CHAPTER - VI
CHAPTER 6

C6.I(a) THE MAGNITUDE OF FACETS OF PROBLEMS - JUDICIAL INDEPENDENCE AND ACCOUNTABILITY:

Judiciary in India has grown extensively. The Indian constitution completed sixty years and above from its inception on 26th January 1950. Responsibilities on Judges have made them overburdened. The backlog of cases both in Supreme Court and High Courts are pending in thousands. There has been thinking among the judicial circle to provide justice to people not to travel long distances to reach the Supreme Court at New Delhi. India being a vast country, poor people from far off places like southern states and eastern states face lot of difficulties to reach to Supreme Court. Idea is generating to bifurcate Supreme Court and place its branches at convenient places.

C6.I(a)i. Bifurcation of Supreme Court:

The democracy is for the people. The Indians are united as a Nation with a unique cultural legacy. The people are proud being united. The historical and geographical grounds made Delhi to be the political capital of India. The British choose Delhi to be the capital and after independence we followed. Since people have established democracy they can also decide, where the judicial capital should be located. The Supreme Court should function where people and litigants need.

People of various stratas feel that huge sums of money are wasted by a single court situated in one corner of the country which is final. The litigants sell their properties to reach Delhi. Air, Railway and Road Travel costs have increased manifold. Lawyers fees have increased at Delhi.
Hotels have become costly. Judges take too many days to settle who work leisurely. New cases to be taken up, naturally have to wait till the old backlog of cases are cleared up. Hence a decision in Supreme Court is not bound with any decisive time factor.

It is best for the interest of people that the court or courts to be located where the litigants remain large in number. The Supreme Court should be accessible. In this large country like India, Delhi is located at a corner-while the majority of Indian people live mostly to the south, east and western parts. These factors are to be considered. Some feel that there must be zonal benches.

Zonal Supreme Court Benches:

There should be four zonal benches of Supreme Court. V.R. Krishna Iyer, a retired Chief Justice of India writes, "the South feels dominated by the north owing to the location of Supreme Court. Is justice being alienated by distance, culture and language from the north? When the Supreme Court authority over rule of the whole nation, this insular judicial imperialism will be a divisive force. This should be avoided at all costs. Decentralisation based on geography, history and social factor is an imperative need". (1)

Four Cassation Benches are to be set up in the Northern Region / Zone in Delhi; the Southern Region / Zone in Chennai / Hyderabad, the Eastern Region / Zone in Kolkata and the Western Region / Zone in Mumbai to deal with all appellate work arising out of the orders/judgements of the High Courts of the Region / Zone. V.R. Krishna Iyer further suggests that "if it is found that Article 130 of the constitution can not be stretched to make it possible to implement this recommendation,
Parliament should enact a suitable legislation or constitutional amendment for the purpose".\(^{(2)}\)

Judicial Justice is definitely precious to the people. There should been easy facility available for the Bench and the Bar together to operate to dispense competent and sound justice. People are not to be harassed economically with excess of expenses. Hence the Bench and Bar must be accessible to the people.

**Questionnaire to Elicit Public Opinion and from Judicial Bodies:**

A questionnaire containing 34 items by Justice K.K. Mathew, Chairman of Law Commission was suo-motto issued though this had not been asked by the Government. This Questionnaire was issued on 1st January 1982 to elicit public opinion and from Judicial Bodies in the study of “The problem of evolving a methodology for speedier disposal of matters before the Supreme Court and High Courts”\(^{(3)}\)

The questionnaire related to whether the Supreme Court exclusively dealing with constitutional matters and whether a court of Appeal should be set up as the final arbiter of disputes of law (other than Constitutional Law) leaving the Supreme Court to concentrate exclusively on constitutional issues. This raised a controversy on the bonafides of the commission. Justice Mathew however denied that the Questionnaire should support public opinion infavour of splitting the Supreme Court. Justice Mathew did not however hide his support for setting up a constitutional court. He said that “the Supreme Court, as it was functioning at present, did not have the right atmosphere of leisure needed for satisfactory adjudication of the constitutional issues. The work load of the Supreme
Court was so high that the judges could not find the leisure to attain the intellectual equipment” (4)

Justice Jagmohan Reddy endorsed the idea of a separate constitution court, Justice Krishna Iyer favoured the creation of wings in Supreme Court to deal with Constitutional and non-constitutional matters. Article 124 provides one Supreme Court and one Chief Justice. Justice Krishna Iyer said, “To supplant Supreme Court and to substitute it with two courts, as contemplated in the Questionnaire, might be deviation from the “founding deed”. The driving force behind the Law Commission’s suggestion, he observed, was elimination of arrears and this could be achieved by having a permanent constitution wing and the other dealing with non-constitutional matters, “Krishna Iyer further confirmed, “Plastic Surgery can not do the duty for the cardiac or cerebral surgery”, he remarked, “we need both for the court to-day”. (5)

Article 32 provides Right to Constitutional Remedy. Creation of a constitutional court would not alter the structure of the constitution. “The problem of pending cases could be solved by- having four or five benches of the Supreme Court in different Zones”, Justice Jagmohan Reddy asserted. (6)

The Questionnaire had a hostile reception from Jurists and Lawyers. The Madras conventions of Bar Council of India rejected the Questionnaires suggestion that the Supreme Court be replaced by a constitutional court and a court of appeal. A former Chief Justice of Kerala and Madras, P. Govinda Nair said there was no need to replace the Supreme Court by a constitutional court dealing exclusively with such matters. (7) The political party like BJP National Executive opposed
bifurcation of Supreme Court. The very idea of creating multiple benches of Supreme Court has now gone to cold storage.

C6.I(a)ii. **Right to Information and Declaration of Assets by Judges:**

In a democratic Country like India, every aspect of administration of justice can not have any secrecy. Secrecy and democracy appear to be contradictory. People have formed democracy so they have every right to know everything. Right to information is a democratic right. All representatives of people like legislatures are responsible to the people, so also the executives and judiciary. None of these organs can work secretly. There must be transparency of every act of the Government when the Government is responsible to the people.

**Right to Information:**

The foundation for Right to Information was laid down by a judgement of Supreme Court in the year 1975 in the election case of Raj Narain v. Indira Gandhi\(^8\). The Supreme court rejected the security claim of privilege on the disclosure of security of instructions for the Prime Minister stated, “In a Government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The Right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussions on public security. To cover with the veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose
of parties and politics or personal interest or bureaucratic routine. The responsibility of officials to explain and justify their acts is the Chief safeguard against operation and corruption". (9)

The Supreme Court further expanded the Principle of Right to Information in subsequent years and included the right to know about criminal liabilities and assets of candidates contesting for electoral posts". The citizens who elect MPs and MLAs are entitled to know that their representative has not mis-conducted himself in collecting wealth after being elected". (10) As per RTI Act 2005 persons filing nominations for MPs, MLAs are to disclose their assets. Public demand came up, then the judges and civil servants declare their assets. One RTI activist Subhash Agrawal demanded to know whether Judges of Supreme Court and High Courts were complying with 1997 “Code of Conduct” adopted at the Chief Justices Conference which required judges to disclose their assets to Chief Justices. This aroused controversy and pressure.

Judges Declaration of Assets and Liabilities Bill 2009:

The Government introduced the Judges (Declaration of Assets and Liabilities) Bill 2009 in Parliament on 03.08.2009 with a controversial clause 6 read as “Not withstanding anything contained in any other law for the time being in force, the declaration made by a judge to the competent authority shall not be made public or disclosed, and shall not be called for or put in to question by any citizen, court or authority and save as provided in subsection 2, no judge shall be subjected to any enquiry or query in relation to the contents of the declaration by any person”. (11)
Support for Disclosure of Assets and Liabilities by Judges:

A large number of retired Chief Justices of Supreme Court and High Court and Judges of Higher Judiciary including Justice Krishna Iyer, Justice J.S. Verma, Justice V.N. Khare and eminent Jurists like Ram Jethmalani, Shanti Bhushan, Prashanta Bhushan, Fali S. Nariman, Soli J. Sorabjee publicly expressed their views in support of Assets' Declaration by Judges. K.G. Balakrishnan, CJI who was opposing vehemently with the plea that Judges are public Authority but ultimately he accepted as Judges are public servants. The controversy was dropped due to media interest and public opinion aroused for the support of Judges Declaration of Assets. However the declaration so far has been made voluntary and not yet made compulsory.

In a democracy, people are the real sovereign entitled to know that their public servants are paying their taxes regularly. These servants should also declare their assets acquired by them are proportionate or disproportionate to their legal income. This will be possible when declaration of assets are made compulsory. By voluntary declaration some may hesitate to declare. However on the basis of the appeal made by “Campaign for Judicial Accountability and Reforms (CJAR) to make voluntarily declaration of assets by Judges public, Justice K. Kaman, former Judge of Punjab and Haryana High Court made his declaration of assets public at Rs.15.49 Lakhs (12) followed by Justice D.V. Shylendra Kumar of Karnataka High Court at Rs.46 Lakhs(13). On the website of Supreme Court, all the 21 Judges of Supreme court revealed their assets and liabilities voluntarily ranging between lakhs of rupees (14) but not like some politicians in crores of rupees. All 33 sitting Judges of Kerala High Court also publicly declared their assets and liabilities voluntarily. (15)
The public disclosure of assets and liabilities by Judges is definitely a welcome step towards judicial accountability. The voluntary disclosure of assets by Judges should be made mandatory by an Act of Parliament. There is no place of secrecy in democracy. All acts should be transparent by all organs of Government including the Judiciary.

C6.I(a)iii Judges Skirt Global Norms on Conflict of Interest:

A Judge is a human being. He may purchase shares in various companies like any other person for the benefit of his family. This is not a crime. In case the shares exceeds than his known legal source of income than he is accountable and a doubt arises about corruption. A Judge should restrain from corrupt practices to accumulate properties.

Global Norm for Conflict of Interest:

The Global Norm is that a Judge having any financial interest in any party for which he is presiding should automatically withdraw himself. This will otherwise lead to conflict of interest. Justice R.V. Ravindran on 26.08.2009 disclosed his shares in 100 companies including 5000 in Reliance Companies involving Ambani Brothers. His daughter was also associated with shares in the high profile Gas disputes. Justice Ravindran withdraw himself because he thought the justice should not interfere with his and his daughters conflict disclosed having shares in union carbide, rescued himself.

There are judges in our country who cover themselves with Global norm with the plea of following “Code of Conduct” - Restatement of Values of Judicial Life adopted in the Chief Justices Conference in December 1999. Clause-II state’s, “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.” (16)

The Judges across the Globe assembled at Bangalore adopted UN Sponsored “Bangalore Principles of Judicial conduct”, adopted in 2002 in the host country, India Clause -2.5 of the Bangalore Principle stipulates, “A judge shall disqualify himself from participating in any proceeding in which the judge or a member of the judge’s family has an economic interest in the outcome of the matter in the controversy”. (17)

The Global norm is “No man could be a judge in his own cause”. A Judge is not to be confined to a cause in which he is a party. If a Judge has an interest in any party, he should automatically withdraw.

**Example of Judge S.H. Kapadia:**

There are examples when Judges in India confer having shares in companies and when no objection is raised by lawyers. The Judge presides over. This is not fair, SC Judge S.H. Kapadia passed orders in Vedanta case (later S.H. Kapadia becomes the CJI) in favour of Vendanta by substituting Sterlite Industries, had admitted shares in Vedanta, raised controversy for conflict of interest. This is a Aluminum Refinery Project, Nimayamgiri KBK district, Odisha. Justice Kapadia continued presiding over Vedanta Issue. There was no objection for his handling by the lawyers. In reality such a judge should withdraw from presiding over on his own rather than asking the lawyers for their consent. This is escaping oneself but definitely raises controversy.

Besides Justice S.H. Kapadia, the SC Judges like Justice Dalveer Bhandari, Justice D.K.Jain, Justice Markandey Katju, Justice V.S. Sirpurkar,
Justice R.M. Lodha, Dr. B. Sudershan Reddy, Justice V. Sathasivam, Justice Deepak Verma, Justice Balbir Singh Chauhan, Justice R.V. Rabindran, Justice J.M. Panchal, Justice Mukundakam Sharma have declared their shares in various companies and made public on a voluntary basis. These were posted on the Supreme Court website on 26.08.2009.\(^{(18)}\)

Judgement can not become impartial if the presiding judge holds a share in a disputed company.

**Judges Kin Practice:**

There is no harm if the sons, daughters or near relatives practice as lawyers but it will not be appropriate for such lawyers to practice in his father’s or near relation’s court. This will also raise conflict of interest.

It was revealed that sons and daughters of as many as 13 judges, enrolled in Gujarat High Court. They were practicing in their relative judge’s court and appeared in thousands of cases. Justice B.P. Majumdar’s first son S.P. Majumdar enrolled himself as an advocate in 2003 and appeared in 2030 cases till December 2006. Justice Majumdar’s second son P.P. Majumdar enrolled as an advocate in June 2006 and appeared in 2007 cases by end of 2006. These two advocates outshone leading advocates of Gujarat like K.K. Vakharia, S.B. Vakil and S. Nanavati. These three advocates handled only 591 cases between almost the same period. Similarly sons and daughters of other judges handled for less cases.

Justice A.M. Kapadia’s daughter Shaili Kapadia appeared in 433 cases, Justice A.L. Dave’s son H.A. Dave appeared in 413 cases and Justice K.A. Puj’s daughters Niyati K. Shah appeared in 216 cases. Justice Sethana’s daughter Delnez Sethana handled 19 cases and Justice Sethana’s
second son Hormaz B. Sethana appeared in 123 cases. The details of other judge’s Kin Practice have also been highlighted by Pioneer. (19)

The Supreme Court Bar Association took a serious note on this Kin Practice of Gujarat High Court. The members of Supreme Court Bar Association moved one unanimous plea that advocates must adhere to the moral code of conduct by desisting from appearing before their relative judges. They also favoured that if judges are transferred on this account, a proper inquiry must be conducted prior to their shifting. (20)

C6.I.(a)iv. Tacking Backlog of Cases:

India is a vast country. The population is growing very fast. As per 2011 Census, the population of India has reached 121.01 crores (21). It is but natural that the number of litigants have also increased. The Higher as well as the Lower Judiciary are facing mounting of backlog cases reaching to thousands. The Judges’ population is not increasing as per population Judges Ratio. Judges have been unable to constitute more than two Judge Benches.

Correction of Lower Courts Decision:

“Over 90% of regular hearing cases are civil, criminal service, labour, tax, land and business matters, which are generally family routine requests to correct a lower courts decision.” (22)

The Supreme Court benches, mostly by now consist of two judges who can not over turn a verdict by a two judge or three-judge bench. This results Supreme Court, essentially sitting as just another High Court. The litigation process is lengthening people who can not effort suffer for several visits. This draws attention of the court from pressing constitutional issues. This emphasizes to make the judicial system more just for those without the
resources to reach the corridors of Supreme Court. “In 2008, writ petitions, where people approach the Supreme Court directly to enforce their fundamental rights, accounted for only about 2% of all admission matters and none was admitted”(23).

**Supreme Court Backlog of Cases:**

“The Supreme Court is facing a mounting backlog, which at nearly 50,000 cases is so high that judges have been unable to find time to constitute 5 Judge benches regularly”(24)

It drawn the attention of Government for shortage of judges. The Supreme Court (Number of judges) Amendment Bill, 2008, proposed and raised from 25 to 30 excluding C.J.I. This will provide relief to some extent. The backlog is more directly caused by the member of cases and the type of cases the Supreme Court accepts rather than laying less number of judges. Nick Robinson, graduated from Yale Law School in 2006 analysed this issue, says from 2005 to 2008, the court accepted about 12% of admission matters placed before it for regular hearing (it decided about 5,000 cases during regular hearing in the same year).(25)

This acceptance rate, more than any other factor, has not only created the court’s backlog, but defined its character and function. The Supreme court is open to accept appeal cases from High Courts. The large number of pending cases leads ultimately for acceptance of high percentage of cases. These total to backlog of cases accumulated earlier.

The Supreme Court acceptance of cases are of a wide range and variety. The type of cases naturally need more time for decision making process. The people become impatient and blame the Judges, some unnecessarily. “In 2007, the three subject categories that most dominated the
court’s docket were criminal matters (974 decisions) service matters (737 decisions) and indirect tax matters (651 decisions). Although on average the court accepted 12% of matters placed before it for regular hearing, the highest acceptance rates were somewhat counter-intuitively for direct tax matters (20%) and arbitration (19%).(26)

There may be a popular belief that acceptance of Public Interest Litigation (PIL) cases may be quite high. The time spent may be less. Justice is given quickly. The study is different from the findings. “In 2007, the court accepted about 7% (or 68) PIL matters placed before it to be admitted for regular hearing. The actual acceptance rate for PIL, in-fact, is must lower than this. In 2006, the court received almost 20,000 letter or postcard petitions pleading for court’s intervention in matters that could be considered as PIL. After being screened by the Registrar, only 243 of these 20,000 pleas were even placed before the judges to be considered for admission out of which only a small fraction then made it to regular hearing”.(27)

Thus the ordinary cases constitute a large number to schedule. The important constitutional cases require larger benches. The Supreme Court disposed only 13 five judge bench matters and only one 9 judge bench matter in the year 2007.

Measures to Tackle Backlog Cases:

The Indian Judiciary was established with 8 Judges at the Apex Court in 1950, increased to 31 including the Chief Justice of India. Considering huge backlog of cases lying at the Supreme Court, increase in number of judges is justified but to find out qualified, sincere and devoted persons to
fill up these posts is a difficult task. Mere increase in the number of judges will not solve the problem.

The Government became aware of large scale backlog cases and made announcements of 3 initiatives for improving the administration of justice. The Department of Justice reported that it had approved a recommendation of the XIth Finance Commission for the creation of 1,734 additional “Fast Track” (Session) Courts to deal with long pending sessions as well as other cases (28) The Government anticipates approximately two million cases will be dealt with by these additional courts. The under trial cases awaiting in the Jails will be dealt with. These prisoners may be released early. The human right issues will be addressed. Government expenses will be reduced considerably.

The Second initiative is the computerisation of City Courts in Delhi, Mumbai, Chennai and Kolkata. This will facilitate parties to file their complaints by computer net work will facilitate the system of allocation of cases to particular judges. This will speed up the administration of justice.

The third initiative is being undertaken by the Department of Justice with the Supreme Court, High Courts and Law Departments of States by networking. This networking will assist these bodies involved in judicial reforms. This will improve access to information.

Suggestions of Parliamentarians:

Some members of Parliament have suggested to reduce the “vacation time” of judges to get them to work more hours to deal with court’s backlog problem. Judges in India appear for more days in court than their counterparts in most other countries (The Supreme Court heard arguments
Many judges use their “vacation time” to research and writing major decisions. They go through briefs and prepare cases. They engage themselves in professional developments by attending conferences and reading latest legal publications. The suggestion of reducing vacation time of judges may not be acceptable.

To deal with Supreme Court backlog problem, some Parliamentarians have suggested creation of a new bench to the Supreme Court. This would sit in South India. This may make the litigants of Southern States more accessible. This may not decrease high pendency rate. It may increase the rate because the Southern bench of Supreme Court becomes easier to approach and cheaper for litigants.

**Procedural Remedy:**

The present practice for hearing admission cases is each bench of the court spends two days a week hearing dozens of admission cases. The Lawyer pleads each case for an average of one to three minutes. After the admission of the cases, during actual hearing of the cases for those are accepted, oral argument can drag on for hours. In constitutional decisions, the argument can drag for days and weeks. This time consuming oral tradition prevails because judges are over worked and have practically little time to go through the written submissions before hearing a case. Brief and well drafted written submission by lawyers may save time for judges to attend oral submission. Some suggest to decrease Supreme Court’s backlog of cases is to create a separate constitutional court to hear only constitutional matters. This becomes more controversial than practical to implement.
C6.I.(b) JUSTIFICATION FOR INTERNAL/EXTERNAL BODY FOR SELECTION TO HIGHER JUDICIARY:

The justification for selection to higher judiciary by internal body of collegiums of judges of Supreme Court became controversial while proposing names of some judges to the Supreme Court. The need for an external body for selection was felt essential for the judges to be appointed to High Courts and Supreme Court. A step for reformation was envisaged.

The Procedure and Process for Appointment of Judges:

The procedure and process for appointment of High Court and Supreme Court judges has been the subject matter of three judgements of Supreme Court considered as internal body of judges.

First Judges Case:

The first one was the popularly known as the First Judges Case- S.P. Gupta v. Union of India, 1982\(^{(30)}\), the Supreme Court unanimously agreed with the meaning of the word consultation in Art 142(2). As in Art.112 and Art 222 ... in case of appointment of judges other than C.J.I., the C.J.I. is always to be consulted by the President.

Consultation does not mean concurrence and the President is not bound by it. Justice Bhagawati opined that the majority of judgement of Supreme Court in the judges transfer was found to have and adverse effect on the independence and impartiality of judges.

Second Judges Case:

The Second Judges Case- The Supreme Court Advocates on Record v. Union of India 1993 \(^{(31)}\) made a significant ruling on the selection process
for the judges. The Court held that the CJI has a pre-eminent position in the appointment of judges and have to consult two senior judges.

Third Judges Case:

In the Third Judges Case- In President Special Reference No.1 of 1998 (32), the Court set out in detail the procedure for appointment and transfer of judges. The Court further determined that “Consultation with the CJI” amounted to consultation by the CJI with the four senior most judges of the Supreme Court as regard to the appointment and transfer of judges. The individual opinion of the CJI, therefore was not enough to be considered as a consultation.

Justice P.N. Bhagawati described the process of appointment and transfer of judges remains a ritual and mystery confined to only a few handful judges. The mystery is kept secret between a few individuals, not more than 2 to 4 judges. This procedure may result in wrong selection for appointment and transfer of judges to higher judiciary.

Primacy for Selection:

In the above three judgements of judges cases, the primacy for selection is given to CJI and not to the Central Government. CJI too, alone can not take a decision, he has to consult his colleagues of most senior judges. This means appointment for judges lies with the collegiums of Supreme Court Judges. This is clear that judges have to judge themselves. The power remains with a handful of judges. Of course the CJI must consult two other or more judges before recommending names of judges for appointment to the Supreme Court and High Courts.
Are CJI Following Rules for Appointment?

Senior Advocate and former Law Minister Shanti Bhushan and Advocate Kamini Jaiswal questioned Justice Ashok Kumar’s appointment as a permanent judge of Madras High Court during the tenure of Chief Justice of India, K.G. Balakrishnan, allegedly without following the norms laid down by the apex court. This prompted a Bench comprising Justice Arijit Pasayat and Justice K. Jain sought the data from the Central Government by an affidavit indicating as to (1) how many additional judges were made permanent after 1st January 1999. (2) In how many cases, the additional judges were made permanent because of the recommendation of the CJI alone. (3) In how many cases, the additional judges were made permanent with the recommendation of the collegiums of judges and the reasons for departure, if any.

This brings down to the question are the “CJIs following rules in appointment of judges?” raised by Shanti Bhushan and Kamini Jaiswal through a writ petition filed in the Supreme Court of India on 16.07.2007. The writ petition was called for hearing by the Bench on 30.07.2007 and the above 3 questions were asked by the Bench to Central Government. (33)

In response to the above the Union of India, through its Law Minister disclosed by an affidavit filed that, “a total number of 351 additional judges have been appointed permanent judges during the period 01.01.1999 and 31.07.2007. In these cases, successive Chief Justices of India have not consulted the collegiums while considering the cases of appointment of additional judges as permanent judges of the High Courts and have advised appointments on their own consideration. here has been no case where an additional judge has been appointed a permanent judge after consultation with the collegium”. (34)
Appointment is not Transparent:

There is a serious problem with the method of selection and appointment of judges to higher judiciary. There is no transparency in the process. There is no system for preparing short list of names. There is also no method followed for choosing among the eligible candidates. The whole process appears to be adhoc and arbitrary. Political favouritism takes places when the selection and appointment were in the hands of Executives. Nepotism takes places when appointments have been with the Judiciary, either by CJI or collegium. All these means that no standard procedure is followed for selection and appointment of judges to higher judiciary.

Is Justice Ashok Kumar's Appointment Justified?

Let us analyse what was violated in the appointment of Justice Ashok Kumar. The guidelines laid down by apex court in 1998 on judges appointment was violated. Justice Kumar was first made an additional judge in Madras HC in April 2003. His term as an additional judge was extended from time to time as the collegium comprising the then CJI and two Senior Judges (CJI R.C Lahoti, Justice Y.K. Sabharwal and Justice Rumal Pal) refused to make him a permanent judge allegedly because of adverse reports. “On February 2/3, 2007, Justice Kumar was appointed permanent judge of the Madras High Court disregarding the law laid down in the 1998 judgement of the apex court. The opinion of the CJI was not formed in the manner required because the CJI neither consulted the two senior- most judges of the Supreme Court nor other Supreme Court judges who were conversant with the High Court concerned”, (35) the petitioner Anil Divan emphasized.
Though not unprecedented, the apex court has so far, only twice examined the appointment of judges to High Courts and only once quashed the appointment of K.N. Shrivastava in 1992.

In 1993, the SC appointed its Chief as Head of a Collegium of two other judges- whose numbers it fixed only to increase them to four in another judgement only five years later on 28.10.1998 as the appointing authority for judges of SC and HCS (President Special Reference No.1 of 1998).\(^{(36)}\)

**Appointment System not Justified:**

The entire appointment system setup by the Supreme Court is not justified. The Law Minister, Dinesh Goswami proposed the establishment of a National Judicial Commission in 1990 to take care of appointment and accountability of judges in higher courts. More than two decades have passed. The proposal has not yet been implemented. The major reason is successive Chief Justices have apposed it.

Justice S.E Barucha said on 28:10.1998 on the advisory opinion of SC on President’s Special Reference that CJI in future will look optimistically and act as per Second Judges case. The CJI must consult two other Senior Judges while recommending a name of a Judge for selection and appointment to SC and HC But surprisingly Justice Barucha himself ignored his own recommendation and not justified court’s ruling after he became CJI on 01.11.2001.\(^{(37)}\)

Late H.M Seervai in his classic Constitutional Law of India, opined that judgements delivered by majority “bristle with almost every fault”... the ruling to be ‘null and void”. The judges had not followed the mandatory
provision of Article 145(4) and (5) of the constitution. Lord Simonds called the ruling of Veeraswami's case on 25.07.1991 is also a case of "a naked usurpation of the legislative function under thin guise of interpretation". (39)

Lord Diplock, a judicial activist pointed out in 1980 that "it endangers continued public confidence in the political impartiality of the judiciary under the guise of interpretation". (40).

Robert Stevens, a scholar among barristers, Opines that "Judges choosing judges is the anti thesis of democracy". (41)

This comment is made of particular relevance to India which we are facing for the last three decades. This may be unconstitutional usurpation of power, legislative and executive for the democratic governance.

It flouted the constitutional provisions and Dr. B. R. Ambedkar's authoritative exposition in constituent Assembly on May 24, 1949." The collegium has no place in the constitution, only in the Court's ipse dixit". (42)

An Example - Justice K. Veeraswami:

Let us discuss as an example, how a most corrupt judge like Justice K.Veeraswami escapes scrutiny from getting promotion as Chief Justice of Madras High Court. Veeraswami joined Madras Bar in 1941. He became Government pleader in 1959, HC judge in 1960 and Chief justice of Madras High Court in 1969.

The CBI filed an FIR and registered a case against him on 24.02.1976 in a Court in Delhi. He was alleged to be in possession of assets that were
disproportionate to his own sources of income and so committed offences under section 5(1)(e) and (2) of prevention of corruption Act. 1947. On 28-02-1976, copy of FIR was filed before the Sessions Court in Madras. On learning of these developments, Justice Veeraswami proceeded on leave on 09.03.1976. He retired on 08.04.1976 on attaining the age of superannuation.

A charge sheet was filed on 15.12.1977. If alleged that after assuming the Office of Chief Justice, Veeraswami gradually commenced accumulation of disproportionate assets and during 01.05.1969 to 24.02.1976, he was in possession of funds and property disproportionate by Rs.6,41,413.36P. to his known sources of income. Forty years ago, this amount was a lot of money. The Session Judge issued process for Justice Veeraswami’s appearance. He moved the High Court to quash the proceedings. A full bench of the court dismissed his petition. He further appealed to the Supreme Court.\(^{(43)}\)

Nothing could be done against Veeraswami. Veeraswami and other corrupted judges have become bad examples of appointments linked to bad practices. The links between the process of appointing judges and justification to the law appear to be ironical. The bad appointments could have been avoided. Due emphasis could also have been given for the prevention of these bad appointments. These are clear examples of betraying the framers of the constitution. In other words we are betraying our own constitution.

Another Example - Justice Dinakaran:

The democratic system in India is very strong. Due to public pressure, Information and Technology media pressure and legal community pressure, the Supreme Court of India, for the first time is under pressure to withdraw a name of a Justice it recommended for selection to be appointed as a Supreme
Court Judge. A report appeared in “the Hindu” on 27.08.2009 about the Collegium’s recommendation to appoint five new judges to Supreme Court. These were Ananga Kumar Patnaik, C.J. of Madhya Pradesh HC, Tirath Singh Thakur, C.J. of Punjab & Haryana HC, Surinder Singh Nijjar, C.J. of Calcutta HC, K.S. Radha Krishnan, C.J. of Gujarat and P.D. Dinakaran, C.J. of Karnataka HC. Pressure from various Sources highlighted the background of Justice Dinakaran as corrupted who was alleged to have land allegations related to 197 acres of land grabbing. Chennai and Karnataka Bar Associations and legal community; Forum for Judicial Accountability (FJA) and Committee on Judicial Accountability (COJA) rose up in protest because the collegiums have not considered the allegations of corruption against Justice Dinakaran or avoided carefully. The protest, not to appoint Justice Dinakaran as a Judge of SC was made to Prime Minister, Union Law Minister and Chief Justice of India. Ultimately Dinakarans allevation was dropped. Other four Judges joined as Judges of Supreme Court of India.

The Dinakaran episode has brought to the surface, the unsatisfactory manner of selection, the problem of arbitrary appointment recommended by the collegiums. Hence the collegiums, an internal body has no justification to recommend for selection to higher judiciary because they are overlooking the corrupt nature of some of the judges.

Formation of External Body:

We therefore need a permanent fulltime external body such as Independent Judicial Performance Commission as a constitutional body to examine the performances of Judges for selection to higher judiciary. This external body must have power to take disciplinary action against the judges being corrupted and prevent them from elevation. The body can also have
power to remove such judges, suspend or transfer or forced them to take voluntary retirement. They should not infect other sincere judges to bad practices.

The Campaign for Judicial Accountability and Judicial Reform (CJA & JR), New Delhi called on the Government and Judiciary to have urgent public consultations on the composition and constitution of a Judicial Performance Commission. This external body of Judicial Performance Commission could be constituted soon after the required constitutional amendment. This body will be welcomed by all political parties. Prashanta Bhushan, a senior most advocate of Supreme Court on behalf of Campaign for Judicial Accountability and Judicial Reform (CJA and JR), New Delhi has suggested a Five Member composition of such a commission. The first member, selected by a collegium of all judges of Supreme Court to be the Head of this Performance Commission. The Second member can be selected by all the Chief Justices of High Courts. The third member could be selected by the Union Cabinet. The fourth member can also be selected from among the collegium of National Human Rights Commission (NHRC); Chief Election Commissioner (CEC), Chief Vigilance & Chief Commissioner (CVC); Chief Attorney General (CAG) and Chief Information Commissioner (CIC). The fifth member can be selected by a collegium of Leaders of Opposition of both Houses of Parliament, Speaker and Vice-President of India. (44)

This external body of Judicial Performance Commission to be legally recognized by the Government with necessary constitutional amendment, will be responsible for maintaining transparency, among the judges of Higher Judiciary. It will look in to the rampant corruption prevalent in the
judiciary and take necessary steps to prevent corruption among the justices of our country.

C6.I.(c) WRONG APPOINTMENTS MAKE ADVERSE EFFECTS:

Qualified persons in legal education join as members of the Bar. These members of the Bar are usually selected as Judges upto the level of district courts with experience of certain years of legal profession as Lawyers. Further some among them are selected as Judges of High Court. A few brilliant of these judges are selected as Chief Justices of High Courts. Mostly some of the Chief Justices are again selected as Judges of the Supreme Court. The senior most and meritorious person is again selected as Chief Justice of India when an vacancy arose. In this entire process and procedure, wrong selection leads to wrong appointment of Judges at various level in both lower and higher courts.

Wrong appointment of judges have affected the image of the Court. These have also undermined the confidence of the people in the Courts. The courts play the role as dispenser of justice. The surveillance of the community is tremendously increasing on the rulings of the courts. People have become alert. People want justice in proper manner. For any deviation, the judge shall be blamed.

Among the three organs of the State, the Legislature, the Executive and the Judiciary, linked to each other, the Judiciary is considered to be the weakest link. It has neither the power of the sword nor the power of the purse. The Judiciary has no financial resources. It can not enforce its own decision without linking with other organs. This means it has to depend on other organs to enforce its decisions. However, inspite of this weak link, the courts, particularly the Superior Courts have enjoyed high esteem and
commanded great respect of the people. This is possible because the Courts possess moral authority. These courts play the role as dispenses of justice in any dispute arising between the rich and the poor persons and also between the State and the Citizens without fear or favour.

**Adverse Effects of Wrong Appointment:**

The wrong or improper appointments of Judges make adverse effects not only for a short time but also continues for a long period afterwards. This effects discouraging other suitable persons from accepting offers for appointment. It is therefore essential to eliminate the chances of favouratism. Persons as Judges to be appointed basically on the merit consideration and good records of sincerity and honesty. A person appointed not on merit but on favouratism or other unlawful practices, can hardly command real and spontaneous respect of the Bar and the people. Any body familiar with the working of the Courts can easily understand that unless we have persons presiding over the courts who command real and spontaneous respect of the Bar and the people, the Court proceedings are liable to run into difficulties. In the system of dispensation of justice, the personality of the judge counts very much. The presiding officers devotion, efficiency and mastery of law or lack of these qualities make all the difference.

It is a common experience of the members of the Bar to observe in some case before one Judge takes two hours and before another judge takes two days. Time taken for giving judgement, less or more does not assume that one is better than the other.

**View of 79th Law Commission:**

In the context of wrong appointments of judges the 79th Report of Law Commission said, “We are also of the opinion that every effort should
be made to see that the best persons available are appointed to serve on the High Court Bench. The overriding consideration for this purpose should be the merit of the individual. All other considerations must be subordinated to the paramount necessity of having the best available person for the post. Experience tells us that wrong appointments not only affect the image of the courts, they also undermine the confidence in, and respect for, the High Court among the litigants, the members of the Bar and the general public. A wrong appointment also affects the quantum of output and the quality of disposal. Cases have also not been unknown when one wrong appointment has deterred competent persons from joining the Bench subsequently despite the entreaties of the Chief Justice". (45)

**View of 14th Law Commission:**

Dealing with the appointment of judges on consideration other than that of Merit, the Law Commission in its 14th Report observed, "The selection of a person on considerations other than of merit has far-reaching repercussions. Such a judge would naturally not receive from members of the Bar, who would be no strangers to his capacity, the full measure of cooperation which is needed for the proper administration of justice; nor would a judge so appointed generally have that amount of confidence in himself which alone can contribute to the efficient discharge of his duties. These circumstances are bound to affect adversely the quantity and quality of the work turned out by such a judge. It is axiomatic that the lowering of judicial standards must adversely affect the efficient administration of justice. It has been stated in some quarters that the larger the number of Judges, the lower is the proportionate output of work. We are of the view that such a generalization is not based on any acceptable data; but what seems to have led to lower output of work by Judges is the appointment of
persons who are not satisfactory. Whether a judge of a High Court is
selected from the Bar or from the service, he should be the fittest person
available to hold that office. If this cardinal principle is over-looked in
making the appointment and persons of individual capacity are appointed the
work turned out by such persons will naturally not come up to the proper
standards. If, therefore, there has been in some cases a proportionately lower
output of work when a larger number of Judges are appointed, the fall in the
work is clearly attributable to the circumstances that the persons added were
not fittest for the office. The inevitable effect of appointments of this
character to the High Court Bench on the disposal of Work, the mounting
arrears is obvious.\(^{(46)}\)

Hence care should be taken not to make wrong appointment of judges
both at the lower and higher courts to maintain the dignity of judiciary.

**C6.I.(d) THE IMPROVEMENT OF PROCEDURE FOR THE
APPOINTMENT IN HIGHER JUDICIARY:**

The question of appointment of judges to the High Courts and
Supreme Court and the procedure for improvement was thought of at the
higher circle of Union of India. Accordingly as per direction of Prime
Minister to examine the issue, the Department of Law, Justice and Company
Affairs wrote a letter on 29.12.1977 to the Member Secretary, Law
Commission, prevailing in 1977 to study the problem in depth and explore
possibilities of improvement. The letter also suggested to have a consultative
panel for appointment of judges to higher judiciary.\(^{(47)}\)

The question of appointment of a Informal Consultative Panel for
appointment of higher judiciary might face constitutional difficulties for its
validity.
The Chairman, Law Commission expressed Commission’s view on 24.01.1978 regarding the appointment procedure and its improvement with a constitutive panel for appointment need constitutional amendment. (48)

The consultative panel suggested, the name may be better to call, “Judges Appointment Committee” or Judges Appointment Commission” should consist of Chief Justice of India as its Chairman, (ex-officio); Minister of Law, Justice and company Affairs, Member (ex-officio), and other 3 members, each of whom has been SC Chief Justice or a Judge of the Supreme Court. In case of difference of opinion between the members of Panel, the opinion of the majority should prevail to be the majority of the panel. The panel if necessary can consult any member of the Bar including the Attorney General, Solicitor General and Advocate General.

**Improvement in Procedure for Appointment:**

The following improvement in the procedure for appointment of judges to High Courts and Supreme Court was recommended.(49)

(1) In case of appointment of Judge of the High Court, the Chief Justice of the High Court, before making recommendation, should consult his two senior most colleagues. In the communication, containing the recommendation, the Chief Justice should state that he has consulted the two senior most colleagues and what has been the view of each of them in respect of the recommendation. Normally, a recommendation in which the two senior most colleagues concur with the Chief Justice, should be accepted.

(2) Similar course should be adopted in case of the appointment of a Judge of the Supreme Court.

(3) In the matter of the appointment of the Chief Justice of the High Court,
no Junior Judge should normally be appointed in supersession of the senior most judge.

(4) If the senior most judge is considered not suitable for appointment as Chief Justice in that event, a Chief Justice or a Judge from another High Court should normally be appointed as Chief Justice.

(5) Apart from that also, we should more frequently appoint a Judge from outside as Chief Justice of the High Court. The disadvantage of this proposal is that an outsider Chief Justice would not have full knowledge about the local talent. The advantage, however would be that he would not suffer from any personal likes or dislikes from which a local person having long association with others, might suffer. It should not also take the outsider long to acquire knowledge of the local talent. An outsider is also likely to bring greater detachment and dispassionate approach to the office of the Chief Justice. The advantages may thus out weight the disadvantages.

(6) We should have also a convention according to which one-third of the Judges in each High Court should be from another State. This would normally have to be done through process of initial appointments and not by transfer. It would in the very nature of things, be a slow and gradual process and take some years before we reach the proportion. Once the principle of having a certain percentage of persons from outside the State as Judges of the High Court is accepted, the modalities to bring about the desired result can be worked out. One suggestion can possibly be that every Chief Justice while proposing the name of a person for appointment as High Court Judge should mention in the communication as to whether that person agrees to be appointed outside the State. In the case of District Judges proposed to be appointed, the prospect of promotion would, in most cases, be enough inducement and thus out weight the possible inconvenience of being posted outside the
State. As regards lawyers, some might consider it advantageous to be appointed outside the State so that after retirement they can resume, if they so desire, the practice in the State wherein they were practicing earlier.

(7) In the matter of appointment of Chief Justice of Supreme Court, the normal convention should be to appoint the senior most Judge. There should be no departure from this convention unless such a course is approved by the consultative panel.

The above proposals, which are of a broad character, would have the effect of not only eliminating political interference in the appointment of judges, they would also, more or less do away with the possibility of any Chief Justice bringing his personal likes and dislikes into the picture.

C6.II.(a) INDEPENDENCE AND ACCOUNTABILITY MUST GO HAND IN HAND.

India became a Republic on 26th January 1950. In the meantime a period of over six decades have passed. The difference of observation before 26th January 1950 and after 26th January 1950 is that we are ruled by our own people by framing our own constitution. Thus, the people have become the real masters. The citizens, the people have created State institutions and the functionaries. The citizens the people therefore, can demand accountability from different functionaries of the State.

There was no bribery in the Court during the first almost three decades. The thought of bribery was never imagined. It was unthinkable that Judges could take bribes. "It's not that all judges are corrupt but there are very few judges like Justice Krishna Iyer and Justice Sawant who are very sensitive to the issue of the poor. It is the right of the masses to ask for the
conduct of judges and their accountability in the same way that they can
demand this right from the Executives.”

The Executives are public servants, appointed by the Government. They are therefore accountable to their Employer-the Government. The Judges derive freedom from the very nature of their appointment. Oath empowers a judge for independent nature of working and thus develops empowerment of independence. A Judge is also immuned that no FIR could be registered against him without the prior written approval of Chief Justice of India in case of Judges of HCs. and SC. Being a brother-Judge, it is but natural that CJI will not give prior written approval. Hence the Judge become more powerful and independent.

Such a judge becomes more powerful with the power of contempt. There is therefore no other way to remove him except impeachment. The process of impeachment is so cumbersome that it has not yet become successful to remove a judge. In 1993, the Supreme Court appoints its Chief Justice as the Head of a collegium where two other senior most judges are members for appointment of judges. In 1998, the two members number increased to four in the collegiums as the appointing recommending authority of Judges of HCs and SC. The working of collegiums is facing criticism from legal circles. When the judge is not a public servant he is not accountable to the Government. If the Judge is a constitutional functionary and if the Parliament fails to pass impeachment motion against him, then the people of India can demand accountability of such judges. There is no alternative provision, provided in the constitution as an alternative to impeachment to tackle such corrupt judges. There is therefore an urgent need to amend the constitution to create an independent agency or commission to look after the problem of corrupt judges.
Alternative fulltime Agency or Commission:

An alternative full time Agency or Commission is urgently needed to consider the serious problem of accountability of judges. This proposed commission can take up complaints against judges, investigate them and take appropriate action against them. This commission is to be responsible both for the appointment and accountability of judges. The independence of judges on appointment and their accountability must go hand in hand. This commission shall be independent of the Government as well as judiciary.

Considering an in house body of sitting judges as a Judicial Council to look after the complaints against judges, proposed in the Judges Inquiry Bill will not serve the purpose. Bar Council the in-house body of Lawyers, Medical Council the in-house body of Doctors have failed to look to the accountability of Lawyers and doctors for their misconduct. Such bodies have their own conflict of interest. A body of sitting judges would be unable to devote enough time required to properly enquire in to the complaints against judges due to their over engagements and availability of time. The Judges have become so powerful in their independence that even criminal investigation can not be done against such a judge without prior written permission of Chief Justice of India. Let us examine what happened in Karnataka. There was a case against a number of judges visiting a Motel and misbehaving a woman. When the Police Officer came to enquire, the judges threatened him and said no FIR could be filed against them because they were judges. The Police Officer quietly left the spot. Similar action could not be taken against those judges involved in Ghaziabad Provident Fund scam. The investigation could not proceed in both the issues because the Chief Justice of India did not give prior written permission." We have get rid of this injunction."(51)
The other problem is the contempt of Court Act. To-day, even if you expose a judge with evidence, you run the risk of contempt. Judges are even seeking themselves free from RTI Act. We have to get rid of this contempt of Court Act but not the whole Act. Disobeying the order of the Court is Civil contempt that should remain. Interfering with the administration of justice is criminal contempt. It should also remain. “What need to be deleted is the clause about scandalizing or lowering the dignity of the court of which Arundhati Roy was sent to jail”\(^{52}\)

Judicial independence and accountability must go hand in hand. What would happen when judicial corruption is manifested by the very decision making process of a judge. You can not do anything to touch a judge because he is immune to his own benefit and yet get rid of from corruption charges.

**Twisting Verdict:**

Let us examine the best example of the Niyamagiri Lease Mining case in Kalahandi District of Odisha. Justice Kapadia who decided on the Niyamagiri Mining Lease case gave his verdict that Vedanta can not be given the Lease because it has been black listed by the Norwegian Government. He however said, Sterlite, the subsidiary company of Vedanta can be given the Lease. It is surprising to note that when the main Vedanta company was refused for Lease, how its subsidiary company was allowed lease? Justice Kapadia could twist the verdict to make it to go in his favour because he had shares in it and yet he passed an order in favour of Sterlite. Though Sterlite is officially given Lease but in reality the company is misusing the name of Vedanta. Vedanta is undertaking all socioeconomic developmental works in Kalahandi District and other areas of Odisha to remain in good book with the government machinery and befooling the
people of Odisha. Lease is given to Sterlite and Vedanta is on the forefront of works in Odisha. Vedanta’s popularity is growing day by day. How do you think of independence and accountability of a judge and accountability in case of Justice Kapadia? He has misused his power. Though there is a law against judges hearing cases where there is conflict of interest but they just by pass it. You can not complain because that would be contempt. Justice Kapadia later became the Chief Justice of India. You can not touch him.

The Supreme Court would file an appeal before itself challenging the judgement of Delhi High Court holding that the office of the CJI came under the ambit of RTI Act. “Holding that the CJI is a public authority under the Act, a full judge bench of Delhi High Court headed by Chief Justice A.P. Shah said, judges of the superior courts should make public their assets as they are not less accountable than the judicial officers of the lower courts”.

The Judicial Officers of the lower courts are bound by service rules to declare their assets. But there is no service rules for judicial officers of higher judiciary. This does not mean that they need not declare their assets. This is not justified.

The above verdict of CJI was seen as a set back to CJI. The CJI was constantly maintaining that his office did not come under the transparency law and hence could not pass with the information like disclosure of judges assets.

“In a path breaking judgement, the Delhi High Court under the purview of RTI Act rejected a Supreme Court Appeal, saying Judicial independence was not a judges personal privilege but a responsibility cast upon him. The Bench dismissed the appeal of Supreme Court which has
vehemently opposed bringing CJI's Office with in the purview of the Act on the ground that it would encroach upon its jurisdiction of independence".\(^{(54)}\)

Earlier when the power of appointment was with the government, judges were often selected on political considerations. Judiciary interpreted the words “appointment by the President in consultation with the Chief Justice of India” to mean “appointment by the collegiums of judges in consultation with the President”. This amounted judges being appointed on nepotistic considerations.

One of the main reasons for the selections is arbitrary. There is no procedure fixed. There is also no criteria being laid down for selection of right type of judges for the right posts. It is also not made clear that we are looking for integrity and competency of a judge with right temperament. By such selection and appointment the appointing authority is the collegiums or infact the CJI. The independence of judges is automatically acquired by the judges being appointed by the CJI and their accountability also remains with the CJI. One advantage is that the CJI will not take any adverse action in case of an errant judge because he is a brother judge. The independence of judge is clearly understood by his working pattern but his conduct is not at all understood regarding his accountability.

The independence and accountability must go hand in hand. It is being thus limited to CJI alone which is not enough in a democracy. The criteria for selecting judges needs to be discussed, debated and a procedure to be laid down. The method of measuring candidates on merit criteria need to be formulated. The method of comparison among meritorious candidates is to be short listed as eligible. This process is never followed. It has been so far
assumed the members of the collegium are trusted to pick up the best persons without going through the above exercise.

This is the reason why we need a full time body which can do the exercise of selecting judges carefully, scientifically and transparently. Today there is no transparency or public participation in the system. Public participation in the way of public hearings are necessary to ensure transparency in the selection and appointment process so that the future judges will remain accountable to be people in a democratic country.

For making independence and accountability of judges must go hand in hand, Campaign on Judicial Accountability (COJA), New Delhi had suggested that, “The Judicial Appointment Commission and the Judicial complaints commission, could each be formulated in the following manner: The Chairman selected by a collegiums of all judges of Supreme Court. Another member selected by a collegiums of all Chief Justices of High Courts, Another member selected by the Union Cabinet. Another member by the collegium of Leaders of opposition in the two houses of Parliament along with the Lok Sabha Speaker and Chairman of Rajya Sabha. A fifth member to be selected by a collegium of Chairman, NHRC, Chief Election Commissioner, Chief Vigilance Commissioner and the Chief Attorney General. Each member of each of the two Commissions would be full time members having a tenure of 5 years, so that after their nomination by these collegiums, they could function independently of them. They would have an investigating organization under their control, through whom they could get the backgrounds of the prospective appointees or complaints against the judges investigated”. (55)
The Judicial Standards Accountability Bill, 2012 already passed by the Lok Sabha on 30th March 2012, pending in Rajya Sabha is needed to setup a system to deal with complaints about misbehavior or incapacity of members of higher judiciary.

In the current collegiums system, only Judges appoint judges. An independent commission with a broad-based composition including bipartisan political representatives as well as eminent citizens can help ensure selection on merit rather than by patronage, opined S.H. Kapadia, Chief Justice of India. Retired Chief Justices J.S. Verma and V.N. Khari have supported the views of S.H. Kapadia, said B.S. Rghavan, emphasizing judicial accountability long overdue.

The present system of appointment by the collegiums of judges suffer from nepotism, arbitrariness and lack of transparency. We need a fulltime Judicial Appointment Commission for selecting Judges of higher Judiciary as well as members of commission, tribunals etc. said Smonath Bharti, Advocate Supreme Court of India and Delhi High Court.

The Parliamentary Standing Committee on the Judicial Accountability has refused to Team Anna’s demand for including for judicial corruption said Sunil Prabhu explaining Accountability Bill: Team Anna vs Govt. The Government is also against the inclusion of MPs in the panel that will probe corruption allegation against judges. “We have to ensure the independence of judiciary, we cannot interfere in their sphere and they cannot be brought under the Lokpal”, said Ex-Union Law Minister Salman Khurshe. “Lokpal is not for Judiciary” said Justice P.N. Bhagawati and Justice J.S. Verma. Asked about corruption in the higher judiciary, Mr. Ashwani Kumar, Union Law Minister said wherever judicial aberration has been
proved, a corrective “in house mechanism” would be one way to deal with it (62).

Thus these judges hence forth to be appointed will have independence to work and accountable to the system. The lack of accountability of judiciary exposed by the lack of a system of selecting judges and dealing with the complaints against them has lead to the issue of gradually losing its credibility. The Campaign of Judicial Accountability (COJA), New Delhi is a campaign for restoring the integrity of the Judicial system.

C6.II(b) HYPOTHESES EXAMINED:

The Researcher has prosecuted this study on the vital issue of Independence and Accountability of judiciary in India and planned out to take up the following hypotheses. Let us now at this stage, examine these hypotheses.

Examination of Hypothesis Number One:

“In what manner justification for conferring protection but not blanket protection on the laws included in the Ninth Schedule by constitutional amendments shall be matter of constitutional adjudication by examining the nature and extent of fundamental rights by a statute sought to be constitutionally protected?”

On an examination of the above hypothesis, it was revealed that once Supreme Court was pronouncing its verdict on a reference made by a 5-judge constitutional bench headed by Justice Y.K. Sabharwal. The verdict on 108 page judgement was based on the issue, whether laws placed in the Ninth Schedule after 24th April 1973 (when Keshavanand Bharati judgement was delivered) were beyond judicial review or not. The court
held that any law placed in the Ninth Schedule after the 24th April 1973 will be open to challenge.

The Ninth Schedule was incorporated in the year 1951 by Prime Minister Jawahar Lal Nehru to include laws on Land Reforms, has about 250 Laws seeking immunity. The controversial Tamil Nadu legislation, providing for 69% reservation, violating Supreme Court norm of 50% which has been placed in Parliament, has been challenged before the Court.

All constitutional amendments placed in the Ninth Schedule after 24th April 1973 shall have to be tested on the touchstone of the basic or essential features of the Constitution. Any law put in the Ninth schedule, it is presumed gives a blanket protection. It could not be subject to judicial scrutiny. The Parliament can not change the basic feature of the constitution. Every law introduced after 24th April 1973 is open to challenge.

All new constitutional amendments to be judged by its own merit. The fundamental rights have infact proved to be the most significant constitutional control on the government, particularly on its legislative power.

The validity of the constitution, 24th Amendment Act., 1971 was challenged in Keshavanand Bharati case popularly known as the Fundamental Right’s case, the petitioner had challenged the validity of the Kerala Land Reform Act. 1963. But during the pendency of the petition the Kerala Act. Was amended in 1971 and was placed in the ninth schedule by the 29th Amendment Act. The petitioners were permitted to challenge the validity of 24th, 25th and 29th Amendment to the Constitution.
The 25th Amendment, 1971 was passed to remove the difficulties created by the Supreme Court decision in the Bank Nationalisation case. A new clause (2-A) made it clear that the deprivation law passed under Article 31 could not be challenged on the ground that it infringes rights guaranteed in Art. 19 of the Constitution. The validity of this amendment has been upheld in Keshavanad Bharati Case.

The 29th Amendment, 1972 inserted two Kerala Land Reforms Act in the ninth schedule of the Constitution.

The 26th Amendment, 1971 was also necessitated by the decision of the Supreme Court in Privy Purse case in which the Presidential order derecognising the privileges of the Ex-Rulers of Indian States was declared unconstitutional. The Privy Purse was upheld to be property and therefore, it could not be taken away merely by an executive order. The Amendment omitted Art. 291 and Art. 362 and inserted a new Art 363-A, which abolished the right to Privy Purse and all rights, liabilities and obligations in report of Privy Purses.

This demonstrated the rights for broad checks on narrow rights of the State Power through a series of judgements of the apex court including the Bank Nationalisation case.

Examination of hypothesis Number Two:

"Should judicial activism not degenerate in to judicial authoritarianism? if much of what judiciary does, becomes more like discretionary and arbitrary exercise of policy choices rather then enforcement of Rule of Law, the whole dignity of law should let be undermined?"
On analyzing and examining this hypothesis the following could be drawn. The argument that the courts are neither meant nor equipped to run the country, though true, is a mere attempt to deviate from the real issue. The real issue is the gradual decline in the credibility of the other organs of the government. Corruption is losing public confidence among the elected representatives, the Civil Services and the Police. The judiciary and in particular, the Supreme count is counted as the only surviving hope. The criticism of Supreme Court is not much concerned on separation of power but concerned over judicial review of sensitive matters. It is expected that judicial activism should not degenerate in to judicial authoritarianism.

The survival of India as a democratic country for the last over six decades, has been in itself a great achievement. We have faced and overcome many challenges. The Challenge to restore Rule of Law to its rightful place is much simpler. The remedy is three fold:

First, re-establish the credibility of the Civil Services and the police by ensuring that they run the country in accordance with the law and policies made by elected representatives;

Second, all populist methods concerned with the Rule of Law must be respected. Populist methods or agendas must remain within the frame work of the constitution;

Third, we need an allocation of sufficient resources to be provided to judiciary to deliver the justice delivery system.

The media can play a role for creating sufficient public awareness which will ultimately force the pace of these reforms. What remains of the Central elements of the Rule of Law are the consistency, predictability, integrity, constitutional morality and proper justification of authorization.
Examination of Hypothesis Number Three:

"Why not the matter of public interest can be the basis of a PIL (Public Interest Litigation)? can the PIL becomes a Pill for every ill? should the judges instill in themselves that they can solve all the problems afflicting the country?"

On detail scrutiny and examination of the hypothesis, the following was traced out.

At present, judicial activism has gone beyond ordering the executive to implement the laws. It is doubtful whether the judiciary can direct the administration to construct roads, erect buildings, to secure land in a particular locality for the accommodation of certain persons. Judges should observe restraint in taking up such tasks and better leave to government and the executive to do their job and the parliament to pass laws for implementation.

Considering the emergence of PIL as a mode of judicial activism, persistent failures of the executive and the parliament and state legislatures in the implementation of laws had forced the judiciary to take up challenge to protect the poor to fulfill their socio-economic needs. This is how judicial activism has emerged in the form of PIL.

This does not mean that the judges must not feel that they can solve all the problems afflicting the country through PIL. It must be remembered that a PIL is not a Pill for every ill. Every matter of Public interest can not be the basis of a PIL. The judges must not instill themselves the belief that the judiciary can solve all the problems of the people and the country.
PIL has however proved to be a strong and potent weapon scams and corruption cases in public life. The court can punish the quality involved in scams. Illegal allotment of government quarters, shops and petrol pumps have come up to the surface through PIL. It is actually the function of the executive to deal with such problems but because of electoral politics, it has not developed will power to fight against such corrupt practices. In view of inaction on the part of the executive and legislature, the judiciary has taken up, the work in its hands. A citizen has a right to seek justice from the court and the court is bound to give justice to its citizens through PIL.

Inspite of all these interventions, the judiciary through PIL can not solve all the problems afflicting the people and the country.

Examination of hypothesis Number Four:

“Should the independence of judiciary be a cardinal principle for effecting judicial system? should not the legislatures and executives have to rise above their self compliances in all their in fractions with the judiciary just as the judiciary should not pose itself to be the Supreme and have to devote heart and soul for deviating itself to enjoy the reverence of the Nation?”

On examination of the above hypothesis the following points have emerged:

The Judiciary enjoys enormous power of independence. It’s cardinal principle is to effect judicial system. The primary obligation of judiciary is to enforce rule of law and up hold the constitution. Judiciary can not substitute its power of mandamus to take over the functions of other organs, meaning legislative and executive. Hence Judiciary must not overstep its
own functions and encroach upon others functions. Judicial activism should not also be misunderstood as judicial over reach. There is no reason for any conflict between the different branches of governance which are all meant to serve the common purpose of public good. These branches derive their autonomy from the common source of the constitution of India, depicting the will of political sovereign, "We the people of India". Each branch has a clear role in the constitutional scheme. The judiciary should stay away from judicial tyranny. The case for judicial interventions in many instances is made on the ground that other branches of the Government, some time is failing in their constitutional obligations.

Constitution does not envisage judicial review as the only mode for the correction of every wrong. It has no task in political matters. Each organ should limit its work and not interfere with others jurisdiction. Let executives, execute the work leaving the legislatures to frame rules for governing the country.

Healthy respects for each other could empower healthy working by all branches. Finally, judiciary have to devote it self heart and soul to enjoy reverence of the nation.

**Examination of Hypothesis Number Five:**

"In a state observing separation of powers, should we have to supplicate judicial independence by relevant machinery of accountability of the judges to achieve excellence of rule of law?"
Let us examine the hypothesis to arrive at getting the answer.

The relevant machinery of judicial accountability is to bridge the gap between independence of judiciary on one hand and accountability of judiciary on the other hand. The bridge to join the gap is people’s power which means judicial accountability becomes public’s accountability. All public power is people’s trust. Judicial power has a fiduciary component.

Trusteeship and accountability go together. Constant monitoring plus social audit of power process is a watchdog factor.

Executive power is accountable to Parliament. The Parliament is accountable to the people. Judicial power is neither accountable to the executive nor to the Parliament in any direct sense. Nevertheless, being a democratic institution, the judicature must be answerable to the people. The oath of office clearly implies this responsibility. The oath prescribed for the judges is, “I will perform the duties of my office without fear of favour”. This oath shall constantly remind the moral of the judges to act while awarding judgements to achieve excellence of rule of law. Ultimately the judges must remember that judiciary is accountable to people’s power.
REFERENCE:


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4) Ibid

5) Ibid

6) Ibid

7) Ibid


9) Ibid

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23) Ibid.
25) Ibid.
26) Ibid.
27) Ibid.
30) S.P. Gupta v. Union of India, AIR 1982, SC 149 (First Judges Case).
31) S.C. Advocate on Record v. Union of India, AIR 1993(4), SC 441 (Second Judges Case).
32) President Special Reference No.1 of 1998, Jt.1998-7SCC, 739 (Third Judges Case).
33) Shanti Bhushan and others v. U.O.I. writ petition No. 375 of 2007, Item No.7, Court No.4, Section PIL, Supreme Court of India, Record of Proceedings.
35) Divan Anil, quoted in “Are CJIs followings rules in appointment of


39) Simonds Lord, Major and St. Mellors-( Rural District Council’s Newport and Corporation (1951) 2AII. ER 838: (1952) AC 189 at 191.


41) Stevens Robert, the English Judges - Their Role in the changing Constitution, Heart Publishing, P144.


47) Secretary, Ministry of Law, Justice and Company Affairs letter dated 29th December 1997 to the Member Secretary, Law Commission, Government of India.


49) Ibid

50) Bhushan Shanti," Appointment and Accountability of Judges, Address at the people’s convention” on Judicial Accountability and Reforms,
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60) Ibid.


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