the Taj Mahal<sup>105</sup> and several afforestation measures. A prominent decision was made in a petition that raised the problem of extensive State Environmental Law Review 101 (Winter 2002) vehicular air pollution in Delhi.

The Court was faced with considerable statistical evidence of increasing levels of hazardous emissions on account of the use of diesel as a fuel by commercial vehicles. The Supreme Court decided to make a decisive intervention in this matter and ordered government-run buses to shift to the use of Compressed Natural Gas (CNG), an environment-friendly fuel<sup>106</sup>. This

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<sup>100</sup> See observations justifying the payment of compensation for human rights violations by state agencies in the following decisions: *Bhim Singh v. State of Jammu and Kashmir*, (1985) 4 SCC 677; *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746; *D.K. Basu v. Union of India*, (1997) 1 SCC 416; Also see: Lutz Oette, 'India's International obligations towards victims of human rights violations: Implementation in domestic law and practice' in C. Raj Kumar & K. Chockalingam (eds.), *Human rights, Justice and Constitutional empowerment* (OUP, 2007) at p. 462-485.

<sup>101</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.

<sup>102</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

<sup>103</sup> *M.C. Mehta v. Union of India* (1988) 1 SCC 471.

<sup>104</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 750.

<sup>105</sup> *M.C. Mehta v. Union of India*, (1996) 4 SCC 351; See Emily R. Atwood, 'Preserving the Taj Mahal: India's struggle to salvage cultural icons in the wake of industrialisation', 11 Penn

<sup>106</sup> *M.C. Mehta v. Union of India*, (1998) 8 SCC 648; Also refer: Armin Rosencranz & Michael Jackson, 'The Delhi Pollution case: The Supreme Court of India and the limits of judicial power', 28 *Columbia Journal of Environmental Law* 223 (2003)

was followed some time later by another order that required privately-run 'autorickshaws' (three-wheeler vehicles which meet local transportational needs) to shift to the use of CNG.

At the time, this decision was criticized as an unwarranted intrusion into the functions of the pollution control authorities, but it has now come to be widely acknowledged that it is only because of this judicial intervention that air pollution in Delhi has been checked to a substantial extent.

**Environment Legal Action v. Union of India**<sup>107</sup>, in this case a registered NGO had sought directions from the Supreme Court in order to tackle ecological degradation in coastal areas. In recent years, the Supreme Court has taken on the mantle of monitoring forest conservation measures all over India, and a special 'Green bench' has been constituted to give directions to the concerned governmental agencies.

In **Lakshmi Kant Pandey v. Union of India**<sup>108</sup>, a writ petition was filed on the basis of a letter complaining malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children to foreign parents. It was alleged that in the guise of adoption, children of tender age were not being to exposed to a long dreadful journey to distant countries at great risk to their lives but also to uncertainly as to their shelter and future. Chief Justice P.N. Bhagwati laid down certain principles and norms to ensure the welfare of the children and directed the Government and various agencies dealing with the matter to follow them.

In landmark case of **Vishaka v. State of Rajasthan**<sup>109</sup>, the Court invoked the text of the Convention for the Elimination of all forms of Discrimination against Women (CEDAW) and framed guidelines for establishing redressal mechanisms to tackle sexual harassment of women at workplaces. Though the decision has come under considerable criticism for

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<sup>107</sup> (1996) 5 SCC 281.

<sup>108</sup> (1987) 1SCC 667.

<sup>109</sup> (1997) 6 SCC 241; See D.K. Srivastava, 'Sexual harassment and violence against women in India: Constitutional and legal perspectives' in C. Raj Kumar & K. Chockalingam (eds.), Human rights, Justice and Constitutional empowerment (OUP, 2007) at p. 486-512.

encroaching into the domain of the legislature, the fact remains that till date the legislature has not enacted any law on the point.

In **People's Union for Civil Liberties v. Union of India**<sup>110</sup>, where the Court sought to ensure compliance with the policy of supplying mid-day meals in government-run primary schools. The mid-day meal scheme had been launched with much fanfare a few years ago with the multiple objectives of encouraging the enrolment of children from low-income backgrounds in schools and also ensuring that they received adequate nutrition. However, there had been widespread reports of problems in the implementation of this scheme such as the pilferage of food grains. As a response to the same, the Supreme Court issued orders to the concerned governmental authorities in all States and Union Territories, while giving elaborate directions about the proper publicity and implementation of the said scheme.

Public interest litigation provides an important forum for agents of civil society to stake their claims. It has turned the judiciary into an arena in which government lawlessness and malfunctioning are debated, providing public exposure and, to a certain extent, relief for frustrated and even traumatized citizens. However, the impact of public interest litigation must not be overestimated<sup>111</sup>.

### **8.5. New intervention in the terrain of Judicial Activism**

However, the social action dimension of public interest litigation has been diluted and eclipsed by another type of “public cause litigation” in courts. In this type of litigation, the court’s intervention is not sought for enforcing the rights of the disadvantaged or poor sections of the society but simply for correcting the actions or omissions of the executive or public officials or departments of government or public bodies. Examples of this type of intervention by the Court are innumerable<sup>112</sup>.

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<sup>110</sup> (2007) 1 SCC 728.

<sup>111</sup> <http://www.asienhaus.de/public/archiv/Chap3.pdf> [Access on 19th March 2013 at 4:00PM]

<sup>112</sup> <http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece>  
Access on 19th Dec 2013 at 8:02PM

In the interest of preventing pollution, the Supreme Court ordered control over automobile emissions, air and noise and traffic pollution, gave orders for parking charges, wearing of helmets in cities, cleanliness in housing colonies, disposal of garbage, control of traffic in New Delhi, made compulsory the wearing of seat belts, ordered action plans to control and prevent the monkey menace in cities and towns, ordered measures to prevent accidents at unmanned railway level crossings, prevent ragging of college freshmen, for collection and storage in blood banks, and for control of loudspeakers and banning of fire crackers<sup>113</sup>.

In recent orders, the Supreme Court has directed the most complex engineering of interlinking rivers in India. The Court has passed orders banning the pasting of black film on automobile windows. On its own, the Court has taken notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration and censured it. The Court has ordered the exclusion of tourists in the core area of tiger reserves. All these managerial exercises by the Court are hung on the dubious jurisdictional peg of enforcing fundamental rights under Article 32 of the Constitution. In reality, no fundamental rights of individuals or any legal issues are at all involved in such cases. The court is only moved for better governance and administration, which does not involve the exercise of any proper judicial function<sup>114</sup>.

In its most activist and controversial interpretation of the Constitution, the Supreme Court took away the constitutionally conferred power of the President of India to appoint judges after consultation with the Chief Justice, and appropriated this power in the Chief Justice of India and a collegium of four judges. In no Constitution in the world is the power to select and appoint judges conferred on the judges themselves<sup>115</sup>.

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<sup>113</sup> Ibid.

<sup>114</sup> The Hindu, Disturbing trends in judicial activism, 6th August 2012.

<sup>115</sup> Ibid.

The Court is made the monitor of the conduct of investigating and prosecution agencies who are perceived to have failed or neglected to investigate and prosecute ministers and officials of government. Cases of this type are the investigation and prosecution of ministers and officials believed to be involved in the Jain Hawala case, the fodder scam involving the former Chief Minister of Bihar, Lalu Prasad Yadav, the Taj Corridor case involving the former Chief Minister of Uttar Pradesh, Mayawati, and the recent prosecution of the Telecom Minister and officials in the 2G Telecom scam case by the Supreme Court<sup>116</sup>.

Justice Jackson of the U.S. has aptly said: “The doctrine of judicial activism which justifies easy and constant readiness to set aside decisions of other branches of Government is wholly incompatible with a faith in democracy and in so far it encourages a belief that judges should be left to correct the result of public indifference it is a vicious teaching<sup>117</sup>. In 1993, the Supreme Court of India issued order on the conduct of military operations in Hazratbal, Kashmir that the provision of food of 1,200 calorific value should be supplied to hostages.

Even proceedings of Legislatures are controlled by the Court. In the Jharkhand Legislative Assembly case, the Supreme Court ordered the Assembly to conduct a Motion of Confidence and ordered the Speaker to conduct proceedings according to a prescribed agenda and not to entertain any other business<sup>118</sup>.

Matters of policy of government are subject to the Court’s scrutiny. Distribution of food-grains to persons below poverty line was monitored, which even made the Prime Minister remind the Court that it was interfering with the complex food distribution policies of government. In the 2G Licenses case, the Court held that all public resources and assets are a matter of public trust and they can only be disposed of in a transparent manner by a public

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> <http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece> [Access on 19th Dec 2013 at 8:02 PM]

auction to the highest bidder. This has led to the President making a Reference to the Court for the Court's legal advice under Article 143 of the Constitution. In the same case, the Court set aside the expert opinion of the Telecom Regulatory Authority of India (TRAI) to sell 2G spectrum without auction to create greater tele-density in India<sup>119</sup>.

Unless the parameters of public interest litigation are strictly formulated by the Supreme Court and strictly observed, public interest litigation which is so necessary in India, is in danger of becoming diffuse, unprincipled, encroaching into the functions of other branches of government and ineffective by its indiscriminate use<sup>120</sup>. The Supreme Court of India for too long had remained "an arena of legal quibbling for men with long purses<sup>121</sup>," but now increasingly the Supreme Court is being identified by justices as well as by people as the "last resort for the oppressed and the bewildered<sup>122</sup>.

The constitution framers envisaged that "the judiciary as a bastion of rights and justice<sup>123</sup>." An independent judiciary is covered with the power of judicial review was the constitutional device chosen to achieve this objective. The power to enforce the fundamental rights was conferred on both the Supreme Court and the High Courts<sup>124</sup> the courts that have entertained all the public interest litigation cases. Judiciary of India can check not only the validity of laws and executive actions but also of constitutional amendments. The interpretation of the constitution and its orders, supported with the power to punish for contempt, can reach everyone throughout the territory of the country. Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public

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<sup>119</sup> Ibid.

<sup>120</sup> The Hindu, Disturbing trends in judicial activism, 6th August 2012.

<sup>121</sup> Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, 29 INT'L COMM'L & JUDICIAL REV. 37 (1982).

<sup>122</sup> Indian Constitution Part IV.

<sup>123</sup> Austin, 'Cornerstone of a Nation', p.175.

<sup>124</sup> Article 32 and Article 226 of Constitution of India.

policies and establishment of rule of law and constitutionalism<sup>125</sup>. Therefore, in order to appreciate the evolution of PIL in India, it is desirable to have a basic understanding of the constitutional framework and the Indian judiciary<sup>126</sup>.

### **8.6. Judicial Overreach**

Judicial activism is exercising control over the administration and keeps it within the bounds of the law, is quite consistent with the theory of constitutional government. The difficulty arises when the judiciary proceeds to interfere in the field of the legislature or the political executive in the matter of laying down policy, suggesting legislative reforms or reviewing constitutional amendments, or dictating them. Then the question arises about the sanctity of the principles of separation of powers and the judiciary is blamed for, violating the principles<sup>127</sup>.

According to the Justice J S Verma (former Chief Justice of India):

“the judiciary should only compel performance of duty by the designated authority in case of its inaction or failure, while a takeover by the judiciary of the function allocated to another branch is inappropriate. Judicial activism is appropriate when it is in the domain of legitimate judicial review. It should neither be judicial ‘ad hocism’ nor judicial tyranny<sup>128</sup>.”

The acknowledgement of this difference between “judicial activism” and “judicial overreach” is vital for the smooth functioning of a constitutional democracy with the separation of powers as its central characteristic and supremacy of the constitution as the foundation of its edifice<sup>129</sup>.

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<sup>125</sup> See: Gobind Das, “The Supreme Court: An Overview” in B.N. Kirpal et al. (eds), *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: OUP, 2000), p.16–47.

<sup>126</sup> See Sheetal B. Shah, “Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India” (1999) 32 *Vanderbilt Journal of Transnational Law* 435, 463.

<sup>127</sup> Nilanjana Jain, (2013), “Judicial Activism in India”, p.209-210.

<sup>128</sup> R. Shunmugasundaram Senior Advocate, Member of Parliament (Rajyasabha) delivering lecture at the Institute of Advanced Legal Studies on July 4, 2007.

[http://sas-space.sas.ac.uk/1719/1/Amicus\\_Curiae\\_2007\\_Issue\\_72,\\_22-28.pdf](http://sas-space.sas.ac.uk/1719/1/Amicus_Curiae_2007_Issue_72,_22-28.pdf). Access on 4th August 2013 at 4:09PM

<sup>129</sup> *Ibid.*

Law making is the main function of the legislative branch of government. However the judiciary in writing its judgment has often strayed into giving guidelines to the executive which have more or less the force of law. This amounts to judicial law making. This has happened specially in cases relating to bonded Labour, Protective Home for women, sexual harassment of women at workplace, custodial violence against prisoners, adoption of Indian Children by foreigners and recently the matter of food security bill<sup>130</sup>.

In **Bandhua Mukti Morcha**<sup>131</sup> case the Court purported to develop, “a scheme for improving the living condition for the workers in stone quarries”, However in this case Pathak J, cautioned the courts regarding the limit of their constitutional jurisdiction and warned it of the ,:the temptation of crossing into territory which properly pertains to the legislature and the executive government.”

In the **Foreign Adoption case**<sup>132</sup>, the petitioner requested the court to bar private agencies from arranging foreign n adoptions , Instead the court went on to issue detailed directions regarding the adoption of Indian children by foreign parents. These directions were a set of principles and guidelines for evolving a procedure to prevent illegal sale of babies. This decision constitute a virtual piece of judicial legislation. In the process, it resolved such controversial and sensitive policy issues as to whether foreigners should be allowed to adopt Indian children at all and if so under what limited circumstances.

In **Sheela Barse v. State of Maharashtra**<sup>133</sup> the court went on to lay down guidelines which should be followed in respect of women prisoners in police lock-ups. In the **Vishaka case**<sup>134</sup> which was regarding sexual harassment of working women, the Supreme Court laid down eleven

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<sup>130</sup> Supra Note 118. at p. 217.

<sup>131</sup> AIR 1984 SC 843.

<sup>132</sup> Laxmi Kant Pandey vs Union of India (1987) 1SCC 67.

<sup>133</sup> (1983) 2 SCC 96; AIR 1983 SC 378.

<sup>134</sup> (1997) 6 SCC 241; AIR 1997SC 3011.

guidelines to be observed at all work places or other institutions until a legislation was enacted for the purpose. These guidelines were to be treated as the law declared by the Supreme Court under Article 141 of the Constitution. What could be a more direct and patent case of judicial law making?

Justice J.S.Verma is best remembered for rocking the political class in the 1990's with the **Jain Hawala case**<sup>135</sup>, without making pretense of steering clear of policy making. Justice Verma laid down the procedure for appointment of the CBI Director, in a bid to insulate it from political pressure, placed the CBI under the supervision of Central Vigilance Commission (C.V.C). The Court issued several directions regarding C.V.C, CBI, Enforcement Directorate etc, in order to ensure that the CBI and other governmental agencies carryout their public duty to investigate the crimes.

In the case of **D.K. Basu**<sup>136</sup>, Justice A.S. Anand came up with the law to check violations of Human Right during and after arrest including any form of torture or cruel, in human or degrading treatment, whether it occurs during investigation, interrogation or otherwise, he regarded transparency of action and accountability as two possible safeguards against the abuse of police power and went on to issue eleven requirement, "to be followed in all case of arrest or detention till legal provisions are made in that behalf as preventive measures."

The court said in the end that failures to comply with these requirements shall render the concerned officials liable for departmental action and also liable to be punished for contempt of court. These requirements were aimed at curbing the use of questionable methods during interrogation and investigation leading sometimes to custodial violence or death in the police lockup. These requirements constitute what has been called "Custodial Jurisprudence"<sup>137</sup>.

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<sup>135</sup> Vineet Narain vs. Union of India (1998) 1SCC 416; AIR 1998 SC 889.

<sup>136</sup> 1997 1SCC 41; AIR 1997 SC 610.

<sup>137</sup> Ibid.

The Supreme Court on August 5, 2008 slammed the government for its refusal to amend the law (Section 441 IPC Criminal trespass) for launching criminal prosecution against those illegally occupying official houses. The Bench was told by the Additional Solicitor General that the Government has decided not to amend the IPC as it was of opinion that the existing provisions of the public premises Act were sufficient to evict those unauthoriselly occupying government accommodation. Moreover, it claimed that out of 99,100 government houses only 300-odd dwellings were under unauthorized occupation<sup>138</sup>.

It is submitted that the function of the court is to implement the law as it is and not fume or fret when the government refuses to yield to its Suggestions to amend the law. This attitude of the court is clear evidence of Judicial Overreach<sup>139</sup>.

The Supreme Court was approached by an NGO, Common causes, to examine whether persons suffering from terminal diseases and likely to go into a permanent vegetative state have the right to die with dignity, subjecting themselves to voluntary euthanasia. It was argued on behalf of the petitioner, “those at the end their natural life span and likely to go into a state of terminal illness or permanent vegetative are deprived of their right to refuse cruel and unwanted treatment like feeding through hydration tubes, being kept on ventilator, and other supporting machines in order to artificially prolong their natural life span<sup>140</sup>.

The Supreme Court issued notice to Centre on a petition seeking a direction to have a fresh look at the Medical Termination of Pregnancy Act ,1971,wich allows abortion of foetus only upto 20 weeks, when there is substantial risk of abnormalities if the child was born. The petition was filed against the Bombay High Court judgement refusing the interference with provision. The SLP raised fundamental issues- the right of a women to self-

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<sup>138</sup> Hindustan Times, Lucknow 6th August 2008 (See Also: Nilanjana Jain, Judicial Activism in India, p.219).

<sup>139</sup> Supra note. 129. p. 220.

<sup>140</sup> The Hindu, 15th Feb 2009.

determination over her body and whether ought to be any legal impediment at all to a woman's right to an abortion and whether the state right to interfere by way of legislation with such a fundamental personal decision, especially when a child was likely to undergo treatments, surgeries and might lead to subnormal life<sup>141</sup>.

Taking suo muto cognizance of the vandalism and destruction of property during the Gujjar agitation in Rajasthan, the Supreme Court in March, 2009 said that it would lay down guidelines for payment of damages, for destruction of public property during agitations and demonstrations by political parties and other organizations. The court earlier constituted a committee to suggest measures to tighten the law and make political parties accountable for such damage. After considering the reports of the committee Justice Arjit Pasayat observed that the existing Prevention of Damages of Public Property (P.D.P.P) Act was grossly inadequate to deal with the huge losses in the course of an agitation<sup>142</sup>.

He said a large number of private property too suffered loss during such agitations on the tune of crores of rupees. The judge indicated that the Bench would frame a guideline and would also set up Damages claim Authority to fast track damages claims. The mechanism would remain in place till comprehensive changes were made in the Act. The Committee had suggested that the leaders of political parties and organizations should be made guilty of abetment of offence, and exemplary damages might be awarded the object of which was to punish those indulging in vandalism<sup>143</sup>.

In a case, Supreme Court trespass into forbidden sphere of high policy making is its intervention in the matter of legislation aimed at fighting hunger (April 2010).

A Supreme Court report released in March 2010 by former Supreme Court Judge D.P. Wadhwa widens the definition of poverty adding about 500

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<sup>141</sup> Supra note. 140.

<sup>142</sup> The Hindu, 13th March 2009.

<sup>143</sup> Ibid.

million people to the rank of the poor and will demand about Rs.52,100 crores above the Rs.1,18,535 crore the government plans to spend fighting poverty in 2010-2011. The report came at a time when the union cabinet was likely to clear this week (Last week of March 2010), the seminal food security bill 2010 based on such reports the Supreme Court has virtually taken over Indian hunger Policy for the past 9 years, passing more than 50 orders in what is now one of the world's most remarkable cases of Judicial intervention- a public interest litigation commonly called the right to food case. The Wadhwa report could become law if Supreme Court accept it in hearing slated for next month (April 2010)<sup>144</sup>.

The proposed bill was withdrawn for a major overhaul as it was found wanting by congress leadership in several respects<sup>145</sup>.

- a. It down sizes people's food entitlement from 35 to 25 k.g.
- b. It has no provision by which the homeless-those without a fixed address can benefit.
- c. Its estimate of the number of BPL families has been disputed.

The bill is the flagship initiative of UPA government and therefore has been sent back to the empowered group of ministers headed by finance minister Pranab Mukherjee<sup>146</sup>.

On July 27, 2010, the Supreme Court took notice of the report published in Hindustan Times on the 140 million tons of grain rotting in the country for want of proper storage facilities and said it was a crime to waste food in a poor country where millions went hungry. A Bench headed by Justice Dalveer Bhandari, hearing a PIL filed by advocate Colin Gonsalves on behalf of the P.U.C.L suggested that the grain should under no circumstances be allowed to rot, but instead, should be distributed among the hungry<sup>147</sup>. "if

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<sup>144</sup> Hindustan Times, 24th March 2010.

<sup>145</sup> Ibid.

<sup>146</sup> Hindustan Times, 3rd April 2010.

<sup>147</sup> Hindustan Time 28th July 2010.

you cannot store the grain , give it to the people to eat” the Bench told additional solicitor general Mohan Parasaran, representing the Centre<sup>148</sup>.

### 8.6.1. Judicial Restraint: Need of the Hour

Supreme Court of India has on various cases and occasion highlighted the importance of judicial restraint for the maintenance of the delicate balance of power of the different limbs in a democracy<sup>149</sup>. Justice Markandey Katju in minor **Priyadarshini’s case**<sup>150</sup> has explained thus:

“Under the Constitution, the legislature, the executive and the judiciary have their own broad spheres of operation. It is, therefore, important that these three organs of the state do not encroach upon the domain of another and confine themselves to their own, otherwise the delicate balance in the Constitution will be upset... The judiciary must therefore exercise self-restraint and eschew the temptation to act as a super legislature. By exercising restraint, it will only enhance its own respect and prestige... Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the state. It accomplishes this in two ways. First it not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary... Second, it tends to protect the independence of the judiciary... If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. The touchstone of an independent judiciary has been its removal from the political and administrative process... Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers.”

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<sup>148</sup> Supra note. 147.

<sup>149</sup> R Shunmugasundaram Senior Advocate, Member of Parliament (Rajyasabha) delivering lecture at the Institute of Advanced Legal Studies on July 4, 2007. [http://sas-space.sas.ac.uk/1719/1/Amicus\\_Curiae\\_2007\\_Issue\\_72,\\_22-28.pdf](http://sas-space.sas.ac.uk/1719/1/Amicus_Curiae_2007_Issue_72,_22-28.pdf). [Access on 4th August 2013 at 4:09PM]. p.27

<sup>150</sup> (2005 (3) CTC 449).

In the cash for query case (**Raja Ram Pal v. Hon'ble Speaker, Lok Sabha**, 2007) a constitution bench of the Supreme Court has acknowledged the power of the legislature to expel their members, that the legislature is supreme in its own sphere, and it is the sole authority to deal with and regulate its internal proceedings and other affairs<sup>151</sup>.

The Madras High Court has passed the following order in the course of dealing with a PIL case which assailed an executive order regarding the free distribution of colour television sets to eligible families in Tamil Nadu state<sup>152</sup>.

“The scheme is with the proven object of uplift of the poor, needy and under privileged to render social justice, to make them aware of the worldly happenings. A free hand should be given to the Government in spending public money for such purposes. Courts cannot poke their nose into each and every activity of the Government, particularly in the economic activities of the Government, under the garb of judicial review<sup>153</sup>.”

### **8.7.Accountability of the Judges in India**

The approbation of such type of activism by the judiciary is not well for healthy democracy. Indian judiciary as an institution is not accountable to the people as other wings are, eg legislature and the executive. The actions of the executive are subject to judicial review when there is social, economic or political injustice or evacuation from the provisions of law and the constitution. When the legislature makes laws beyond constitutional bounds or acts arbitrarily contrary to its basic structure, the higher judiciary checks the validity of laws. When the judiciary is guilty of excesses, only a larger Bench or a constitutional amendment can intervene. There is only one method of removal of judges in the constitution, which is called impeachment, which

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<sup>151</sup> The Hindu, June 26, 2007.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

is too tough. This lack of accountability requires the judiciary to watch its step and exercise self-restraint<sup>154</sup>.

The late Chief Justice Ismail Mohamed of South Africa once said that “the independence of judiciary and the legitimacy of its claim to credibility and esteem must in the last instance rest on the integrity and the judicial temper of the judges, the intellectual and emotional equipment they bring to bear upon the process of adjudication, the personal qualities of character they project, and the parameters they seek to identify on the exercise of judicial power. Judicial power is potentially no more immune from vulnerability to abuse than legislative or executive power but the difference is this: the abuse of legislative or executive power can be policed by an independent judiciary but there is no effective constitutional mechanism to police the abuse of judicial power<sup>155</sup>. It is therefore crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial Power is matched by the real depth of judicial Responsibility. Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs<sup>156</sup>.”

### **8.8. Judicial Activism In Judicial Appointment**

When Alexander Hamilton stated that “the judiciary was the least dangerous branch of the government”, the former Indian Union Home secretary Madhav Godbole argues that, “In India it is the most powerful and feared organ of the state<sup>157</sup>.”

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<sup>154</sup> Supra Note. 140. p. 27.

<sup>155</sup> Supra note. 140. at. p. 28.

<sup>156</sup> Ibid.

<sup>157</sup> Judicial Activism/ Judicial Overreach

<http://www.ndtvmi.com/b8/Dopesheets/ashishstutirandeep.pdf> [Access on 7th August 2013 at 4:09 PM].

### 8.8.1. First Judge Case

In **S.P. Gupta**<sup>158</sup> case a bench of five judges of the SC considered the method of appointment of judges of the Supreme Court and the High Court. The relevant article for the appointment of SC judge is sub-cl. (2) of Art.124<sup>159</sup> and High Court is sub-cl (1) of Art.217<sup>160</sup>.

Art.124 (2) in relation to a Supreme Court judge and ART 217(1) in relation to High Court judge require an appointment by president (which means the executive) after “consultation ”among other functionaries mentioned in the article of the Chief Justice of India. The expression consultation does not in ordinary parlance mean concurrence. The Constituent Assembly debates shows that when it as suggested by some of the members that the expression should be concurrence and not consultation it was not agreed.<sup>161</sup>

Dr. Ambedkar who was the chairman of the Drafting Committee of the constitution once stated that<sup>162</sup>:

“With regards to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seems to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is very eminent person. But after all the Chief Justice is a man with all the feelings, all the sentiments and all the prejudices which we common people have and I think to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared

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<sup>158</sup> S.P. Gupta v UOI (1981) supp. SCC 574; AIR (1982) SC 149.

<sup>159</sup> Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

<sup>160</sup> Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court.

<sup>161</sup> Mona Shukla, Judicial Accountability, Regal Publication, New Delhi, p.48.

<sup>162</sup> Ibid. p.48.

to vest in the president or the government of the day. I therefore think that it also a dangerous proposition”.

So as per the constitutional it was held speak of consultation and not concurrence and it was open to central government to override the opinion given by the constitutional functionaries required to be consulted and to arrive as its own decision on the appointment or nor appointment so long as it was based on relevant considerations and not mala fide<sup>163</sup>.

The court held that the ultimate power of appointment resided with the central government and that was in accordance with constitutional practice prevailing in other democratic countries like the UK, Canada and New Zealand<sup>164</sup>. The reasoning given by the court is that the executive was responsible to the legislature and through the legislature it was accountable to the people who were consumer of justice<sup>165</sup>.

### **8.8.2. Second Judges Case:**

There is no substantial that the executive misused the power of appointment, acknowledged to be with it by the first judge case since 1982. Of the 547 appointments to the higher judiciary in the decade ending in 1993 only 7 were not in accordance with the opinion of Chief Justice of India<sup>166</sup>.

Ten years later in 1993 the Supreme Court in the case of **Supreme Court Advocates on Record Association v. UOI**<sup>167</sup> constituted a large bench of 9 judges to consider the correctness of the first judge case which had held that the Chief Justice of India did not have any primary of his opinion. By a majority, overruling the first judge case it was held that as the Chief Justice of India was best equipped to know and assess the worth of candidate judge and because it was also necessary to eliminate political influence in the appointment of judge the opinion of Chief Justice of India as consultee would

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<sup>163</sup> Ibid.

<sup>164</sup> Ibid. at p. 49.

<sup>165</sup> The Majority of the Court Speaking through J. Bhagwati. (See also: Mona Shukla, *Judicial Accountability*, Regal Publication, New Delhi, p.48.

<sup>166</sup> Supra note. 161. p. 49.

<sup>167</sup> (1993) 4 SCC 441, AIR (1994) SC 268.

have to be the final opinion which must prevail in the appointment of judge<sup>168</sup>.

The primary of the Chief Justice of India was according to the second judge case to be formed collectively i.e after taking into account the view of two of his senior colleagues who were required to be consulted by him in the formations of his opinion on the case of the appointment of judge of Supreme Court. If after due consideration of the reasons disclosed to the Chief Justice of India by the executive the recommendation was reiterated by the Chief Justice of India the view of the Chief Justice of India for the appointment must prevail over those of the executive<sup>169</sup>.

As regard the appointment of Chief Justice of India himself the second judge case requires that the senior most judge in the normal circumstance must be appointed in the accordance with the exiting convention which had been followed. Thus in the year 2002 the Supreme Court had seen four new Chief Justice of India taking their turn by seniority two of them with terms of six month and one of about one month<sup>170</sup>.

Regarding reasoning given in the first judge case that the executive should have primacy since it is accountable to people while the judiciary had no such accountability, the majority view in the second judge case dismissed this view and said that Chief Justice of India and Chief Justice of High Court being responsible for the functioning of the court have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever vigilant bar<sup>171</sup>.

### **8.8.3. Third Judge's Case:**

The second judge case left an area of uncertain as regards the collective opinion of Chief Justice and his senior colleagues. If Chief Justice consulted his colleague till that everything is fine but if Chief Justice not

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<sup>168</sup> Supra note. 166.

<sup>169</sup> Ibid.

<sup>170</sup> Supra note. 168. at. p. 50.

<sup>171</sup> Ibid.

consulted his senior colleagues or if it was apparent that majority of the existing SC judges were against the Chief Justice's appointment? During eight month of Chief Justice Punchi's tenure as the Chief Justice of India, a number of recommendations for appointment were found controversial and the law ministry alleged that the Chief Justice had not consulted with his colleagues as required by the second judge case. The Chief Justice denied this and is reported to have maintained that the law ministry was entitled to enquire into extent to the Chief Justice's consultations. It was even feared that a Bench of Supreme Court constituted by the Chief Justice could issue a mandamus on the government to appoint a judge recommended by him. In these circumstances the central government hurriedly decided in July 1998 to make reference to the Supreme Court of India under Art 143(1) seeking the opinion of the Supreme Court<sup>172</sup>. Nine questions were formulated for the opinion of the court, some of them appearing to be quite inconsistent and obviously answered by the second judge' case itself<sup>173</sup>.

The court opined that the Chief Justice must make a recommendation to appoint the judge of the Supreme Court this time in consultation with the four senior most puisne judges of the Supreme Court and in so far as the appointment to the High Court was concerned the recommendation must be consultation with two senior most puisne judges of the Supreme Court<sup>174</sup>.

The court further stated apparently in the context of the unstated situation which had arisen from the Chief Justice's proposals that the recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process as stated in the latest opinion would not be binding the Government of India<sup>175</sup>.

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<sup>172</sup> (1998) 7 SCC 739.

<sup>173</sup> Supra note. 171.

<sup>174</sup> Supra Note.173. at p.51.

<sup>175</sup> Ibid.

#### **8.8.4. Judicial Appointments: Effect of the Second and Third Judge Cases**

The court has re-written the provisions of the constitution for appointment of judges. The executive's function on the appointment process has for all practical purposes been eliminated and reduced to a formal approving authority of recommendations made by the Chief Justice of India and his collegiums. The High Court judges who figure us consultants in the appointment of a Supreme Court judge in Art 214(2) have no role to play consultation of the Chief Justice of India has been translated into concurrence. The clear intention of the constitution makers reflected in the constituted assembly debates of not making the Chief Justice of India the final appointing authority is disregarded<sup>176</sup>.

#### **8.8.5. Comments regarding these decisions-**

Writing on the third judge case in another article "where angels fear to tread", Sir Robin Cooke says that:

"It sounds more like a promulgation of policy than an exercise in juridical reason. The reasoning is noticeably limited. All in the opinion of Supreme Court in the third judge's case must be the most remarkable ruling even issued by a supreme national appellate court in the common law world<sup>177</sup>."

But the other opinion would be why the SC became impatient to overrule the first judge case to take upon itself the power of appointment when the earlier system itself acknowledged in the second judge case<sup>178</sup>:

"except for rare instances the executives is guided in the matter of appointments by the opinion of Chief Justice of India."

So it can be said that Second and Third judge case's has created more problems in place of solution and executive interfering with the independence

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<sup>176</sup> Ibid.

<sup>177</sup> Supreme but not infallible- Essays in Honour of the SC of India, (2000) Oxford, p.97.

<sup>178</sup> Supra Note.174. at p.52

of judiciary during the short period of two years of the emergency would hardly justify a rewriting of the constitution in favour of the judiciary<sup>179</sup>.

The Supreme Court of India should formulate a code of conduct for judges to follow while practicing the judicial activism, otherwise it may allow a judge to follow his motion of justice ignoring the limits of law and “judicial activism” may regenerate into “judicial adventurism”. Further judicial activism shall be made use of only as a last resort and should be sparingly used when all other attempts on the part of judiciary have failed to force the executive and the legislature to perform their duties<sup>180</sup>.

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<sup>179</sup> Ibid.

<sup>180</sup> Judicial Activism/Judicial overreach  
<http://www.ndtvmi.com/b8/Dopesheets/ashishstutirandeep.pdf> [Access on 7th August 2014 at 2PM].



*Conclusion & Suggestions*

## CHAPTER 9

### CONCLUSION & SUGGESTIONS

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The people of our country have lost their faith in the quality, integrity, and efficiency of the government institutions, simply because of the character of the leaders. The people of this country, therefore, are bound look towards the courts to get relief. The people of this country have failed to get anything from the leaders they expected. At present, the situation has become more disturbing that everyone's only hope is judiciary for the relief and in such circumstances the independence and impartiality becomes one of the hallmarks of the democratic system and this independence and impartiality is expected from the judiciary alone.

Judiciary can protect the rights of individuals and can provide equal justice without fear and favour. For this purpose the Constitution of India provides many privileges to the judiciary to maintain its independence, impartiality and integrity. With this aim, the constitution makers put the word justice, social, economic and political in the Preamble of the Constitution of India. It is expected from the independence of judiciary that the people howsoever high, must conform to the discipline of law. Judicial independence is not meant only for the judges but for the people also. Judges have an important role to play to protect the liberty of the people. However, advocates of independence of the judiciary say that judges should not be held accountable to follow the rule of law. This understanding of the advocates creates a conflict between judicial independence and judicial accountability. Although they are unseparable but not inconsistent with each other. In fact, they nourish each other. It is said that Indian judiciary is most powerful and independent judiciary in the world. India has a single integrated, hierarchical judicial system. It has got its origin in the English legal system.

In a democratic set-up of India, the judiciary is considered the highest and strongest pillar of the democracy. Indian democracy has given the power to the Supreme Court to interpret the constitution and even to declare a law framed by the Parliament or by the legislature of the state to be ultra-vires of the constitution. The result of this power given to the Supreme Court and High Courts has made them accountable to none.

Judiciary of India enjoys independence but sometimes in the name of the independence the judiciary misuses its power and privileges. The concept of judicial accountability is now a days a matter of controversy. The accountability of the judges and the standard of their work has become subject matter of the Judicial Standard and Accountability Bill 2010. The accountability of the judiciary of India need to be compared with the judicial accountability in other nations of the world like USA, Australia and etc.

Judges have been accorded a distinct position keeping in view their association with higher cause of truth and justice. The constitutional provisions provide that impartial and independent judicial body must be there in every country to adjudicate upon disputed the matter and to act as the interpreter and guardian of the constitution. Constitution assures that any authority deriving its existence cannot claim absolute and unaccountable power. Such authority must be accountable either to the source of its origin or to the people.

Two wings of the government of India that is legislature and executive are accountable to the people of the nation. But the judiciary is accountable to none. This is not a good situation, every wing of the government must be accountable to the people of the nation.

Judiciary should not be unbridled. No wing of the government should interfere and invade into the domain of other organs maintaining judicial independence. The judges take oath to act without fear and favour, affection and ill will. They take oath to uphold the constitution. In the name of judicial

independence, sometimes judges act beyond their domain even then they are accountable to none.

The doctrine of separation of powers has not been applied in India in a rigid sense and in other countries. But it does not mean that the principle has no relevance now a days. Hence it is felt that government cannot work smoothly in the effect of complete separation of powers. Actually, the government of India can move smoothly with the co-operation and mutual adjustment of all the three organs of the state.

Prof. Garner once stated that “the doctrine is impracticable as a working principle of Government.” It is not possible to categorize the functions of all three branches of Government on mathematical basis. Jurist Frankfurter once stated that “Enforcement of a rigid conception of separation of powers would make Government impossible.” The doctrine of Montesquieu may be possible when all the wings of the state should exercise its power on the principle of checks and balances. This principle also signifies that each wing of government must have performed within limits. Professor Laski said that it is necessary to have a separation of functions which need not imply a separation of personnel.

In the Supreme Court of United Kingdom, the judges do not wear official robes in the court proceedings. Lawyers also could dispense with official robes on mutual consent. The proceedings of important cases are telecast live and media trial is also have a place there. These are some significant instances which reflect institutional democracy and transparency. The openness and transparency in the system must occur at all stages of judicial process. John Rawls once stated that justice is fairness. The Supreme Court of United Kingdom simply demonstrates it. The independence of judiciary is based on an equally independent Judicial Appointments Commission and it preserves the democracy of the nation.

In Canada, the judiciary possesses the adequate knowledge and rich experience for the maintenance and development of its democratic society.

The Canadian courts play a role of resolver of disputes, interpreter of the law and guardian of the Constitution and the Charter.

The Dicey's doctrine of rule of law has been idealist in nature and its implementation in the nation like India is almost impossible quite difficult. In the opinion of Dicey the justice must be done through known principles of law and not by principles of men. He believes that the discretion always opens a room for arbitrariness. In India, there is a need to preserve the rule of law for punishing deviations and lapses from the code of conduct. It has been difficult to secure the conviction of the actual culprits in a court of law, due to the corruption in the judiciary and this situation might be a precursor to collapse of administration of criminal justice which would ultimately result in a state of chaos and anarchy. There is need to eliminate or minimize the political and other extraneous interferences into the proceedings of judiciary.

The principle of rule of law does not have only formal legality which provides regularity and consistency in the enforcement of democratic society but also gives justice to the public which is based on the recognition of the supreme values of the human personality and guaranteed by institutions providing a framework for its fullest expression. For the welfare of any country, it is essential that democracy and the rule of law are connected to each other. Therefore, there is an urgent need to take steps to establish a rule of law in India otherwise our credibility as a democracy will be eroded and there is also a pressing need to make judiciary accountable for maintaining rule of law in our country.

The term 'Rule of Law' is not mentioned in the Constitution of India. That is why it is suggested that the term "Rule of Law" should be included under Articles 14 and 21 of the Constitution by making the amendment in the Constitution. The Supreme Court of India recognizes that rule of law is the basic structure of the Constitution and also trying to establish it as a human rights concept. It is well known that the rule of law includes the independence of judiciary which means keeping corruption out from the judiciary. The

strong need of the present times is to keep judiciary out of the influence and control of the legislature or executive.

Politicians always blame on judiciary that the judiciary is overreaching its powers. They should try to understand that the constitution has vested the power of review in the judiciary to check the validity of actions of the legislature against the violation of fundamental rights of the people of India. There should be checks and balances among the three organs of government. The Constitution of India has given the judiciary the power to check the actions of the legislature if any of them violates the fundamental rights of the citizens. In a parliamentary form of government, the legislature and the executive works in coordination. So there is every possibility of the legislature becoming despotic based on the principle of majority rule. Judicial review may be viewed as one of the fundamental rights of the people of India. The Constitution is supreme as the judiciary is its interpreter and preserve the rule of law.

There is no transparency in the appointment of the judges in Supreme Court and High Courts. There is need to amend the appointment procedure to show that there is transparency in the appointment of the judges. Judges of the High Courts are appointed among the advocates of the ten years practice. Judicial officers are elevated after atleast 25 years of service. They get the experiences of the all fields of law. The advocate practicing in High Court is not expected to gain as much knowledge of all fields of law in ten years in comparison to judicial officers of the rank of the District Judge. Persons who decorate the lower judiciary are selected through a state level competitive examination.

Advocate to be elected to the High Court is not required to appear in any test. They are not called for any interview to test their knowledge of law before recommendation of their names are made for high elevation. Lower judiciary is ignored and advocates are preferred without any test or interview. They become bosses of the lower judiciary. The leaders are also expected to

gain majority from the people. Generally, the names of the favourable advocates are recommended for the elevation. There is no criteria for merit for elevation in cases of advocates. Dishonest advocates have been appointed judges of the High Courts. A District Judge having a small blot in 20 years of careers is ignored.

There is a contradiction in the processes regarding the 'removal' and 'appointment' of the judges. Two separate processes are there. The judges fill their vacancies themselves and the President of India has no say in the appointment of the judges. He is bound to issue a warrant of appointment to an advocate whose name has been forwarded by the Chief Justice of India through his own collegium. The Chief Justice of India and collegium of the Supreme Court do not possess any machinery to verify the work and conduct of an advocate. It is not expected that the name of an advocate forwarded by the Chief Justice of a High Court shall always be a person of good conduct and have a good reputation about his integrity and the knowledge of law.

The Chief Justice of a High Court has not sufficient means to verify the work, conduct and reputation of an advocate. He simply forwards the name of the advocates on the recommendation of his companion judges. A judge of bad character and integrity cannot be removed without the two- third majority of the total members of the Parliament of present and voting.

A government servant is dismissed from a service by the same authority who appoints him but this is not same in the matter of judges of High Court and Supreme Court. The complicated procedure of the removal of the judges of the High Court and Supreme Court has made them unaccountable and irresponsible. The judges act in an arbitrarily manner and sometimes judges go beyond their powers conferred upon them by court of India. Two or three judges can declare an Act of Parliament as unconstitutional. They do not think that the members of Parliament represent the wishes and will of the people of the nation. Sometimes, judges become

biased from by the public opinion and their bias reflected in their judgments. They also express their personal opinions.

Impeachment procedure for the removal of judges of a Supreme Court or of High Court of India has been very tough especially in the present context. The impeachment is almost impossible because there is less possibility of any party coming with full-fledged two- third majority. Because of this lacuna, the judges sometimes act arbitrarily. The procedure of impeachment for removal of the judges should be simple. The method of removal of the judges should be in the authority which makes the appointment of the judges of Supreme Court or of High Courts. By the amendment in the constitution of India, it should be ensured that a judge may be removed from the office by a simple majority on the recommendation of full court. The impeachment of the judges is the method to combat the corruption in the higher judiciary and to remove them from their offices as we know that by impeachment only the higher level officer is removed from the office.

An independent body must investigate and hear complaints against judges and exacting standards should be applied for the removal of a judge. The mechanism for removal of the judges at all levels must be clear, transparent and fair, and reasons need to be given for decisions. In the case of finding of corruption, a judge should be liable to prosecution. A judge must have the right to a fair hearing, legal representation and an appeal in any disciplinary matter.

There is too much corruption in the courts. The officials of the courts do arbitrary act and demand money. At the higher level, it is also a corruption that the kith and kins are appointed by making approaches to the uncle judges. Uncle judges support the sons and relatives of other colleague judges. The sons and relatives earn money in the name of their uncles and there is no check. A nephew advocate as soon as he joins practice, he earns a lot of money in the name of his uncle judge. He charges exorbitant fee from the

litigants and the litigants do not hesitate to pay such exorbitant fee because the litigant knows the worth of the relation of the advocate with the uncle judges.

The advocate practicing in a High Court is elevated in the same High Court as a judge. This is also a main reason to breed corruption in the High Court. A judge who has been practicing in a particular High Court cannot be expected to be so fair towards their colleague advocates due to their long affinity.

Corruption spreads in judiciary because of the delay in justice, poor implementation of laws, and the lack of a proper redressal mechanism. It is well known that there is no machinery to check the legislatures, ministers and bureaucrats from their arbitrary actions and the corruption is continuously spreading its tentacles in all branches. The third organ that is the judiciary must act impartially as a watchdog to check that people are governed by law. Judiciary of India has no power to frame any law, it can only interpret the laws passed by the legislature under the constitutional framework. But judiciary is interfering in the work of legislature and executive through public interest litigant. Through public interest litigation, judiciary is using its activist power. In the shades of contempt of court and public interest litigant, judges have no fear for their biased and partial acts. There is no answerability for their decisions and acts. These factors also increase corruption in the judiciary.

The government of India is also responsible for corruption in judiciary. There is a huge pendency of cases in each court and vacancies of judges are not filled up. This causes delay in justice and delay in justice means a problems in law and order. Due to frustration caused by the delay in justice, the litigant takes the law in his own hands. The litigant thinks that it would be better to finish the opposite party to litigate for years together.

The doctrine of impartiality in judiciary is interrelated with the independence of judiciary. The concept of independence means no

interference in the work of the judges from the outsiders as we know that the three organs of the constitution are free to perform their work without any interference from one other. The impartiality is the internal duty of the judiciary and it should not be influenced by any source. It must be maintained by the judge during the whole process of the adjudication. A judge should always be impartial when he is deciding the case. And he must avoid any situation which would cause loss of faith of the people that he is not impartial.

The Bangalore Principles of Judicial Conduct 2002 have listed a number of situations when a judge should withdraw from the case to protect the impartiality requirement, such as (i) when he or she has actual bias or prejudice concerning a party or personal knowledge of disputes on evidential facts concerning the proceedings; (ii) when he or she previously served as a lawyer or was a material witness in the matter in controversy; (iii) when he or she or a member of his or her family has an economic interest in the outcome of the case.

There has always been a struggle for supremacy between the executive and judiciary in India. In the present era of public interest litigation, the judiciary of India has become more active and playing important role in shaping public policy. But due to this increasing power, the judiciary has been engulfed by many evils like corruption etc. From the Ghaziabad Provident Fund scam to serious charges of misappropriation against the close relatives of former Chief Justice of India, K G Balakrishnan and allegations of sexual misconduct against a former Supreme Court judge, instances of financial and moral corruption in our judiciary have become embarrassingly and frequent over the years. Exasperated over the systemic rot in Allahabad High Court, the largest High Court in India with 160 judges, the Supreme Court was moved to paraphrase Shakespeare's Hamlet and remark that "something is wrong in the Allahabad High Court".

The report of Transparency International's Global Corruption Barometer 2013 says that 45 percent of surveyed households in India

considered judiciary to be ‘corrupt’ or ‘extremely corrupt’ and 36 percent of households who had contact with the judiciary in 2012 reported to have paid a bribe.

In India, the removal of a corrupt judge is virtually impossible. In India, the procedure of impeachment is not feasible because it requires a huge (two-thirds) majority in Parliament. In the 1990s, when the Congress was in power, a motion seeking to impeach Justice V. Ramaswami could not be passed by Parliament as Congress members abstained from voting. There has been no other attempt at impeachment in India.

Judicial corruption in India is attributable to a number of factors, including "delays in the disposal of cases, shortage of judges and complex procedures, all of which are exacerbated by a preponderance of new laws." In 2012, it was estimated that at the current rate of disposal it would take another 350 years for disposal of the pending cases even if no other cases were added. Another factor is the low ratio of judges per one million population. This high workload encourages delays and adjournments on frivolous grounds. The judicial system, including judges and lawyers, has developed a vested interest in delays as well as corruption.

The judicial system of our country, far from being an instrument for protecting the rights of the weak and oppressed, has become an instrument of harassment of the common people of the country. In fact it has become the leading edge of the ruling establishment for pushing through neo liberal policies by which the resources such as land, water and public spaces left with the poor are being increasingly appropriated by the rich and the powerful. The courts are increasingly displaying their elitist bias and it appears that they have seceded from the principles of the Constitution which set up a republic of the people who were guaranteed "justice- social, economic and political".

In the words of David P. Currie, “ The critical question is neither how to make judge independent nor how to control them but rather how best to reconcile the best values to find the happy medium the golden mean, how in

other words to optimize the cost and benefits of judicial independence and accountability”

The judiciary of India should not go beyond its limits that have been imposed on it by the constitution. Judiciary of India must make efforts to display prudence and moderation for the establishment of a good governance. Judicial activism is an appreciable step of the court and its implications can be assimilated in letter and spirit. The doctrine of judicial review is recognized as part of the basic structure of the Indian constitution. Judicial activism is a sine qua non of democracy. In the absence of an alert and enlightened judiciary, the democracy of the nation will be totally lapsed. Therefore, the doctrine of judicial activism cannot be totally extinguished. It is must for the maintenance of rule of law and for the protection of fundamental rights in the nation.

The doctrine of judicial activism has been an essential aspect of the dynamics of a constitutional court but it is necessary that judiciary does not cross its limits in the guise of judicial activism. As Dr. A.S. Anand, former Chief Justice of India once stated that “the Supreme Court is the custodian of the Indian Constitution and exercises judicial control over the acts of both the legislature and the executive.”

It has been said that “the present system of judicial appointments in the constitutional courts exemplifies the ‘misalignment’ between the core values of judicial independence and accountability. Our current appointments system is out of step with democratic culture primarily because it lacks transparency, and provides for no oversight. Choosing judges based on undisclosed criterion in largely unknown circumstances reflects an increasing democratic deficit. We should be taking lessons from other countries like the United Kingdom and South Africa where a transparent process of appointment of judges is followed, while maintaining judicial independence. International consensus seems to favour appointments to the higher judiciary through an independent commission.

To bring the transparency in the appointment of the judges, recently the National Judicial Appointment Commission Bill 2014 has been passed by the Houses of the Parliament. One can hope it will ensure the transparency and accountability of the judges. But it is submitted that the proposed amendment still has a lacuna.

It gives power to the commission for the appointment of the judges but it does not have any provision regarding the dismissal of the judges on misconduct and misbehaviour. This is against natural justice. It is not found in any law or natural justice that there should be two different sources from each other. Appointing authority and dismissal authority must be one and the same. This lacuna may be filled if the recommendations of the National Judicial Appointment Commission are put up before Parliament for approval by the same procedure as is prescribed for the dismissal of the judges. On the approval of the Parliament the names may be sent to the President for his signature. Thus the authority for complying with the procedure of appointment and dismissal shall be one and the same.

The Parliament represents wishes of the nation, thus, the judges may be made accountable to the nation. The commission may prepare a list of probable vacancies to show that this process may not be repeated frequently. The recommendation may be revised after six months every year.

There is another lacuna that no provision has been made to appoint members of the commission from among the minority, scheduled castes, scheduled tribes. In the absence of their members in the commission there shall be nobody to raise their voice and grievances for these sections of the society.

The commission should contain atleast fifteen members and recommendation may be accepted by a majority. It is not possible that in the present set up of the commission all the members may agree on all the names before the commission.

This commission must have provision for the appointment of the Chief Justices of the High Courts whose names are not under consideration. The commission may make rules for inviting applications from the legal luminaries. Thus, there shall be no secrecy. Public shall have right to see as to who is going to be appointed as a judge.

It may be said that judiciary of India is least accountable in comparison to judiciaries in other countries of the world. It has protected itself by the shield of contempt of court and it is also having protection from investigation into any criminal matter without the prior consent of the Chief Justice of India. This has really become a serious problem for the democratic set-up and rule of law of the country. Therefore, accountability of judiciary has become a need of the day. Otherwise, there would be no meaning of democratic process of the country when one wing is allowed to work without any answerability for its work.

A code of judicial conduct serves as a guide to and measure of judicial conduct, and should be developed and implemented by the judiciary. So that they may be held themselves liable for their own acts. Breaches of the code of conduct must be thoroughly investigated and sanctioned by a judicial body.

There is an urgent and imperative need of judicial accountability in the working of the judiciary and transparency in the appointment of the judges. In the absence of accountability and transparency in the working of courts, judiciary of India will lose its respect in the eyes of public as other organs of the state are losing respect.

It is, therefore, indispensable that judiciary must be made accountable in its working so that it may restore the faith of the public. The Supreme Court has also observed that a single dishonest judge not only dishonors himself and disgraces his office but destroys the integrity of the entire judicial system. People's Convention on Judicial Accountability said that judicial system of the country far from being an instrument for protecting the rights of the weak and oppressed people of India, it has now become an instrument of

the harassment of the common man of the country. Fingers are raised against the judicial system that it works only for the rich classes and not for the weak and the poor sections of the society.

It may be concluded that there is a close relation between judicial appointments and independence of the judges. Public confidence in the judiciary depends upon open and transparent procedure for the appointments of the judges. Transparency and openness in the appointment of the judges depends upon the criteria and mechanism that is adopted. The criteria and mechanism should not be complicated because it shall have direct impact on the public trust as well as judicial independence. It is a need of the time that judicial appointment should be fair and transparent so that judicial independence may be well maintained. There has been a long controversy regarding the appointment of the judges from the very beginning. Generally, judges are appointed on merit in a number of countries. The appointment should be so made as to make the judges accountable to their work. It is judicial accountability that may maintain the confidence of people in the court system. The judicial independence and accountability must be balanced.

## SUGGESTIONS

Some necessary steps will have to be taken if state and the judiciary want to provide speedy justice to citizens of India.

1. Lower judiciary should not be under the control of higher judiciary.
2. It is suggested that the President should appoint an advocate of 25 years of practice on the recommendation of Union Public Service Commission on examination or interview held by it. The officers of the lower judiciary having a career of 20-25 years of services may also be allowed to appear in a examination held by Public Service Examination for recommendation of the appointment of the judges of the High Court.
3. In a democratic set-up a party generally doesn't get the two- third majority in the Parliament. President of India should also be given the power of the dismissal on the proved misbehaviour or incapacity on the recommendation of a panel consisting of senior judges of Supreme Court, senior advocates and high senior- most Chief Justices of states.
4. The All Indian Judicial Services should be created for judicial officers in the same manner as that of IAS and IPS officers. At no point, the political party in power should have a choice to recommend the candidates. The collegium system may be adopted for selection to higher judiciary. Every 5 years judges to be tested for updating their knowledge by the higher judicial officers. Recently, it is a good news that National Judicial Appointment Commission Bill 2014 has been passed by the Houses of the Parliament and it will replace the collegium system. Hope it would be good step of government of India to bring transparency in the appointment of the judges.
5. There should be a permanent body at the level of district judiciary, High Court and Supreme Court to hear the grievances of litigants and public in general in administration sides. In the absence of any forum

to hear the grievances of the litigants, the official of the court have become unbridled.

6. Bar Association should set- up a committee at its own level to see that its members are working properly. The Bar Association must also take an action against its erring members. The members of Bar should not act in a manner which may be cost their reputation in the eyes of the public.
7. The license of advocates may be made subject to removal after a fixed period to show that they not be unbridled. Their licenses may be renewed after a examination by the concerned Bar Council.
8. There should be timely meetings between the members of the Bar and the members of the judiciary from time to time to ensure that they may remove their misunderstanding against each other. In the meetings, the officers of the district administration and police may also be invited. They must also raise their grievances in such meetings.
9. It has been seen that judges of a lower court and High Courts do not give date of hearing to the litigants by their own hands. Every court must follow the directions of the Honorable Supreme Court, which have been issued in this regard.
10. Information and communication technology in lower courts should be adopted to provide speedy justice to the common people of India. The use of modern communication and information technology will also have a positive effect in a way of eliminating arbitrariness and corruption from courts. Video conferencing may be included in the processing of the courts to escape from the lots of crowd in courts and for the safety purposes of the judges and the litigants. So that there is an urgent need to upgrade and expand infrastructure and simplify procedures.
11. There is a need to set up a judicial disciplinary authority over the misconduct of judges, to prevent the corruption in judiciary.

12. It is suggested that the number of courts should be increased so that the cases may be decided within a month. Police investigation is also the main reason of delay in justice. The police force engaged in investigation may be separated from the police engaged in maintaining the law and order.
13. Salaries of the judges should be increased and the number of holidays in all levels of judiciary should be cut down.
14. There should be an interaction between the judiciary and academics to attract talent and to cultivate fresh ideas. The law curriculum needs ethics education and up-gradation.
15. There is a need of an independent National Judicial Commission (NJC), which must be created as a constitutional body like the Election Commission.
16. The Judicial Commission must not be monopolized by existing or retired judges and must include respected members from the legislature and academia, independent thinkers, and activists. It should be empowered to appoint judges as well as probe complaints of misconduct against them and initiate criminal proceedings wherever required without anyone's consent.
17. Court should adopt a simple procedures enabling a common man to directly approach the court.
18. Ensuring the required standards in the legal professional or the person concerned.
19. There is a need that judicial process would should have been automated. This process can be made available in the software library. Generic package can be made available which will be utilized for creation of new applications by the domain user itself.
20. It is expected that the judicial system will be completely ICT enabled during this phase.



*Annexures*

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**Bill No. 136 of 2010**

**THE JUDICIAL STANDARDS AND ACCOUNTABILITY BILL, 2010**

ARRANGEMENT OF CLAUSES

CHAPTER I

PRELIMINARY

CLAUSES

1. Short title and commencement.
2. Definitions.

CHAPTER II.

JUDICIAL STANDARDS TO BE FOLLOWED BY JUDGES

3. Judicial standards.

CHAPTER III

DECLARATION OF ASSETS AND LIABILITIES BY JUDGES

4. Declaration of assets and liabilities.
5. Making available document or information in relation to a declaration of assets and liabilities of Judges on website.
6. Maintenance of records.

CHAPTER IV

MAKING OF COMPLAINT

7. Complaints.
8. Manner of making of complaint.
9. Reference to Scrutiny Panel.

CHAPTER V

SCRUTINY PANEL

10. Constitution of Scrutiny Panel.
11. Composition of Scrutiny Panel.
12. Functions of Scrutiny Panel.
13. Procedure of Scrutiny Panel.
14. Power relating to scrutiny of complaints.
15. Provision for officers and other employees for Scrutiny Panel.
16. Provision regarding frivolous and vexatious complaints.

CHAPTER VI

A. NATIONAL JUDICIAL OVERSIGHT COMMITTEE, ITS POWERS AND FUNCTIONS AND PROCEDURE FOR INQUIRY OF COMPLAINTS

17. Establishment of Oversight Committee.

CLAUSES

18. Composition of Oversight Committee.
19. Forwarding of complaint relating to misbehaviour to Scrutiny Panel.
20. Records of complaints forwarded to Scrutiny Panel.
21. Certain complaints not to be forwarded to Scrutiny Panel.

B. CONSTITUTION OF INVESTIGATION COMMITTEE, ITS POWERS AND FUNCTIONS AND PROCEDURE FOR INVESTIGATION

22. Investigation by investigation committee.
23. Powers of Oversight Committee and investigating committee.
24. Search and seizure by investigation committee.
25. Assistance to investigation committee by Government agencies.
26. *Ex parte* investigation.
27. Investigation into act or conduct of certain other persons in certain cases.
28. Submission of report by investigation committee.

C. INQUIRY PROCEDURE OF INVESTIGATION COMMITTEE

29. Procedure in inquiries by investigation committee.
30. Investigation committee to have power to regulate its own procedure.
31. Central Government to appoint an advocate to conduct cases against Judge.

D. STAFF OF OVERSIGHT COMMITTEE

32. Staff of Oversight Committee.

E. PENALTIES ON CONCLUSION OF INQUIRY

33. Stoppage of assigning judicial work in certain cases.
34. Procedure on receipt of report of investigation committee.
35. Advice to President for removal of Judge.
36. Filing of complaint against complainant in certain cases.

F. OTHER PROVISIONS RELATING TO INQUIRY

37. Proceedings before Oversight Committee to be judicial proceedings.
38. Power to call for assistance.
39. Confidentiality in complaint procedure.
40. Keeping identity of complainant confidential.
41. No action for contempt to lie in certain cases.
42. Investigation and inquiry by Oversight Committee not to affect criminal liability.
43. All records, documents, etc., related to complaint, scrutiny, investigation and inquiry to be confidential.
44. Protection of action taken in good faith.

CHAPTER VII

PROCEDURE FOR PRESENTATION OF AN ADDRESS FOR REMOVAL OF A JUDGE

45. Laying of advice of Oversight Committee before Parliament.
46. Motion for removal of a Judge.

CLAUSES

47. Investigation into misbehaviour or incapacity of Judge by investigation committee for removal of Judges.
48. Consideration of report and procedure for presentation of an address for removal of Judge.
49. Power of Joint Committee to make rules.

CHAPTER VIII

OFFENCES AND PENALTIES

50. Intentional insult or interruption to Oversight Committee.
51. Penalty for violation of confidentiality in complaint procedure.
52. Power of Oversight Committee to try certain cases.
53. Punishment for frivolous and vexatious complaints.
54. Offences by companies.
55. Offences by societies or trusts.
56. Appeal to Supreme Court.
57. Power of Central Government to make rules.
58. Power to remove difficulties.
59. Repeal and saving.

THE SCHEDULE.



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AS INTRODUCED IN LOK SABHA

**Bill No. 136 of 2010**

**THE JUDICIAL STANDARDS AND ACCOUNTABILITY BILL, 2010**

A  
BILL

*to lay down judicial standards and provide for accountability of Judges, and, establish credible and expedient mechanism for investigating into individual complaints for misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and to regulate the procedure for such investigation; and for the presentation of an address by Parliament to the President in relation to proceeding for removal of a Judge and for matters connected therewith or incidental thereto.*

BE it enacted by Parliament in the Sixty-first Year of the Republic of India as follows:—

**CHAPTER I**

**PRELIMINARY**

1. (1) This Act may be called the Judicial Standards and Accountability Act, 2010. Short title and commencement.
- 5 (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Definitions.

2. In this Act, unless the context otherwise requires,—

(a) “assets” includes immovable and movable property; 5

*Explanation.*—For the purposes of this clause,—

(i) “immovable property” includes the land and any building or other structure attached to the land or permanently fastened to anything which is attached to the land, and tenancies, lease holds or any other interest in immovable property; 10

(ii) “movable property” includes any other property which is not immovable property as also corporeal and incorporeal property of every description and household goods and personal effects of the value of each item of more than fifty thousand rupees;

(b) “Chairman” means the Chairman of the Council of States; 15

(c) “competent authority” means in relation to,—

(i) the Judge of the High Court, the Chief Justice of that High Court;

(ii) the Chief Justice of the High Court, the Chief Justice of India;

(iii) the Judge of the Supreme Court, the Chief Justice of India;

(iv) the Chief Justice of India, the President of India; 20

(d) “incapacity” means physical or mental incapacity which is, or is likely to be, of a permanent character;

(e) “investigation committee” means the investigation committee constituted under section 22;

(f) “inquiry” means an inquiry for proof of misbehaviour or incapacity; 25

(g) “Judge” means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of India and the Chief Justice of a High Court;

(h) “judicial standards” means the values of judicial life specified in section 3, and the Schedule;

(i) “liabilities” includes financial guarantees given and all loans raised from any bank, financial institution or any other source; 30

(j) “misbehaviour” means,—

(i) conduct which brings dishonour or disrepute to the judiciary; or

(ii) wilful or persistent failure to perform the duties of a Judge; or

(iii) wilful abuse of judicial office; or 35

(iv) corruption or lack of integrity which includes delivering judgments for collateral or extraneous reasons, making demands for consideration in cash or kind for giving judgments or any other action on the part of the Judge which has the effect of subverting the administration of justice; or

(v) committing an offence involving moral turpitude; or 40

(vi) failure to furnish the declaration of assets and liabilities in accordance with the provisions of this Act; or

(vii) wilfully giving false information in the declaration of assets and liabilities under this Act; or

(viii) wilful suppression of any material fact, whether such fact relates to a period before assumption of office, which would have bearing on his integrity; or

(ix) wilful breach of judicial standards;

(k) "notification" means a notification published in the Official Gazette;

(l) "Oversight Committee" means the National Judicial Oversight Committee established under section 17;

(m) "prescribed" means prescribed by rules made under this Act;

(n) "Scrutiny Panel" means a panel constituted under sub-section (1) or sub-section (2) of section 11 for the scrutiny of complaints;

(o) "Speaker" means the Speaker of the House of the People.

## CHAPTER II

### JUDICIAL STANDARDS TO BE FOLLOWED BY JUDGES

3. (1) Every Judge shall continue to practice universally accepted values of judicial life as specified in the Schedule to this Act.

Judicial standards.

(2) In particular, and without prejudice to the generality of the foregoing provision, no Judge shall—

(a) contest the election to any office of a club, society or other association or hold such elective office except in a society or association connected with the law or any court;

(b) have close association with individual members of the Bar, particularly with those who practice in the same court in which he is a Judge;

(c) permit any member of his immediate family (including spouse, son, daughter, son-in-law or daughter-in-law or any other close relative), who is a member of the Bar, to appear before him or associated in any manner with a cause to be dealt with by him;

(d) permit any member of his family, who is a member of the Bar, to use the residence in which the Judge actually resides or use other facilities provided to the Judge, for professional work of such member;

(e) hear and decide a matter in which a member of his family, or his close relative or a friend is concerned;

(f) enter into public debate or express his views in public on political matters or on matters which are pending or are likely to arise for judicial determination by him:

Provided that nothing contained in this clause shall apply to,—

(i) the views expressed by a Judge in his individual capacity on issues of public interest (other than as a Judge) during discussion in private forum or academic forum;

(ii) the views expressed by a Judge relating to administration of court or its efficient functioning;

(g) give interview, to the media in relation to any of his judgment delivered, or order made, or direction issued, by him, in any case adjudicated by him;

(h) accept gifts or hospitality except from his relatives;

(i) hear and decide a matter in which a company or society or trust in which he holds or any member of his family holds shares or interest, unless he has disclosed his such holding or interest, and no objection to his hearing and deciding the matter is raised;

(j) speculate in securities or indulge in insider trading in securities;

(k) engage, directly or indirectly, in trade or business, either by himself or in association with any other person: 5

Provided that the publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business for the purpose of this clause;

(l) seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available or admissible; 10

(m) hold membership in any organisation that practices invidious discrimination on the basis of religion or race or caste or sex or place of birth;

(n) have bias in his judicial work or judgments on the basis of religion or race or caste or sex or place of birth.

*Explanation.*—For the purposes of this sub-section, “relative” means— 15

(i) spouse of the Judge;

(ii) brother or sister of the Judge;

(iii) brother or sister of the spouse of the Judge;

(iv) brother or sister of either of the parents of the Judge;

(v) any lineal ascendant or descendant of the Judge; 20

(vi) any lineal ascendant or descendant of the spouse of the Judge;

(vii) spouse of the person referred to in clauses (ii) to (vi).

### CHAPTER III

#### DECLARATION OF ASSETS AND LIABILITIES BY JUDGES

Declaration of  
assets and  
liabilities.

4. (1) Every Judge shall make a declaration of his assets and liabilities in the manner as provided by or under this Act. 25

(2) A Judge shall, within thirty days from the date on which he makes and subscribes an oath or affirmation to enter upon his office, furnish to the competent authority the information relating to—

(a) the assets of which he, his spouse and his dependent children are, jointly or severally, owners or beneficiaries; 30

(b) his liabilities and that of his spouse and his dependent children.

(3) A Judge holding his office as such, at the time of the commencement of this Act, shall furnish information relating to such assets and liabilities, as referred to in sub-section (2) to the competent authority within thirty days of the coming into force of this Act. 35

(4) Every Judge shall file with the competent authority, on or before the 31st July of every year, an annual return of such assets and liabilities, as referred to in sub-section (2), as on the 31st March of that year.

(5) The information under sub-section (2) or sub-section (3) and annual return under sub-section (4) shall be furnished in such form and in such manner, as may be prescribed. 40

*Explanation.*—For the purposes of this section, “dependent children” means sons and daughters who have no separate means of earning and are wholly dependent on the Judge for their livelihood.

5. The competent authority shall exhibit the document or information in relation to a declaration of assets and liabilities of Judges,—
- (a) in the case of Judges and Chief Justices of the High Courts, on the website of the High Court in which such Judges and Chief Justice are serving;
- 5 (b) in the case of Judges of the Supreme Court and Chief Justice of India, on the website of the Supreme Court.
6. The competent authority shall keep the documents or information forms containing the details of the assets and liabilities and other particulars in relation thereto filed by the Judges in its safe custody for such period as may be decided by the Oversight
- 10 Committee.
- Making available document or information in relation to a declaration of assets and liabilities of Judges on website.
- Maintenance of records.

#### CHAPTER IV

##### MAKING OF COMPLAINT

7. Any person making an allegation of misbehaviour or incapacity in respect of a Judge may file a complaint in this regard to the Oversight Committee.
- 15 8. The complaint under section 7 shall—
- (a) be in such form and filed in such manner as may be prescribed;
- (b) set forth particulars of the misbehaviour or incapacity which is the subject matter of allegation;
- 20 (c) be verified at the foot of the complaint by the complainant and shall specify, by reference to the numbered paragraphs of the complaint, what he verifies of his own knowledge and what he verifies upon information and shall refer to the source of the information.
9. Save as otherwise provided under this Act, the Oversight Committee shall refer all such complaints to the appropriate Scrutiny Panel constituted under Chapter V for
- 25 scrutiny.
- Complaints.
- Manner of making of complaint.
- Reference to Scrutiny Panel.

#### CHAPTER V

##### SCRUTINY PANEL

10. There shall be constituted a panel to be called "Complaints Scrutiny Panel" in the Supreme Court and in every High Court to scrutinise the complaints against a Judge received under this Act.
- 30 11. (1) The Scrutiny Panel in the Supreme Court shall consist of a former Chief Justice of India and two Judges of the Supreme Court to be nominated by the Chief Justice of India.
- (2) The Scrutiny Panel in every High Court shall consist of a former Chief Justice of that High Court and two Judges of that High Court to be nominated by the Chief Justice of that High Court.
- 35 12. (1) If the Scrutiny Panel, after scrutiny of the complaint referred to it for scrutiny under section 9, and after making scrutiny of the complaint, as it deems appropriate, is satisfied that—
- 40 (a) there are sufficient grounds for proceeding against the Judge, it shall, after recording reasons therefor, submit a report on its findings to the Oversight Committee for making inquiry against the Judge in accordance with the provisions of this Act;
- Constitution of Scrutiny Panel.
- Composition of Scrutiny Panel.
- Functions of Scrutiny Panel.

(b) the complaint is frivolous or vexatious, or, is not made in good faith, or there are not sufficient grounds for inquiring into the complaint, or the complaint relates only to the merits of the judgment or a procedural order, and, then, it shall after recording reasons therefor submit a report on its findings to the Oversight Committee for not proceeding with the complaint and treating the matter as closed. 5

(2) The Scrutiny Panel shall submit its report under clause (a) or clause (b) of sub-section (1), to the Oversight Committee in this behalf within a maximum period of three months from the date of receipt of the complaint from the Oversight Committee.

Procedure of Scrutiny Panel. 13. Save as otherwise provided in this Act, the Scrutiny Panel shall have power to regulate its own procedure in scrutinising the complaints referred to it for scrutiny under section 9. 10

Power relating to scrutiny of complaints. 14. The Scrutiny Panel shall, while scrutinising the complaints forwarded to it for scrutiny under section 9, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 and in particular, in respect of the following matters, namely:— 5 of 1908.

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath; 15

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or other documents; 20  
and

(f) any other matter which may be prescribed.

Provision for officers and other employees for Scrutiny Panel. 15. (1) The Chief Justice of India shall, determine the nature and categories of the officers and other employees required to assist the Scrutiny Panel referred to in sub-section (1) of section 11 in the discharge of its functions and provide the Scrutiny Panel with such officers and other employees as he may think fit. 25

(2) The Chief Justice of the High Court shall, determine the nature and categories of the officers and other employees required to assist the Scrutiny Panel referred to in sub-section (2) of section 11 in the discharge of its functions and provide the Scrutiny Panel with such officers and other employees as he may think fit. 30

Provision regarding frivolous and vexatious complaints. 16. If the Scrutiny Panel is of the opinion that a complaint was filed frivolously or vexatiously or only with a view to scandalise or intimidate a Judge, it may refer the case to the Oversight Committee for further action.

## CHAPTER VI

A. NATIONAL JUDICIAL OVERSIGHT COMMITTEE, ITS POWERS AND FUNCTIONS AND PROCEDURE FOR INQUIRY OF COMPLAINTS 35

Establishment of Oversight Committee. 17. With effect from such date as the Central Government may, by notification, appoint, there shall be established a National Judicial Oversight Committee.

Composition of Oversight Committee. 18. (1) The National Judicial Oversight Committee shall consist of the following, namely:— 40

(a) a retired Chief Justice of India appointed by the President after ascertaining the views of the Chief Justice of India — Chairperson;

(b) a Judge of the Supreme Court nominated by the Chief Justice of India— Member;

(c) the Chief Justice of a High Court nominated by the Chief Justice of India—  
Member *ex officio*;

(d) the Attorney-General for India— *ex officio* Member;

(e) an eminent person nominated by the President—Member:

5 Provided that—

(a) where the allegations are against a Judge of the Supreme Court, who is a member of the Oversight Committee, then, the Chief Justice of India shall nominate another Judge of the Supreme Court in his place as a member of that committee; or

10 (b) where the allegations are against the Chief Justice of a High Court, who is a member of the Oversight Committee, then, the Chief Justice of India shall nominate a Chief Justice of another High Court in his place as a member of that committee.

(2) After the commencement of the proceedings relating to a complaint against a Judge,—

15 (a) if any change in the composition of the Oversight Committee arises due to elevation of a member of the Oversight Committee, as the Chief Justice of India or a Judge of a Supreme Court, as the case may be; or

(b) if any change arises in the composition of the Oversight Committee due to refusal or retirement or resignation or any other reason,

20 the proceedings of the Oversight Committee shall continue from the stage from which it was pending before such change and the Chairperson of the Oversight Committee shall make such incidental changes, as he deems necessary, to continue the proceedings.

19. The Oversight Committee shall, within three months of the receipt of a complaint relating to misbehaviour of—

25 (a) an individual Judge of the Supreme Court or Chief Justice of a High Court, refer the complaint, to the Scrutiny Panel of the Supreme Court to scrutinise and report thereon;

(b) an individual Judge of a High Court, refer the complaint, to the Scrutiny Panel of the High Court in which such Judge is acting as such, to scrutinise and report thereon.

30 20. The Oversight Committee shall maintain a record of the complaints referred to the Scrutiny Panel.

21. A complaint against the Chief Justice of India shall not be referred to the Scrutiny Panel for scrutiny but shall be scrutinised by the Oversight Committee.

Forwarding of complaint relating to misbehaviour to Scrutiny Panel.

Records of complaints forwarded to Scrutiny Panel.

Certain complaints not to be forwarded to Scrutiny Panel.

35 B. CONSTITUTION OF INVESTIGATION COMMITTEE, ITS POWERS AND FUNCTIONS AND PROCEDURE FOR INVESTIGATION

22. (1) The Oversight Committee, shall for the purpose of inquiry for misbehaviour by a Judge, constitute an investigation committee (by whatever name called) to investigate into the complaint in respect of which the Scrutiny Panel has recommended in its report under clause (a) of sub-section (1) of section 12 for making inquiry against the Judge in accordance with the provisions of this Act.

40 (2) The composition and tenure of the investigation committee shall be such as may be decided by the Oversight Committee:

Provided that the number of the investigation committees, in no case, at a time, shall exceed three:

45 Provided further that the Oversight Committee may, having regard to the nature of misbehaviour of a Judge, may constitute different investigation committees for inquiry into different complaints.

Investigation by investigation committee.

Powers of Oversight Committee and investigating committee.	23. The Oversight Committee, shall, for the purpose of proceedings under this Act and the investigation committee, while conducting any investigation under this Chapter, have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 and in particular, in respect of the following matters, namely:—	5 of 1908.
	(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;	5
	(b) requiring the discovery and production of any document;	
	(c) receiving evidence on affidavits;	
	(d) requisitioning any public record or copy thereof from any court or office;	
	(e) issuing commissions for the examination of witnesses or other documents;	10
	and	
	(f) any other matter which may be prescribed.	
Search and seizure by investigation committee.	24. (1) If the investigation committee has reason to believe that any documents which, in its opinion, will be useful for, or relevant to, any preliminary investigation or inquiry, are secreted in any place, it may authorise any officer subordinate to it, or any officer of an agency referred to in section 25, to search for and to seize such documents.	15
	(2) If the investigation committee is satisfied that any document seized under sub-section (1) would be evidence for the purpose of any investigation and that it would be necessary to retain the original document in its custody, it may so retain the said document till the completion of such investigation or retain a copy of such document, as it may deem fit.	20
	(3) The provisions of the Code of Criminal Procedure, 1973, relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if, for the word "Magistrate", wherever it occurs, the words "investigation committee or any officer authorised by it" were substituted.	2 of 1974. 25
Assistance to investigation committee by Government agencies.	25. The investigation committee shall be entitled to make a request to the Oversight Committee for assistance to it and the Oversight Committee may invoke its powers in this behalf under section 38 of this Act.	
Ex parte investigation.	26. If a Judge, to whom notice is issued by the investigation committee referred to in section 22, refuses to appear before it or does not co-operate with it in conducting investigation, then, the investigation committee may proceed <i>ex parte</i> .	30
Investigation into act or conduct of certain other persons in certain cases.	27. The investigation committee may cause investigation into any act or conduct of any person, other than the Judge concerned, in so far as it considers necessary so to do for the purpose of its investigation into any allegations made against a Judge and shall give such person a reasonable opportunity of being heard and to produce evidence in his defence.	35
Submission of report by investigation committee.	28. The investigation committee, after completion of the inquiry in respect of a complaint, shall submit its findings to the Oversight Committee.	
	C. INQUIRY PROCEDURE OF INVESTIGATION COMMITTEE	40
Procedure in inquiries by investigation committee.	29. (1) The investigation committee shall frame definite charges against the Judge on the basis of which the inquiry is proposed to be held.	
	(2) Every such inquiry shall be conducted <i>in camera</i> by the investigation committee.	
	(3) Charges framed under sub-section (1) together with the statement of grounds on which each such charge is based shall be communicated to the Judge and he shall be given	45

a reasonable opportunity of presenting a written statement of defence within such time as may be specified by the investigation committee.

(4) The investigation committee shall hold every such inquiry as expeditiously as possible and in any case complete the inquiry within a period of six months from the date of receipt of the complaint:

Provided that the Oversight Committee, for reasons to be recorded in writing, may extend the period for completion of the inquiry by a further period of six months.

30. Save as otherwise provided, the investigation committee shall have power to regulate its own procedure in making the inquiry and shall give reasonable opportunity to the Judge of cross examining witnesses, adducing evidence and of being heard in his defence.

Investigation committee to have power to regulate its own procedure.

31. The Central Government may, if requested by the investigation committee, appoint an advocate to conduct the cases against the Judge.

Central Government to appoint an advocate to conduct cases against Judge.

#### D. STAFF OF OVERSIGHT COMMITTEE

32. (1) The Oversight Committee shall, for the purpose of performing its functions under this Act, appoint a Secretary and such other officers and employees possessing such qualifications, as the President may determine, from time to time, in consultation with the Oversight Committee.

Staff of Oversight Committee.

(2) The terms and conditions of service of the Secretary, officers and employees referred to in sub-section (1) shall be such as the President may determine, from time to time, in consultation with the Oversight Committee.

(3) In the discharge of their functions under this Act, the Secretary, the officers and employees referred to in sub-section (1) shall be subject to the administrative control and direction of the Oversight Committee.

(4) The Oversight Committee shall provide such number of its officers and other employees to assist the investigation committee as the Oversight Committee considers appropriate having regard to the nature of investigation in a case.

#### E. PENALTIES ON CONCLUSION OF INQUIRY

33. During the pendency of the inquiry by the investigation committee, the Oversight Committee may recommend stoppage of assigning judicial work including cases assigned to the Judge concerned if it appears to the Oversight Committee that it is necessary in the interest of fair and impartial scrutiny of complaints or investigation or inquiry.

Stoppage of assigning judicial work in certain cases.

34. (1) If the Oversight Committee on receipt of the report from the investigation committee is satisfied that—

Procedure on receipt of report of investigation committee.

(a) no charges have been proved, it shall dismiss the complaint and matter be closed and no further action shall be taken against the Judge and the complainant shall be informed accordingly;

(b) all or any of the charges have been proved but the Oversight Committee is of the opinion that the charges proved do not warrant removal of the Judge, it may, by order, issue advisories or warnings.

(2) Without prejudice to the provisions contained in sub-section (1), if the Oversight Committee, on receipt of the report from the investigation committee is satisfied that there has been a *prima facie* commission of any offence under any law for the time being in force by a Judge, it may recommend to the Central Government for prosecution of the Judge in accordance with the law for the time being in force.

(3) In a case where an inquiry or investigation against the Judge has been initiated and such Judge has demitted office during such inquiry or investigation, such inquiry or investigation may be continued if the Oversight Committee is of the opinion that the misbehaviour is serious in nature and requires to be inquired into or investigated and the Oversight Committee may after conclusion of inquiry forward its findings to the Central Government to take further action in the matter under relevant law for the time being in force. 5

Advice to President for removal of Judge. 35. If the Oversight Committee is satisfied that all or any of the charges of misbehaviour or incapacity of a Judge have been proved and that they are of serious nature warranting his removal, it shall request the judge to voluntarily resign and if he fails to do so, then, advise the President to proceed for the removal of the Judge and the President shall refer the matter to Parliament. 10

Filing of complaint against complainant in certain cases. 36. If the Scrutiny Panel refers a case to the Oversight Committee under section 16, the Oversight Committee shall consider the matter further and if it concurs with the conclusion of the Scrutiny Panel, it may authorise the filing of a criminal complaint against the original complainant before a competent court. 15

#### F. OTHER PROVISIONS RELATING TO INQUIRY

Proceedings before Oversight Committee to be judicial proceedings. 37. All proceedings under this Act shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, and the Oversight Committee shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. 45 of 1860. 2 of 1974. 20

Power to call for assistance. 38. The Oversight Committee shall be entitled to take assistance of such officers of the Central Government or State Government or any agency thereof or authority as it deems fit.

Confidentiality in complaint procedure. 39. Notwithstanding anything contained in any other law for the time being in force, the complainant and every person who participates in the scrutiny or investigation or inquiry as a witness or as a legal practitioner or in any other capacity, whether or not he seeks confidentiality about his name, shall undertake to the Oversight Committee or Scrutiny Panel or investigation committee that he shall not reveal his own name, the name of the Judge complained against, the contents of the complaint or any of the documents or proceedings to anybody else including the media without the prior written approval of the Oversight Committee. 25 30

Keeping identity of complainant confidential. 40. The Oversight Committee or the Scrutiny Panel or investigation committee may, at the request of a complainant, direct that the complainant be accorded such protection, as it deems appropriate, including keeping his identity confidential, from every body and also the Judge against whom the complaint is made.

No action for contempt to lie in certain cases. 41. After the commencement of scrutiny of complaints under this Act, no action for contempt of court shall lie or shall be proceeded with in respect of the allegations, which are the subject matter of the investigation or inquiry. 35

Investigation and Inquiry by Oversight Committee not to affect criminal liability. 42. Any scrutiny, investigation or inquiry pending before the Scrutiny Panel or investigation committee or Oversight Committee shall not affect the criminal liability in respect of such allegations which are the subject matter of the investigation or inquiry. 40

All records, documents, etc., related to complaint, scrutiny, investigation and inquiry to be confidential. 43. Notwithstanding anything contained in the Right to Information Act, 2005 or any other law for the time being in force, all papers, documents and records of proceedings related to a complaint, preliminary investigation and inquiry shall be confidential and shall not be disclosed by any person in any proceeding except as directed by the Oversight Committee: 22 of 2005. 45

Provided that the findings of the investigation committee and the orders passed by the Oversight Committee under clause (b) of sub-section (1) of section 34 shall be made public.

44. No suit, prosecution or other legal proceeding shall lie against the Chairperson or any member of the Oversight Committee, Scrutiny Panel, investigation committee or against any officer or employee, agency or person engaged by such committees or panel for the purpose of conducting scrutiny or investigation or inquiry in respect of anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

Protection of action taken in good faith.

## CHAPTER VII

### PROCEDURE FOR PRESENTATION OF AN ADDRESS FOR REMOVAL OF A JUDGE

45. The President, on receipt of advice under section 35, shall cause the findings of the Oversight Committee along with the accompanying materials to be laid before both Houses of Parliament.

Laying of advice of Oversight Committee before Parliament.

46. On laying of the advice of the Oversight Committee along with the accompanying material, the Central Government may move a motion in either House of Parliament for taking up the said advice for consideration by the House.

Motion for removal of a Judge.

47. (1) Notwithstanding anything contained in section 45 or section 46, if notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,—

Investigation into misbehaviour or incapacity of Judge by investigation committee for removal of Judges.

(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;

(b) in the case of a notice given in the Council of States, by not less than fifty members of that Council,

then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

(2) If the motion referred to in sub-section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and the matter shall be referred to the Oversight Committee for constitution of an investigation committee under section 22.

(3) The Oversight Committee, after receipt of reference under sub-section (2), constitute an investigation committee under section 22 and the investigation committee shall conduct an inquiry in accordance with the provisions contained under Chapter VI and submit its report to the Oversight Committee for being submitted to the Speaker or Chairman, as the case may be, for consideration.

(4) Where it is alleged that a Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the investigation committee may arrange for the medical examination of the Judge by such Medical Board as may be appointed for the purpose by the Speaker or, as the case may be, the Chairman.

(5) The Medical Board shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the investigation committee stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

(6) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the investigation committee stating therein the examination which the Judge has refused to undergo, and the investigation committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged in the motion referred to in sub-section (1).

Consideration of report and procedure for presentation of an address for removal of Judge.

48. (1) If the report of the investigation committee contains a finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, then, no further steps shall be taken in either House of Parliament in relation to the report and the motion pending in the House or the Houses of Parliament shall not be proceeded with.

(2) If the report of the investigation committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in section 46 shall together with the report of the investigation committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

(3) If the motion is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

Power of Joint Committee to make rules.

49. (1) There shall be constituted a Joint Committee of both the Houses of Parliament in accordance with the provisions hereinafter contained for the purpose of making rules to carry out the purposes of this Chapter.

(2) The Joint Committee shall consist of fifteen members of whom ten shall be nominated by the Speaker and five shall be nominated by the Chairman.

(3) The Joint Committee shall elect its own Chairman and shall have power to regulate its own procedure.

(4) Without prejudice to the generality of the provisions of sub-section (1), the Joint Committee may make rules to provide for the following, among other matters, namely:—

(a) the manner of transmission of a motion adopted in one House to the other House of Parliament;

(b) the manner of presentation of an address to the President for the removal of a Judge;

(c) the travelling and other allowances payable to the members of the Committee and the witnesses who may be required to attend such Committee;

(d) the facilities which may be accorded to the Judge for defending himself;

(e) any other matter which has to be, or may be, provided for by rules or in respect of which provision is, in the opinion of the Joint Committee, necessary.

(5) Any rules made under this section shall not take effect until they are approved and confirmed both by the Speaker and the Chairman and are published in the Official Gazette, and such publication of the rules shall be conclusive proof that they have been duly made.

## CHAPTER VIII

### OFFENCES AND PENALTIES

Intentional insult or interruption to Oversight Committee.

50. (1) Whoever intentionally insults, or causes any interruption, to the Scrutiny Panel or investigation committee or Oversight Committee while the Oversight Committee or Scrutiny Panel or investigation committee or any of their members is doing scrutiny or conducting any investigation or inquiry under this Act, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

(2) The provisions of sub-section (2) of section 199 of the Code of Criminal Procedure, 1973 shall apply in relation to an offence referred to in sub-section (1) as they apply in relation to an offence referred to in sub-section (2) of the said section 199, subject to the modification that no complaint in respect of such offence shall be made by the Public Prosecutor except with the previous sanction of the Oversight Committee.

51. If any complainant or other person, who participates in the scrutiny or investigation or inquiry as a witness or as a lawyer or in any other capacity, contravenes the provisions of section 39 or section 40 or section 43, shall be liable for punishment with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees or with both.

Penalty for violation of confidentiality in complaint procedure.

52. When any such offence as is described in sub-section (1) of section 50 is committed, in the view, or, in the presence, of the Oversight Committee, then the said Oversight Committee, may cause the offender to be detained in custody and may at any time on the same day take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause as to why he should not be punished under this section, try such offender summarily so far as may be in accordance with the procedure specified for summary trials under the Code of Criminal Procedure, 1973, and sentence him to simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees or with both.

Power of Oversight Committee to try certain cases.

2 of 1974.

53. (1) Any person who makes a complaint which is found, after following the procedure under this Act to be frivolous or vexatious or made with an intent to scandalise or intimidate the Judge against whom such complaint is filed, shall be punishable with rigorous imprisonment for a term which may extend to five years and also to fine which may extend to five lakh rupees.

Punishment for frivolous and vexatious complaints.

(2) The provisions of this section shall have effect notwithstanding anything contained in the Code of Criminal Procedure, 1973.

2 of 1974.

54. (1) Where an offence under this Act which has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Offences by Companies.

Provided that where a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch or unit nominated by the company as responsible shall be liable for contravention in respect of such establishment, branch or unit:

Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.*—For the purpose of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

55. (1) Where an offence under this Act has been committed by a society or trust, every person who at the time the offence was committed was in charge of, and was responsible to, the society or trust for the conduct of the business of the society or the trust, as well as the society or trust, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Offences by societies or trusts.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a society or trust and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary, trustee or other officer of the society or trust, such director, manager, secretary, trustee or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. 10

*Explanation.*—For the purpose of this section,—

(a) “society” means any body corporate registered under the Societies Registration Act, 1860 and, “trust” means any body registered under the Indian Trusts Act, 1882; 21 of 1860.  
2 of 1882.

(b) “director”, in relation to a society or trust, means a member of its governing board other than an *ex officio* member representing the interests of the Central or State Government or the appropriate statutory authority. 15

Appeal to Supreme Court.

56. Any person convicted on a trial held under sub-section (1) of section 53 may, notwithstanding anything contained in any other law for the time being in force, appeal, within sixty days of order of such conviction, to the Supreme Court. 20

Power of Central Government to make rules.

57. (1) The Central Government may make rules, in consultation with the Chief Justice of India, to carry out the provisions of this Act (other than the provisions contained under Chapter VII).

(2) In particular, and without prejudice to the generality of the foregoing power, rules made under this section may provide for all or any of the following matters, namely:— 25

(a) the form and manner in which, information is to be furnished or, annual return to be filed, under section 4;

(b) the form and manner in which complaint shall be filed under section 8;

(c) other matters in respect of which the Scrutiny Panel shall, for the purpose of scrutiny of complaint, have powers of a civil court under section 14; 30

(d) other matters in respect of which the Oversight Committee shall, for the purpose of inquiry or investigation of complaint have powers of a civil court under clause (f) of section 23;

(e) any other matter which is required to be, or may be, specified by rules or in respect of which provision is to be made by rules. 35

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule. 40

Power to remove difficulties.

58. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, after consultation with the Chief Justice of India, by an order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty: 45

Provided that no such order shall be made after the expiry of a period of three years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

51 of 1968. 5

59. (1) The Judges (Inquiry) Act, 1968 is hereby repealed.

51 of 1968.

(2) Notwithstanding the repeal of the Judges (Inquiry) Act, 1968 (hereinafter referred to as the repealed Act) the rules made by the Joint Committee under section 7 of the repealed Act shall continue to be in force until rules are framed under section 49 of this Act.

10 (3) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken including any order or notice made or issued or any inquiry initiated under the repealed Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken or initiated under the corresponding provisions of this Act.

10 of 1897. 15 (4) The mention of particular matters in sub-sections (2) and (3) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal.

Repeal and saving.

## THE SCHEDULE

[See section 3 (I)]

### JUDICIAL STANDARDS

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1. Norms, including punctuality and commitment to work, guidelines and conventions essential for the conduct and behaviour of Judges, being pre-requisite for an independent, strong and respected judiciary, having integrity and detachment and impartial administration of justice as reflected in the Restatement of Values already adopted by the Conference of Chief Justices held in 1999 shall be practised by every Judge.
  2. All times be conscious that he is under the public gaze and not do any act or omission which is unbecoming of the high office he occupies and the public esteem in which that office is held.
  3. A degree of aloofness consistent with the dignity of his office shall be practised by every Judge.
  4. Judgments should speak for themselves.
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## STATEMENT OF OBJECTS AND REASONS

The Judges (Inquiry) Act, 1968 was enacted with a view to lay down a procedure for removal, for proved misbehaviour or incapacity, of Judges of the High Courts and the Supreme Court by way of address of the Houses of Parliament to the President. There is, however, no legal provision at present for dealing with complaints filed by the public against Judges of the High Courts and the Supreme Court. The need for a statutory mechanism to address complaints of the public in this regard has been felt to bring greater transparency in the judiciary.

2. The Full Court meeting of Supreme Court of India on 7 May, 1997 had adopted "the Restatement of Values of Judicial Life". The above Restatement lays down certain judicial standards which are to be followed by the Judges of the Supreme Court and the High Courts. However, this Restatement of Values of Judicial Life does not have any legal authority and cannot be enforced. It is felt that the judicial standards also be made a part of the statute to give it the requisite legal sanction. This measure is also likely to increase public confidence in the judiciary considerably as the Judges would be required to follow the prescribed judicial standards.

3. There is also no legal provision at present that requires Judges of the Supreme Court and High Courts to declare their assets and liabilities. The Resolution adopted at the Full Court meeting of the Supreme Court of India on 7 May, 1997 requires every Judge to declare his assets within a reasonable time of assuming office and thereafter whenever acquisition of substantial nature is made. The Second Administrative Reforms Commission, in its Fourth Report on Ethics in Governance, endorsed the above resolution after noting that independence of Judiciary is inextricably linked with judicial ethics and any conduct on the part of a Judge which demonstrates lack of integrity and dignity will undermine the trust reposed in the judiciary by the citizens and, therefore, the conduct of a judge should be above reproach. In the Writ Petition (C) No. 288/09 filed on behalf of the Hon'ble Supreme Court in the Delhi High Court challenging the order dated 6 January, 2009 passed by the Central Information Commission under the Right to Information Act, 2005, it has been asserted on behalf of the Supreme Court that the Judiciary has no objection to the disclosure of assets of Judges provided this is done in a formal manner by an Act of Parliament with adequate safeguards. In this backdrop, it is considered necessary to enact a law in this regard to meet with the larger public interest as well as ensuring and maintaining the independence of the judiciary.

4. The Judicial Standards and Accountability Bill, 2010 seeks to repeal the Judges (Inquiry) Act, 1968, while retaining its basic features and aims to achieve all the above objectives of creating a statutory mechanism for enquiring into individual complaints against Judges of the High Courts and the Supreme Court and recommending appropriate action, enabling declaration of assets and liabilities of Judges and laying down the judicial standards to be followed by the Judges. All these measures will increase accountability of Judges of the High Courts and the Supreme Court thereby further strengthening the independence of the judiciary.

5. The proposed Bill would strengthen the institution of judiciary in India by making it more accountable thereby increasing the confidence of the public in the institution.

6. The Bill seeks to achieve the above objectives.

NEW DELHI;  
The 10th November, 2010.

M. VEERAPPA MOILY.

PRESIDENT'S RECOMMENDATION UNDER ARTICLE 117 OF THE CONSTITUTION OF  
INDIA

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[Copy of letter No. K.11015/5/2009-US.II dated the 16th November, 2010 from Dr. M. Veerappa Moily, Minister of Law and Justice to the Secretary-General, Lok Sabha]

The President, having been informed of the subject matter of the proposed Judicial Standards and Accountability Bill, 2010 has recommended the introduction and consideration of the Bill under article 117(1) and (3) of the Constitution.

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*Notes on clauses*

*Clause 2.*— This clause defines certain expressions used in the proposed legislation, which, *inter alia*, include the expressions “assets”, “immovable property”, “movable property”, “competent authority”, “incapacity”, “investigation committee”, “inquiry”, “judicial standards”, “liabilities” and “misbehaviour”, etc.

*Clause 3.*— This clause specifies the judicial standards. It provides that every Judge shall continue to practice universally accepted values of judicial life as specified in the Schedule to the proposed legislation. The judicial standards, *inter alia*, include that no Judge shall—(a) contest the election to any office of a club, society or other association or hold such elective office except in a society or association connected with the law or any court; (b) have close association with individual members of the Bar, particularly with those who practice in the same court in which he is a Judge; (c) permit any member of his immediate family (including spouse, son, daughter, son-in-law or daughter-in-law or any other close relative), who is a member of the Bar, to appear before him or associated in any manner with a cause to be dealt with by him; (d) permit any member of his family, who is a member of the Bar, to use the residence in which the Judge actually resides or use other facilities provided to the Judge, for professional work of such member; (e) hear and decide a matter in which a member of his family, or his close relative or a friend is concerned; (f) enter into public debate or express his views in public on political matters or on matters which are pending or are likely to arise for judicial determination by him, etc. It further defines the term “relative” for the purposes of this clause.

*Clause 4.*— This clause makes provision for declaration of assets and liabilities by Judges. It provides that every Judge shall make a declaration of his assets and liabilities in the manner as provided by or under the proposed legislation.

It further provides that a Judge shall, within thirty days, from the date on which he makes and subscribes an oath or affirmation to enter upon his office, furnish to the competent authority the information relating to the assets of which he, his spouse and his dependent children are, jointly or severally, owners or beneficiaries and his liabilities and that of his spouse and his dependent children.

It also provides that every Judge shall file with the competent authority, on or before the 31st July of every year, an annual return of such assets and liabilities, as on the 31st March of that year in the form and manner as may be provided in the rules.

*Clause 5.*— This clause provides for making available document or information in relation to a declaration of assets and liabilities of Judges on website. It provides that the competent authority shall exhibit the document or information in relation to a declaration of assets and liabilities of Judges in the case of Judges and Chief Justices of the High Courts, on the website of the High Court in which such Judges and Chief Justice are serving; and in the case of Judges of the Supreme Court and Chief Justice of India, on the website of the Supreme Court.

*Clause 6.*— This clause makes provision for maintenance of records. It provides that the competent authority shall keep the documents or information forms containing the details of the assets and liabilities and other particulars in relation thereto filed by the Judges in its safe custody for such period as may be decided by the Oversight Committee.

*Clause 7.*— This clause makes provisions relating to complaints. It provides that any person making an allegation of misbehaviour or incapacity in respect of a Judge may file a complaint in this regard to the Oversight Committee.

*Clause 8.*— This clause makes provision for manner of making of complaint. It provides that the complaint under clause 7 shall be filed in form and manner as may be provided in the rules made in this behalf. It further provides that the complaints should set forth particulars of the misbehaviour or incapacity which is the subject matter of allegation and be verified at the foot of the complaint by the complainant and shall specify, by reference to the numbered

paragraphs of the complaint, what he verifies of his own knowledge and what he verifies upon information and shall refer to the source of the information.

*Clause 9.*— This clause makes provision for reference to Scrutiny Panel. It provides that the Oversight Committee shall refer all such complaints to the appropriate Scrutiny Panel constituted under Chapter V for scrutiny.

*Clause 10.*— This clause provides for the constitution of the Scrutiny Panel. It provides that there shall be constituted a panel to be called "Complaints Scrutiny Panel" in the Supreme Court and in every High Court to scrutinise the complaints against a Judge received under the proposed legislation.

*Clause 11.*— This clause provides for the composition of the Scrutiny Panel. It provides that the Scrutiny Panel in the Supreme Court shall consist of a former Chief Justice of India and two Judges of the Supreme Court to be nominated by the Chief Justice of India and in every High Court the Scrutiny Panel shall consist of a former Chief Justice of that High Court and two Judges of that High Court to be nominated by the Chief Justice of that High Court.

*Clause 12.*— This clause specifies the functions of the Scrutiny Panel. It provides that if the Scrutiny Panel, after scrutiny of the complaint referred to it for scrutiny under clause 9, and after making scrutiny of the complaint, as it deems appropriate, is satisfied that there are sufficient grounds for proceeding against the Judge, it shall, after recording reasons therefor, submit a report on its findings to the Oversight Committee for making inquiry against the Judge in accordance with the provisions of this Act; and if the complaint is frivolous or vexatious, or, is not made in good faith, or there are not sufficient grounds for inquiring into the complaint, or the complaint relates only to the merits of the judgment or a procedural order, then, it shall after recording reasons therefor submit a report on its findings to the Oversight Committee for not proceeding with the complaint and treating the matter as closed.

It further provides that the Scrutiny Panel shall submit its report to the Oversight Committee within a maximum period of three months from the date of receipt of the complaint from the Oversight Committee.

*Clause 13.*— This clause provides the procedure of the Scrutiny Panel. It provides that save as otherwise provided in the proposed legislation, the Scrutiny Panel shall have power to regulate its own procedure in scrutinising the complaints.

*Clause 14.*— This clause vests power of civil court in the Scrutiny Panel in respect of scrutinising the complaints forwarded to it which include the powers of summoning and enforcing the attendance of any person from any part of India and examining him on oath; requiring the discovery and production of any document; receiving evidence on affidavits; requisitioning any public record or copy thereof from any court or office; and issuing commissions for the examination of witnesses or other documents.

*Clause 15.*— This clause makes provisions for officers and other employees for the Scrutiny Panel. This clause provides that the Chief Justice of India shall determine the nature and categories of the officers and other employees required to assist the Scrutiny Panel in the discharge of its functions and provide the Scrutiny Panel with such officers and other employees as he may think fit.

It further provides that the Chief Justice of the High Court shall determine the nature and categories of the officers and other employees required to assist the Scrutiny Panel in the discharge of its functions and provide the Scrutiny Panel with such officers and other employees as he may think fit.

*Clause 16.*— This clause makes provision regarding frivolous and vexatious complaints. It provides that if the Scrutiny Panel is of the opinion that a complaint was filed frivolously or vexatiously or only with a view to scandalise or intimidate a Judge, it may refer the case to the Oversight Committee for further action.

*Clause 17.*— This clause provides that the Central Government may, by notification, establish a National Judicial Oversight Committee with effect from such date as it may decide.

*Clause 18.*— This clause provides for the composition of the Oversight Committee. It provides that the National Judicial Oversight Committee shall consist of a retired Chief Justice of India appointed by the President after ascertaining the view of the Chief Justice of India as its Chairperson; and a Judge of the Supreme Court and the Chief Justice of a High Court, to be nominated by the Chief Justice of India and; the Attorney General for India an, *ex officio* member and an eminent person to be nominated by the President as its Member.

It further provides that where the allegations are against a Judge of the Supreme Court, who is a member of the Oversight Committee, then, the Chief Justice of India shall nominate another Judge of the Supreme Court in his place as a member of that committee and in case where the allegations are against the Chief Justice of a High Court, who is a member of the Oversight Committee, then, the Chief Justice of India shall nominate a Chief Justice of another High Court in his place as member of that committee.

It also provides that after the commencement of the proceedings relating to a complaint against a Judge if any change in the composition of the Oversight Committee arises due to elevation of a member of the Oversight Committee, as the Chief Justice of India or a Judge of a Supreme Court, as the case may be; or if any change arises in the composition of the Oversight Committee due to refusal or retirement or resignation or any other reason, then, the proceedings of the Oversight Committee shall continue from the stage from which it was pending before such change and the Chairperson of the Oversight Committee shall make such incidental changes, as he deems necessary, to continue the proceedings.

*Clause 19.*— This clause provides for procedure of forwarding of complaint relating to misbehaviour to Scrutiny Panel. It provides that the Oversight Committee shall, within three months of the receipt of a complaint relating to misbehaviour of an individual Judge of the Supreme Court or Chief Justice of a High Court, refer the complaint, to the Scrutiny Panel of the Supreme Court to scrutinise and report thereon; and in the case of complaint of misbehaviour of an individual Judge of a High Court, refer the complaint, to the Scrutiny Panel of the High Court in which such Judge is acting as such, to scrutinise and report thereon.

*Clause 20.*— This clause makes provision for maintenance of records of complaints forwarded to Scrutiny Panel. It provides that the Oversight Committee shall maintain a record of the complaints referred to the Scrutiny Panel.

*Clause 21.*— This clause provides that a complaint against the Chief Justice of India shall not be referred to the Scrutiny Panel for scrutiny but shall be scrutinised by the Oversight Committee.

*Clause 22.*— This clause makes provision for investigation by an investigation committee. It provides that the Oversight Committee constitute an investigation committee to investigate into the complaint in respect of which the Scrutiny Panel has recommended in its report for making inquiry against the Judge in accordance with the provisions of the proposed legislation.

It further provides that the composition and tenure of the investigation committee shall be such as may be decided by the Oversight Committee and different investigation committees may be constituted for inquiry into different complaints.

*Clause 23.*— This clause vests power of civil court in the Oversight Committee and the investigation committee in respect of investigation of the complaints forwarded to them which include the powers of summoning and enforcing the attendance of any person from any part of India and examining him on oath; requiring the discovery and production of any document; receiving evidence on affidavits; requisitioning any public record or copy thereof

from any court or office; and issuing commissions for the examination of witnesses or other documents.

*Clause 24.*— This clause empowers the investigation committee with the power of search and seizure. It provides that if it has reason to believe that any documents which, in its opinion, will be useful for, or relevant to, any preliminary investigation or inquiry, are secreted in any place, it may authorise any officer subordinate to it, or any officer of an agency referred to in clause 25, to search for and to seize such documents.

It further provides that the provisions of the Code of Criminal Procedure, 1973, relating to searches shall, so far as may be, apply to searches under this clause subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if, for the word "Magistrate", wherever it occurs, the words "investigation committee or any officer authorised by it" were substituted.

*Clause 25.*— This clause empowers the investigation committee to make a request to the Oversight Committee for providing assistance to it and the Oversight Committee on such request may invoke its powers in this behalf under clause 38 of the proposed legislation.

*Clause 26.*— This clause empowers the investigation committee to proceed *ex parte* if a Judge, to whom notice is issued by the investigation committee referred to in clause 22, refuses to appear before it or does not co-operate with it in conducting investigation.

*Clause 27.*— This clause empowers the investigation committee to cause investigation into any act or conduct of any person after giving such person a reasonable opportunity of being heard and to produce evidence in his defence if it considers necessary so to do for the purpose of its investigation into any allegations made against a Judge.

*Clause 28.*— This clause provides that the investigation committee, after completion of the inquiry in respect of a complaint, shall submit its findings to the Oversight Committee.

*Clause 29.*— This clause lays down the procedure in inquiries by the investigation committee. It provides that the investigation committee shall frame definite charges against the Judge on the basis of which the inquiry is proposed to be held and every such inquiry shall be conducted *in camera*.

It further provides that the charges framed and the statement of grounds on which each such charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified by the investigation committee.

It also provides that the investigation committee shall complete the inquiry within a period of six months from the date of receipt of the complaint and the Oversight Committee may after recording the reasons in writing extend the period for completion of the inquiry by a further period of six months.

*Clause 30.*— This clause provides that the investigation committee shall have power to regulate its own procedure in making the inquiry and shall give reasonable opportunity to the Judge of cross-examining witnesses, adducing evidence and of being heard in his defence.

*Clause 31.*— This clause provides that if it is requested by the investigation committee, then, the Central Government may appoint an advocate to conduct the cases against the Judge.

*Clause 32.*— This clause makes provision for staff of the Oversight Committee. It provides that the Oversight Committee shall appoint a Secretary and such other officers and employees possessing such qualifications, as the President may determine, from time to time, in consultation with the Oversight Committee.

It further provides that the terms and conditions of service of the Secretary, officers and employees of the Oversight Committee shall be such as the President may determine, from time to time, in consultation with the Oversight Committee. The Secretary, officers and other employees shall be under control and direction of the Oversight Committee.

It also provides that the Oversight Committee shall provide such number of its officers and other employees to assist the investigation committee as the Oversight Committee considers appropriate having regard to the nature of investigation in a case.

*Clause 33.*— This clause empowers the Oversight Committee, if it considers it necessary in the interest of fair and impartial scrutiny of complaints or investigation or inquiry, to recommend stoppage of assigning judicial work including cases assigned to the Judge concerned during the pendency of the inquiry by the investigation committee.

*Clause 34.*— This clause empowers the Oversight Committee to dismiss the complaint or impose minor penalties. It provides that if the Oversight Committee on receipt of the report from the investigation committee is satisfied that no charges have been proved, it shall dismiss the complaint and matter be closed and no further action shall be taken against the Judge and the complainant shall be informed accordingly. It further provides that if all or any of the charges have been proved but the Oversight Committee is of the opinion that the charges proved do not warrant removal of the Judge, it may, by order, issue advisories or warnings.

It further provides that if the Oversight Committee, on receipt of the report from the investigation committee is satisfied that there has been a *prima facie* commission of any offence under any law for the time being in force by a Judge, it may recommend to the Central Government for prosecution of the Judge in accordance with the law for the time being in force.

It also provides that the inquiry or investigation may be continued against the Judge even if such Judge has demitted office, if the Oversight Committee is of the opinion that the misbehaviour is serious in nature and requires to be inquired into or investigated and the Oversight Committee may after conclusion of inquiry forward its findings to the Central Government to take further action in the matter under relevant law for the time being in force.

*Clause 35.*— This clause makes provision for advice to President for removal of Judge. It provides that if the Oversight Committee is satisfied that all or any of the charges of misbehaviour or incapacity of a Judge have been proved and that they are of serious nature warranting his removal, it shall request the Judge to voluntarily resign and if he fails to do so, then advise the President accordingly who shall refer the matter to Parliament.

*Clause 36.*— This clause provides that if the Scrutiny Panel refers a case to the Oversight Committee under clause 16 relating to complaints which was filed frivolously or vexatiously or only with a view to scandalise or intimidate a Judge, the Oversight Committee shall consider the matter and if it concurs with the conclusion of the Scrutiny Panel, it may authorise the filing of a criminal complaint against the original complainant before a competent court.

*Clause 37.*— This clause makes provision to deem all proceedings under the proposed legislation to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, and the Oversight Committee shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

*Clause 38.*— This clause empowers the Oversight Committee to take assistance of such officers of the Central Government or State Government or any agency thereof or authority as it deems fit.

*Clause 39.*— This clause makes provision as regard to confidentiality in complaint procedure. It provides that notwithstanding anything contained in any other law for the time being in force, the complainant and every person who participates in the scrutiny or investigation or inquiry as a witness or as a legal practitioner or in any other capacity,

whether or not he seeks confidentiality about his name, shall undertake to the Oversight Committee or Scrutiny Panel or investigation committee that he shall not reveal his own name, the name of the Judge complained against, the contents of the complaint or any of the documents or proceedings to anybody else including the media without the prior written approval of the Oversight Committee.

*Clause 40.*— This clause provides for keeping identity of complainant confidential. It provides that the Oversight Committee or the Scrutiny Panel or investigation committee may, at the request of a complainant, direct that the complainant be accorded such protection, as it deems appropriate, including keeping his identity confidential, from every body and also the Judge against whom the complaint is made.

*Clause 41.*— This clause provides that after the commencement of scrutiny of complaint no action for contempt of court shall lie or shall be proceeded with in respect of the allegations, which are the subject matter of the investigation or inquiry.

*Clause 42.*— This clause provides that any scrutiny, investigation or inquiry pending before the Scrutiny Panel or investigation committee or Oversight Committee shall not affect the criminal liability in respect of such allegations which are the subject matter of the investigation or inquiry.

*Clause 43.*— This clause make overriding provision with reference to confidentiality of informations. It provides that notwithstanding anything contained in the Right to Information Act, 2005 or any other law for the time being in force, all papers, documents and records of proceedings related to a complaint, preliminary investigation and inquiry shall be confidential and shall not be disclosed by any person in any proceeding except as directed by the Oversight Committee. However, the findings of the investigation committee and the orders passed by the Oversight Committee under clause (b) of sub-clause (1) of clause 34 relating to action taken on receipt of the report from the investigation committee shall be made public.

*Clause 44.*— This clause provides for protection of action taken in good faith. It provides that no suit, prosecution or other legal proceeding shall lie against the Chairperson or any member of the Oversight Committee, Scrutiny Panel, investigation committee or against any officer or employee, agency or person engaged by such committees or panel for the purpose of conducting scrutiny or investigation or inquiry in respect of anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

*Clause 45.*— This clause provides for laying of advice of Oversight Committee before Parliament. It provides that the President, on receipt of advice under clause 35, shall cause the findings of the Oversight Committee along with the accompanying materials to be laid before both the Houses of Parliament.

*Clause 46.*— This clause provides for motion for removal of a Judge. It provides that on laying of the advice of the Oversight Committee along with the accompanying material, the Central Government may move a motion in either House of Parliament for taking up the said advice for consideration by the House.

*Clause 47.*— This clause makes provision of investigation into misbehaviour or incapacity of Judge by investigation committee for removal of Judges. It provides that if notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed in the case of a notice given in the House of the People, by not less than one hundred members of that House; and in the case of a notice given in the Council of States, by not less than fifty members of that Council, then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

It further provides that if the motion is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and the matter shall be referred to the Oversight Committee for constitution of an investigation committee under clause 22 and thereafter the

Oversight Committee shall constitute an investigation committee which shall conduct an inquiry in accordance with the provisions contained in Chapter VI and submit its report to the Oversight Committee for being submitted to the Speaker or Chairman, as the case may be, for consideration.

It also provides that where it is alleged that a Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the investigation committee may arrange for the medical examination of the Judge by such Medical Board to be appointed for the purpose by the Speaker or, as the case may be, the Chairman and the Medical Board shall undertake medical examination of the Judge and submit a report to the investigation committee stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

It also provides that if the Judge refuses to undergo medical examination, the Medical Board shall submit a report to the investigation committee stating therein the examination which the Judge has refused to undergo, and the investigation committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged in the motion.

*Clause 48.*— This clause makes provision for consideration of report and procedure for presentation of an address for removal of Judge. It provides that if the report of the investigation committee contains a finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, then, no further steps shall be taken in either House of Parliament in relation to the report and the motion pending in the House or the Houses of Parliament shall not be proceeded with. It further provides that if the report of the investigation committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in clause 46 shall together with the report of the investigation committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

It further provides that if the motion is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

*Clause 49.*— This clause empowers the Joint Committee to make rules. It provides that a Joint Committee of both Houses of Parliament shall be constituted in accordance with the provisions hereinafter contained for the purpose of making rules to carry out the purposes of this Chapter. It further provides that the Joint Committee shall consist of fifteen members of whom ten shall be nominated by the Speaker and five shall be nominated by the Chairman and the Joint Committee shall elect its own Chairman and shall have power to regulate its own procedure.

It also specifies the matter for which the Joint Committee may make rules. It also provides that any rule made under this clause shall not take effect until they are approved and confirmed both by the Speaker and the Chairman and are published in the Official Gazette, and such publication of the rules shall be conclusive proof that they have been duly made.

*Clause 50.*— This clause provides punishment for intentional insult or interruption to the Oversight Committee. It provides that whoever intentionally insults, or causes any interruption, to the Scrutiny Panel or investigation committee or Oversight Committee while the Oversight Committee or Scrutiny Panel or investigation committee or any of their members is doing scrutiny or conducting any investigation or inquiry under the proposed legislation, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

## FINANCIAL MEMORANDUM

Clause 17 of the Bill provides for establishment of National Judicial Oversight Committee comprising of a retired Chief Justice of India as the Chairperson, a Judge of the Supreme Court and the Chief Justice of a High Court to be nominated by the Chief Justice of India and the Attorney-General for India and an eminent person to be nominated by the President as members.

Clause 31 of the Bill empowers the Central Government, if requested by the investigation committee, to appoint an advocate to conduct the cases against the Judge.

Clause 32 of the Bill provides for appointment of a Secretary and such other officers and employees as the President may determine, from time to time, in consultation with the Oversight Committee.

The expenditure on account of the aforesaid provisions would be negligible. At this stage, it is not practicable to make an estimate of expenditure likely to be involved in the financial year 2010-2011, both recurring and non-recurring. However, the expenditure would be met from the Consolidated Fund of India.

## MEMORANDUM REGARDING DELEGATED LEGISLATION

Sub-clause (1) of clause 57 of the Bill empowers the Central Government to make rules, in consultation with the Chief Justice of India, to carry out the provisions of the proposed legislation.

2. Sub-clause (2) of clause 57 specifies the matters in respect of which such rules may be made. These matters, *inter alia*, include: (i) the form in which the information relating to assets and liabilities is to be furnished by Judges and the form for filing annual return by Judges regarding their assets and liabilities, (ii) the form and manner in which a complaint is to be filed, (iii) other matters in respect of which the Scrutiny Panel and the Oversight Committee shall have powers of a civil court, and (iv) any other matter which is required to be or may be prescribed for the purposes of the proposed legislation.

3. The rules made by the Central Government are to be laid before each House of Parliament.

4. The matters in respect of which rules may be made in accordance with the aforesaid provisions of the Bill are matters of procedure and detail and it is not practicable to provide for them in the Bill itself. The delegation of legislative power is, therefore, of a normal character.

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to lay down judicial standards and provide for accountability of Judges, and, establish credible and expedient mechanism for investigating into individual complaints for misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and to regulate the procedure for such investigation; and for the presentation of an address by Parliament to the President in relation to proceeding for removal of a Judge and for matters connected therewith or incidental thereto.

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*(Shri M. Veerappa Moily, Minister of Law and Justice.)*

LOK SABHA

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CORRIGENDA

to

THE JUDICIAL STANDARDS AND ACCOUNTABILITY BILL, 2010

[To be/As introduced in Lok Sabha]

1. Page (ii), in the Arrangement of Clauses, in clause 23,-  
for "investigating"  
read "investigation"
2. Page 1, in line 5 of the long title,-  
for "proceeding"  
read "proceedings"
3. Page 7, line 2,-  
omit "ex officio"
4. Page 7, line 16,-  
for "Judge of a Supreme Court"  
read "Judge of the Supreme Court"
5. Page 8, in the marginal heading against clause 23, -  
for "investigating committee"  
read "investigation committee"
6. Page 12, line 15,-  
for "both the Houses"  
read "both Houses"
7. Page 13, line 22,-  
for "Act which has"  
read "Act has"

P.T.O.

8. Page 19, line 8 from the bottom,-  
for "provisions"  
read "provision"
9. Page 20, line 13 from the bottom,-  
for "provisions"  
read "provision"
10. Page 20, line 11 from the bottom,-  
for "Scrutiny Panel"  
read "Scrutiny Panel in the Supreme Court"
11. Page 20, line 7 from the bottom,-  
for "Scrutiny Panel"  
read "Scrutiny Panel in the High Court"
12. Page 21, line 20,-  
for "of a Supreme Court"  
read "of the Supreme Court"
13. Page 24, line 18,-  
for "make overriding"  
read "makes overriding"
14. In the docket page,-  
for "proceeding for removal"  
read "proceedings for removal"

**NEW DELHI;**

**November 26, 2010**  
**Agrahayana 5, 1932 (Saka)**

**Bill No. 97 of 2014**

THE CONSTITUTION (ONE HUNDRED AND TWENTY-FIRST  
AMENDMENT) BILL, 2014

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*further to amend the Constitution of India.*

BE it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:—

1. (1) This Act may be called the Constitution (One Hundred and Twenty-first Amendment) Act, 2014.

Short title  
and  
commencement.

5 (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In article 124 of the Constitution, in clause (2),—

Amendment  
of article 124.

10 (a) for the words “after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose”, the words, figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted;

(b) the first proviso shall be omitted;

(c) in the second proviso, for the words “Provided further that”, the words “Provided that” shall be substituted.

Insertion of new articles 124A, 124B and 124C.

3. After article 124 of the Constitution, the following articles shall be inserted, namely:—

5

National Judicial Appointments Commission.

“124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:—

(a) the Chief Justice of India, Chairperson, *ex officio*;

(b) two other senior Judges of the Supreme Court next to the Chief Justice of India—Members, *ex officio*;

10

(c) the Union Minister in charge of Law and Justice—Member, *ex officio*;

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People—Members:

15

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination.

20

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

Functions of Commission.

124B. It shall be the duty of the National Judicial Appointments Commission to—

25

(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

30

(c) ensure that the person recommended is of ability and integrity.

Power of Parliament to make law.

124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.”

35

Amendment of article 127.

4. In article 127 of the Constitution, in clause (1), for the words “the Chief Justice of India may, with the previous consent of the President”, the words “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of India, may with the previous consent of the President” shall be substituted.

40

Amendment of article 128.

5. In article 128 of the Constitution, for the words “the Chief Justice of India”, the words “the National Judicial Appointments Commission” shall be substituted.

6. In article 217 of the Constitution, in clause (1), for the portion beginning with the words “after consultation”, and ending with the words “the High Court”, the words, figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. Amendment of article 217.
- 5        7. In article 222 of the Constitution, in clause (1), for the words “after consultation with the Chief Justice of India”, the words, figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. Amendment of article 222.
8. In article 224 of the Constitution,— Amendment of article 224.
- 10        (a) in clause (1), for the words “the President may appoint”, the words “the President may, in consultation with the National Judicial Appointments Commission, appoint” shall be substituted;
- (b) in clause (2), for the words “the President may appoint”, the words “the President may, in consultation with the National Judicial Appointments Commission, appoint” shall be substituted.
- 15        9. In article 224A of the Constitution, for the words “the Chief Justice of a High Court for any State may at any time, with the previous consent of the President”, the words “the National Judicial Appointments Commission on a reference made to it by the Chief Justice of a High Court for any State, may with the previous consent of the President” shall be substituted. Amendment of article 224A.
10. In article 231 of the Constitution, in clause (2), sub-clause (a) shall be omitted. Amendment of article 231.

## STATEMENT OF OBJECTS AND REASONS

The Judges of the Supreme Court are appointed under clause (2) of article 124 and the Judges of the High Courts are appointed under clause (1) of article 217 of the Constitution, by the President. The *Ad hoc* Judges and retired Judges for the Supreme Court are appointed under clause (1) of article 127 and article 128 of the Constitution respectively. The appointment of Additional Judges and Acting Judges for the High Court is made under article 224 and the appointment of retired Judges for sittings of the High Courts is made under article 224A of the Constitution. The transfer of Judges from one High Court to another High Court is made by the President after consultation with the Chief Justice of India under clause (1) of article 222 of the Constitution.

2. The Supreme Court in the matter of the Supreme Court Advocates-on-Record Association Vs. Union of India in the year 1993, and in its Advisory Opinion in the year 1998 in the Third Judges case, had interpreted clause (2) of article 124 and clause (1) of article 217 of the Constitution with respect to the meaning of “consultation” as “concurrence”. Consequently, a Memorandum of Procedure for appointment of Judges to the Supreme Court and High Courts was formulated, and is being followed for appointment.

3. After review of the relevant constitutional provisions, the pronouncements of the Supreme Court and consultations with eminent Jurists, it is felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of Judges of the Supreme Court and High Courts. The said Commission would provide a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process.

4. The Constitution (One Hundred and Twenty-first Amendment) Bill, 2014 is an enabling constitutional amendment for amending relevant provisions of the Constitution and for setting up a National Judicial Appointments Commission. The proposed Bill seeks to insert new articles 124A, 124B and 124C after article 124 of the Constitution. The said Bill also provides for the composition and the functions of the proposed National Judicial Appointments Commission. Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.

5. The proposed Bill seeks to broad base the method of appointment of Judges in the Supreme Court and High Courts, enables participation of judiciary, executive and eminent persons and ensures greater transparency, accountability and objectivity in the appointment of the Judges in the Supreme Court and High Courts.

6. The Bill seeks to achieve the above objectives.

NEW DELHI;  
*The 8th August, 2014.*

RAVI SHANKAR PRASAD.

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### PRESIDENT'S RECOMMENDATION UNDER ARTICLE 117 OF THE CONSTITUTION OF INDIA

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[Copy of letter No. K-11016/1/2009-US.II, dated 8 August, 2014 from Shri Ravi Shankar Prasad, Minister of Law and Justice to the Secretary-General, Lok Sabha]

The President, having been informed of the subject matter of the proposed Constitution (One Hundred and Twenty-first Amendment) Bill, 2014, recommends to the House the consideration of the Bill under article 117(3) of the Constitution of India.

ANNEXURE

EXTRACTS FROM THE CONSTITUTION OF INDIA

\* \* \* \* \*

CHAPTER IV. —THE UNION JUDICIARY

**124.** (1) \* \* \* \*

Establishment and constitution of Supreme Court.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4).

\* \* \* \* \*

**127.** (1) If at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the attendance at the sittings of the Court, as an *ad hoc* Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

Appointment of *ad hoc* Judges.

\* \* \* \* \*

**128.** Notwithstanding anything in this Chapter, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court:

Attendance of retired Judges at sittings of the Supreme Court.

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

\* \* \* \* \*

**217.** (1) Every Judge of a high Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years:

Appointment and conditions of the office of a Judge of a High Court.

Provided that—

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) 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;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

\* \* \* \* \*

Transfer of a Judge from one High Court to another.

**222.** ( 1 ) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

\* \* \* \* \*

Appointment of additional and acting Judges.

**224.** (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

\* \* \* \* \*

Appointment of retired Judges at sittings of High Courts.

**224A.** Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.

\* \* \* \* \*

Establishment of a common High Court for two or more States.

**231.**(1) \* \* \* \* \*

(2) In relation to any such High Court,—

(a) the reference in article 217 to the Governor of the State shall be construed as a reference to the Governors of all the States in relation to which the High Court exercises jurisdiction;

\* \* \* \* \*

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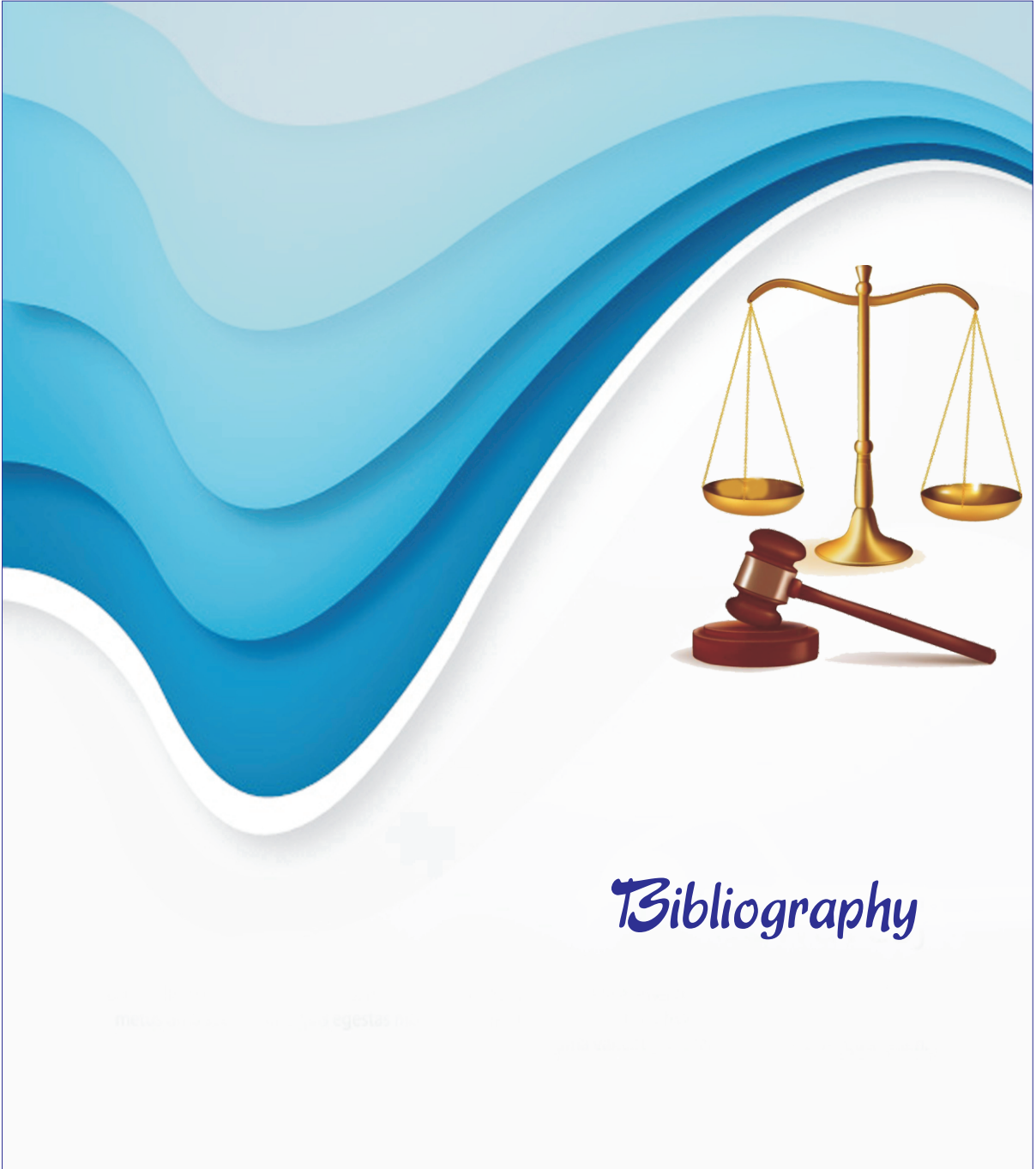
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further to amend the Constitution of India.

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*(Shri Ravi Shankar Prasad, Minister of Law and Justice)*



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## SUMMARY

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The “Transparency International’s Global Corruption Barometer 2013” highlighted the lack of public trust in India’s judiciary, which many feel is overbearing and democratically unaccountable.

In India, from times immemorial, judges have been held in highest esteem and revered as super humans. But now a days the instances of corruption infecting the judicial system are reported. There is a great danger that such instances can erode the faith that people have in the judiciary. The judge is accountable to no one. The judiciary versus the executive or legislature is a battle which is not new but in present times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash-point. A need definitely is there to make judiciary accountable, as derogation of values in judiciary is far more dangerous than in any other wing of the government as judiciary has to act as the guardian of our Constitution.

Judicial accountability or answerability of the judges is not a new concept. Several countries in their Constitutions have already provided for ensuring accountability of judiciary. The accountability of judges, particularly in the context of increasing allegations of malpractices resorted to by judges, is a matter of a grave concern in India. As of now there is no open process for the selection, promotion and, if required, the dismissal of High Court or Supreme Court judges in the country. The entire process is retained within the whims of the Supreme Court. All attempts so far to enforce accountability on the judiciary are vetoed by the judiciary itself.

A string of judicial scandals has erupted in the past, starting with Chief Justice Sabharwal’s case, and then going on to the Ghaziabad

district court Provident fund scam, the 15 lakh cash-at-judges-door scam of Chandigarh, elevation of Justice Dinakaran to Supreme Court and the Justice Soumitra Sen case of Calcutta. Some of these have arisen due to the lack of transparency in the selection and appointment of judges.

Under Article 121 of the Constitution, the conduct of a judge cannot be debated in the Parliament. There is a separate procedure for impeachment; this is with the intention to secure the independence of the judiciary. Similarly, under Article 122, the proceedings of the Parliament cannot be questioned by the judiciary even if a point of order is found contrary to the statute. This is indirectly envisaging the supremacy of the legislature in making laws, based on reasonable policies that cannot be questioned. It is not that there is no provision for judicial accountability under our Constitution. A difficult impeachment process is the best weapon of Indian judiciary.

The Supreme Court of India has ruled that no first information report (FIR) can be registered against a judge, nor a criminal investigation be initiated without prior approval of the Chief Justice of the Supreme Court. Further, the judiciary is even insulated from public criticism by the threat of Contempt of Court, which can be used in a very draconian manner by the very judges towards whom the criticism is directed, as we saw in the Arudhanti Roy case. The sword of contempt has kept the judiciary away from searching public scrutiny, particularly within the mainstream media.

The judiciary is obviously happy to live with this situation as well. The judiciary is even seeking to effectively remove itself from the purview of the Right to Information Act. The Supreme Court has recommended amending the Act to remove this jurisdiction of the Central Information Commission over it under the Act and further that

any information interdicted by the Chief Justice on the ground of the independence of judiciary will not be given. It is generally accepted that public interest litigation and judicial activism have touched almost every aspect of life. But there are also many instance of judiciary being unlimited.

The foul smell of corruption is increasingly enveloping the temples of justice, popularly referred to as courts. Almost everyone is aware of the level of the corruption in the lower stream of justice. But, the screamers about instances of corruption in the higher judiciary appear to have forced the government and the Chief Justice of India to look afresh for an effective antidote. One of the most frequently used words in India is 'corruption' which signifies a range of things.

In India, the removal of a corrupt judge is virtually impossible. In India, the procedure of impeachment is not feasible because it requires a huge (two-thirds) majority in Parliament. In the 1990s, when the Congress was in power, a motion seeking to impeach Justice V. Ramaswami could not be passed by Parliament as Congress members abstained from voting. There has been no other attempt at impeachment in India.

Judicial corruption in India is attributable to a number of factors, including "delays in the disposal of cases, shortage of judges and complex procedures, all of which are exacerbated by a preponderance of new laws." In 2012, it was estimated that at the current rate of disposal it would take another 350 years for disposal of the pending cases even if no other cases were added. Another factor is the low ratio of judges per one million population. This high workload encourages delays and adjournments on frivolous grounds. The judicial system, including judges and lawyers, has developed a vested interest in delays as well as corruption.

The judicial system of our country, far from being an instrument for protecting the rights of the weak and oppressed, has become an instrument of harassment of the common people of the country. In fact it has become the leading edge of the ruling establishment for pushing through neo liberal policies by which the resources such as land, water and public spaces left with the poor are being increasingly appropriated by the rich and the powerful. The courts are increasingly displaying their elitist bias and it appears that they have seceded from the principles of the Constitution which set up a republic of the people who were guaranteed "justice- social, economic and political".

In the words of David P. Currie, “ The critical question is neither how to make judge independent nor how to control them but rather how best to reconcile the best values to find the happy medium the golden mean, how in other words to optimize the cost and benefits of judicial independence and accountability”

### **Judicial Accountability: Meaning**

The word ‘accountability’ is defined in Oxford dictionary and the meaning is that ‘responsible for your own decisions or actions and expected to explain them when you are asked’. Simply, it means that one who will be held responsible for his work or duty or action or decision and even would be expected to give the explanation about his action that has been performed by him. The word ‘accountability’ and the word ‘judicial’ should be read together to form a meaning of judicial accountability. Judicial accountability expects immunity of judges from internal infirmities with total independence. Judicial accountability must be in consonance with the Article 235 of the Constitution of India which empowers the higher judiciary to control subordinate judiciary. India is a democratic country where judges are treated as a “God” in the judicial system.

Such environment creates serious situation as it is hard to keep our eyes closed and remain blind folded from what is happening? Delay in dispensing of justice and increasing corruption in the judiciary made us to realize that this is all happening because of lack of judicial accountability towards the judicial system, towards the government as well as towards the citizens of India. This is all because justice has supreme place in our democratic system. Accountability of the judges preserves the rule of law and also promotes it by deterring conduct that compromises integrity, impartiality, and independence of judiciary. The judge who is facing impeachment process in the allegation of taking bribe with impurity, in spite of all, he is employed. Then accountability decreases his literal independence as he is enjoying to make himself dependent on external and internal influences that might interfere with his ability to follow the concept of rule of law.

### **Objectives of the Study**

The objectives of this research work are to touch upon all the important facets of judicial accountability. The main objective of the study is to find out various shortcomings available in the object of the rational, critical and comparative analysis of the following concept and find out their answers:

1. To evaluate the issue of judicial accountability in a democratic set up informed by rule of law and separations of powers.
2. To appreciate the reasons for delay in imparting justice.
3. To evaluate the constitutional and legislative mechanism related to the issue of judicial accountability.
4. To find out the efficacy of measure to check corruption among judges and to suggest an appropriate mechanism, if required.
5. To discuss the condition of services of judges and their impact on judge's functions.

6. To place the much talked about controversy regarding judiciary vs legislature and executive in proper perspective.

### **Scope of the Study**

To analyze that the laws which has been passed by the legislature, whether they are sufficient to curb the corruption in the judiciary. Is it being successful in bringing the more transparency and accountability in the judiciary of India?

### **Research Methodology**

1. The proposed study would be based mainly on descriptive, analytical and doctrinal methods. Besides these methods, some other methods found to be appropriate during study will also be applied according to the need of the study.
2. All the primary as well as secondary documentary sources will be utilized to make the study up-to-date, orderly and scientific. Various reports, books, articles, journals, judicial decision, website, international, constitutional norms and national measures will be taken as important research tools.
3. The hypotheses will be evaluated on the basis of provisions and polices made by the government. A critical analysis would do to evaluate the recent government policies in context to accountability of the judiciary. The research will be pursued by consulting various institutional libraries.

Independence of the judiciary plays importance role in upholding the foundations of the democratic system, hence ensuring a free society. Whenever there is a mention of the independence of the judiciary, there is always a concern about the latent dangers to the judicial independence and there arises the need of judicial accountability. In this regard, some

necessary steps will have to be taken if state and the judiciary want to provide speedy justice to citizens of India.

1. Lower judiciary should not be under the control of higher judiciary.
2. It is suggested that the President should appoint an advocate of 25 years of practice on the recommendation of Union Public Service Commission on examination or interview held by it. The officers of the lower judiciary having a career of 20-25 years of services may also be allowed to appear in a examination held by Public Service Examination for recommendation of the appointment of the judges of the High Court.
3. In a democratic set-up a party generally doesn't get the two- third majority in the Parliament. President of India should also be given the power of the dismissal on the proved misbehaviour or incapacity on the recommendation of a panel consisting of senior judges of Supreme Court, senior advocates and high senior- most Chief Justices of states.
4. The All Indian Judicial Services should be created for judicial officers in the same manner as that of IAS and IPS officers. At no point, the political party in power should have a choice to recommend the candidates. The collegium system may be adopted for selection to higher judiciary. Every 5 years judges to be tested for updating their knowledge by the higher judicial officers. Recently, it is good news that National Judicial Appointment Commission Bill 2014 has been passed by the Houses of the Parliament and it will replace the collegium system. Hope it would be good step of government of India to bring transparency in the appointment of the judges.

5. There should be a permanent body at the level of district judiciary, High Court and Supreme Court to hear the grievances of litigants and public in general in administration sides. In the absence of any forum to hear the grievances of the litigants, the official of the court have become unbridled.
6. Bar Association should set- up a committee at its own level to see that its members are working properly. The Bar Association must also take an action against its erring members. The members of Bar should not act in a manner which may be cost their reputation in the eyes of the public.
7. The license of advocates may be made subject to removal after a fixed period to show that they not be unbridled. Their licenses may be renewed after a examination by the concerned Bar Council.
8. There should be timely meetings between the members of the Bar and the members of the judiciary from time to time to ensure that they may remove their misunderstanding against each other. In the meetings, the officers of the district administration and police may also be invited. They must also raise their grievances in such meetings.
9. It has been seen that judges of a lower court and High Court do not give date of hearing to the litigants by their own hands. Every court must follow the directions of the Honorable Supreme Court, which have been issued in this regard.
10. Information and communication technology in lower courts should be adopted to provide speedy justice to the common people of India. The use of modern communication and information technology will also have a positive effect in a way of eliminating arbitrariness and corruption from courts. Video

conferencing may be included in the processing of the courts to escape from the lots of crowd in courts and for the safety purposes of the judges and the litigants. So that there is an urgent need to upgrade and expand infrastructure and simplify procedures.

11. There is a need to set up a judicial disciplinary authority over the misconduct of judges, to prevent the corruption in judiciary.
12. It is suggested that the number of courts should be increased so that the cases may be decided within a month. Police investigation is also the main reason of delay in justice. The police force engaged in investigation may be separated from the police engaged in maintaining the law and order.
13. Salaries of the judges should be increased and the number of holidays in all levels of judiciary should be cut down.
14. There should be an interaction between the judiciary and academics to attract talent and to cultivate fresh ideas. The law curriculum needs ethics education and up-gradation.
15. There is a need of an independent National Judicial Commission (NJC), which must be created as a constitutional body like the Election Commission.
16. The Judicial Commission must not be monopolized by existing or retired judges and must include respected members from the legislature and academia, independent thinkers, and activists. It should be empowered to appoint judges as well as probe complaints of misconduct against them and initiate criminal proceedings wherever required without anyone's consent.
17. Court should adopt a simple procedures enabling a common man to directly approach the court.

18. Ensuring the required standards in the legal professional or the person concerned.
19. There is a need that judicial process would should have been automated. This process can be made available in the software library. Generic package can be made available which will be utilized for creation of new applications by the domain user itself.
20. It is expected that the judicial system will be completely ICT enabled during this phase.

It is, therefore, indispensable that judiciary must be made accountable in its working so that it may restore the faith of the public. The Supreme Court has also observed that a single dishonest judge not only dishonors himself and disgraces his office but destroys the integrity of the entire judicial system. People's Convention on Judicial Accountability said that judicial system of the country far from being an instrument for protecting the rights of the weak and oppressed people of India, it has now become an instrument of the harassment of the common man of the country. Fingers are raised against the judicial system that it works only for the rich classes and not for the weak and the poor sections of the society.

In fact, the judicial system needs to be reclaimed and reinvented by the people of the country, so that it can come to function in accordance with the philosophy of the constitution. The system will need to be cleared of procedural complexities and cobwebs so that it can be accessed by the common citizens without professional lawyers, who have become a part of the exploitative judicial system. It will need to be strengthened to deliver justice quickly, efficiently and honestly. Whatever, additional financial allocation or additional judges are required for this must be done. For this, the various layers of protection

created to shield the judges from accountability would have to be peeled away.

In last, it may be concluded that there is a close relation between judicial appointments and independence of the judges. Public confidence in the judiciary depends upon open and transparent procedure for the appointments of the judges. Transparency and openness in the appointment of the judges depends upon the criteria and mechanism that is adopted. The criteria and mechanism should not be complicated because it shall have direct impact on the public trust as well as judicial independence. It is a need of the time that judicial appointment should be fair and transparent so that judicial independence may be well maintained. There has been a long controversy regarding the appointment of the judges from the very beginning. The appointment should be so made as to make the judges accountable to their work. It is judicial accountability that may maintain the confidence of people in the court system. The judicial independence and accountability must be balanced. Recently, the National Judicial Appointment Commission Bill 2014 has been passed by the both Houses of Parliament and it is hoped that it would bring more transparency and accountability in procedure of appointment of the judges.

*Supervisor*

*Submitted By*

**Professor (Dr.) S.K. BHATNAGAR**

**RAGINI NARAIN**

**School for Legal Studies**

**(Research Scholar)**

**Department of Human Rights**

**BBA University, Lucknow 226 025**