8.1 Introduction

The Indian Constitution contains detailed provisions intended to secure the institutional independence for the judicial wings essential to deliver free and fair justice even against the State.¹ The contempt jurisdiction² which the judiciary enjoys is vast enough to ensure compliance of its orders and directions. The power of judicial review over executive and legislative actions³ and the theory of “basic structure”⁴ judicially evolved, make the Supreme Court of India one of the powerful courts in the world.⁵

Indian polity is under severe strain. Faith of the people in the quality, integrity and efficiency of governmental institutions stands seriously eroded. They turn to the judiciary as the last bastion of hope. But of late, even here matters have become increasingly disturbing and one is, unfortunately, no more in a position to say that all is well with the judiciary.⁶ The judges are human beings and one cannot proceed on the assumption that they can never go wrong. Hence, in a civilized society, there is need for checks and balances to restrain the misuse of power;⁷ arbitrary power it is well known, will corrupt even the best of persons, absolutely.⁸ As V.R. Krishna Iyer J. stated “All public power in a republic is a people’s trust. Judicial power is no exception.”⁹ So the judge must be the servant of justice and not its master.¹⁰ Moreover, the political executive is accountable to the legislature and the legislature is democratically accountable to the people—that is the theory of Indian Constitutional scheme. Increased reliance on the judicial process has

² Articles 129 and 215.
⁵ N. R. Madhava Menon, supra note 1, p.476.
provoked new interest in problems of judicial accountability and liability. Judges, like
the rest of mankind, have prejudices and these prejudices may affect their understanding
of the Constitution. The judges are expected to maintain the highest standards in their
conduct. But it is an undoubted fact in India that corruption has infected the Indian
judiciary also. Corruption brings disrepute to the institution of judiciary, reduces public
confidence in courts, leads also to unpredictability of judicial decisions and undermines
the effectiveness of the institution. This in fact strengthens the importance of judicial
accountability.

The present chapter makes a critical analysis of Constitutional provisions, the role
of the judiciary and legislative efforts to make the judiciary accountable in India.

8.2 The Existing Parameters for Judicial Accountability

In India, the concept of judicial accountability is as old as the independence of the
judiciary. The principle of accountability of courts in India which is evident from the
reading of the Third Schedule imposes on the judges, a duty to preserve sovereignty and
national integrity and uphold the Constitution and the laws without fear or favour,
affectation or ill-will. In short, justices wear robes on oath under the Constitution as
trustees par excellence of judicial power, of course within their legal jurisdiction and
constitutional jurisprudence. The Supreme Court has lent strength, through its holding
that ‘the judiciary is “State” for the purpose of constitutional limitations on power.’
The inclusive definition of ‘State’ in Article 12 correctly perceived by the Apex Court, to
include the judiciary, gives dimensions for the restraints on the powers of the judges.
The definition of a ‘Public Servant’ in Section 21 of the Indian Penal Code, 1860 (herein after called IPC) covers the judges. The Judicial Officers’ Protection Act, 1850 and the Judges (Protection) Act, 1985 do not confer, consistently with section 166 of the IPC, any immunity for crime. Thus, the laws prescribe judicial accountability. The Supreme Court, in a ruling of the Constitution Bench in K.Veeraswami v. Union of India, held that:

“Judges are under the law, not above it. Your public life, and even private life to the extent it influences your judicial role, should be accountable and transparent to the public.”

In C. Ravichandran Iyer v. Justice A. M. Bhattacharjee the Supreme Court relied on Krishna Swami v. Union of India to observe that:

“The holder of the office of a judge of the Supreme Court or the High Court should be above the conduct of ordinary mortals in society. The standards of judicial behavior, both on and off the bench, are normally high.”

8.2.1 Judges’ Removal Process

The mechanism in India for judicial accountability is a removal process as provided under Articles 124(4) and 217, for making errant judges answer for misbehaviour or incapacity.

8.2.2 Appellate Process and Reasons for Judgements

In India, the judicial branch of government has probably been historically and in actuality, one of the accountable wings of the government. Judicial accountability is manifest in the following ways: the business of all courts is, except in extraordinary circumstances, conducted in public. Judges resolve disputes under the obligation to give full reasons for their decisions. Each decision, other than those of the ultimate court of appeal, is subject to being appealed. Academic lawyers are free to criticize judicial

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23 Section 166: Public servant disobeying law, with intent to cause injury to any person.- Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.
24 T. Devidas T. & Hem Lall Bhandari, supra note 20, p.97.
26 V.R. Krishna Iyer, supra note 17.
29 See, Chapter VII, pp.244-252.
reasoning. Media attend hearings and in some circumstances may have a legal right to be heard in relation to closure of the court.\(^{30}\) As far as accountability for judgements is concerned P.B. Sawanth J. in the case of *In Re. Sanjiv Date*\(^ {31}\) noticed that:

“There are internal and external checks to correct the errors of courts. The law, jurisprudence and the precedents, the open public hearings, reasoned judgments, appeals, revisions, references and reviews constitute internal checks, while objective critiques, debates and discussions of judgments outside the courts, and legislative correctives, provide the external checks. Together, they go a long way to ensure judicial accountability.”

Even at the highest level, the rules permit a petition for review. Still more, the Supreme Court has, by a judicial order, introduced the remedy of a curative petition\(^ {32}\) and every judgement is a public document.\(^ {33}\) It is open to critical public analysis.\(^ {34}\)

**8.2.3 Accountability of Subordinate Judiciary**

In so far as the judges in the subordinate judiciary are concerned, the control is directly vested with the High Court under Article 235\(^ {35}\) and the High Court can enforce accountability on the part of the members of the subordinate judiciary and hold disciplinary proceedings against judges for misconduct and impose commensurate punishment; this is a constitutionally recognized and permitted mode of ensuring judicial accountability.\(^ {36}\)

**8.3 Judiciary on Judicial Accountability**

The judiciary in India, itself, has taken various steps to enhance accountability to ensure a corruption-free judicial system. On 7\(^ {th}\) May, 1997, a full court meeting of the Supreme Court adopted Restatement of Values in Judicial Life, Declaration of Assets by the Supreme Court and High Court Judges and ‘In-House Procedure’ for inquiry into

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\(^{31}\) 1995(3) SCC 619.

\(^{32}\) In *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388, it was held that the power of review can be exercised under Article 136 and 32 by filing curative petition if there is deprivation of fundamental rights.

\(^{33}\) The Supreme Court and High Court are courts of record as provided under Articles 129 and 215 respectively.


\(^{36}\) See, Chapter VII, pp.260-267.
allegations against judges of the higher judiciary. These resolutions were later adopted in the Conference of the Chief Justices of High Courts in 1999, held in New Delhi.

8.3.1 The Restatement of Values in Judicial Life

The Restatement of Values in Judicial Life, has 16 clauses embodying values to be followed by judges and also a code of ethics for judges to comply with, in public and private lives, to serve as a guide to be observed by judges, essential for an independent, strong and respected judiciary, indispensable in the impartial administration of justice, the values are as follows:

1) 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 Court, whether in official or personal capacity, which erodes the credibility of this perception, has to be avoided.

2) 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.

3) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

4) 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.

5) 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.

6) A Judge should practice a degree of aloofness consistent with the dignity of his office.

7) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
8) 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.

9) A Judge is expected to let his judgments speak for themselves; he shall not give interview to the media.

10) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.

11) 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.

12) A Judge shall not speculate in shares, stocks or the like.

13) 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).

14) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.

15) 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 though the Chief Justice.

16) 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 values are only code of conduct for judges and guidelines; they are not meant to be exhaustive but only illustrative of what is expected of a judge.

8.3.2 Resolution adopted in Respect of Declaration of Assets

The following Resolution was adopted in the full court meeting of the Supreme Court of India on 7th May 1997, for declaration of assets: “Every judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting judges,
within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice of the Court. The Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential.”

8.3.3 In-House Procedure for Remedial Action Against Judges

A committee of four Supreme Court judges and one Chief Justice of a High Court, headed by the then Supreme Court judge, S.C. Agrawal J., devised the in-house procedure in 1997 for taking suitable remedial action against judges who, by their acts of omission or commission, do not follow universally accepted values of judicial life. These values were adopted by the Supreme Court in May 1997 and later by all the High Courts, in 1999. By adopting the in-house procedure, the committee believed that, a complaint against a judge could be dealt with at the appropriate level within the institution, the allegations being examined by his peers and not by an outside agency, thereby maintaining the independence of the judiciary. It was assumed that the awareness of machinery for examination of complaints against a judge would preserve the people's faith in the independence and impartiality of the judicial process.

Under an in-house mechanism, complaints are often received containing allegations against a judge pertaining to the discharge of his judicial functions. Sometimes complaints are received with regard to the conduct and behaviour of the judge outside the court. A complaint against a judge of a High Court is received either by the Chief Justice of that High Court or by the Chief Justice of India directly. Sometimes such a complaint is made to the President of India. The complaints that are received by the President of India are generally forwarded to the CJI. Under the procedure, if the Chief Justice of the High Court is of the opinion that the allegations against a judge of the High Court need a deeper probe, he shall forward to the CJI the complaint and the response of the judge concerned along with his comments.

The procedure stipulates that after considering these, if the CJI thinks that a deeper probe is required, he shall constitute a three-member inquiry committee of two Chief Justices of High Courts other than the High Court to which the judge facing the

37 Except those of Orissa and Gujarat.
allegation belongs and one High Court judge. The judge, concerned, would be entitled to appear before the committee and have an opportunity to defend himself. Under the procedure adopted by the Supreme Court, it would not be a formal judicial inquiry involving the examination and cross-examination of witnesses and representation by lawyers. Under the in-house procedure, the committee may conclude and report to the CJI (a) that there is no substance in the allegations contained in the complaint; or (b) that there is sufficient substance in the allegations and the misconduct disclosed is so serious that it calls for initiation of proceedings for removal of the judge; or (c) that there is substance in the allegations contained in the complaint but the misconduct disclosed is not of such a serious nature as to call for initiation of proceedings for removal of the judge. If the Committee finds that there is substance in the allegations contained in the complaint and the misconduct disclosed in the allegations is such that it calls for initiation of proceedings for removal of the judge, the CJI shall adopt the following course:

(i) The judge concerned should be advised to resign his office or seek voluntary retirement;

(ii) In case the case the judge expresses his unwillingness to resign or seek voluntary retirement, the Chief Justice of the concerned High Court should be advised by the CJI not to allocate any judicial work to the judge concerned and the President of India and the Prime Minister shall be intimated that this has been done because allegations against the judge had been found by the Committee to be so serious as to warrant the initiation of proceedings for removal and the copy of the report of the Committee may be enclosed. If the Committee finds that there is substance in the allegations but the misconduct disclosed is not serious as to call for initiation of proceedings for removal of the judge, the CJI shall call the judge concerned and advise him accordingly and may also direct that the report of the Committee be placed on record.

In the case of a complaint against a Supreme Court judge, if the CJI, in the light of the response of the judge concerned, feels that it needs a deeper probe, he could

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constitute an inquiry committee of three Supreme Court judges. The CJI shall take further action based on the findings of the committee.\textsuperscript{39}

\textbf{8.4 Problems of Accountability}

People hold a great stake in the administration of justice. Despite the value of judicial accountability in any free democratic republic, the judiciary in India is at best completely unaccountable to any institution in the country. Many factors have contributed to this dire situation and the problem of accountability is wide and complex.

\textbf{8.4.1 Contempt of Court}

One of the major obstacles to ensuring judicial accountability is the power to punish for contempt of courts. With the fall in standards in every democracy, it is impossible to expect the judiciary to ‘remain clean.’ Without doubt, of the three, the judiciary is the least corrupt. But it would be wrong to say that there is no corruption in the judiciary.\textsuperscript{40} But no newspaper or TV channel dare publish or telecast any wrong doing in the higher judiciary.\textsuperscript{41} This brings to the fore the conflict between the right to freedom of speech and expression and the power of the courts to stifle such reports by invoking the draconian provisions of contempt law.\textsuperscript{42}

\textbf{8.4.1.1 Constitutional and Statutory Provisions on Contempt of Court}

The relevant provisions of the Constitution touching the law of contempt are Article 19(2), 129 and 215.\textsuperscript{43} The fundamental right to freedom of speech and expression is enshrined in Article 19(1) (a) of the Constitution. This right is subject to the restrictions mentioned in Article 19(2). One of the grounds on which this right can be curbed is ‘contempt of court.’\textsuperscript{44} Under Articles 129 and 215, both the Supreme Court and High Courts which are ‘court of record’ can punish for contempt of court. The Parliament also

\textsuperscript{39} Ibid.
\textsuperscript{44} Arvind P. Datar, \textit{supra} note 40.
enacted the *Contempt of Court Act*, 1971.\(^45\) A perusal of the provisions of this Act reveals that ‘contempt’ is an offence, which may be civil\(^46\) or criminal\(^47\) in nature and the person committing contempt, called the contemnor, is liable to fine or imprisonment, or both. A mere glance at this statutory exposition shows that the ‘contempt-law’ is a very powerful instrument in the hands of the judiciary. Its purpose (as distinguished from civil contempt) is to protect and preserve the majesty of law and the dignity and independence of itself.\(^48\) The ambit of the contempt power is indeed very wide. Its wide amplitude, as deciphered from the various judicial decisions, could be comprehended and crystallized as follows:

First and foremost is the principle that permits a court to be a judge in its own cause. Seemingly, such a position is in contradiction with the fundamental principle of natural justice. Nevertheless, in contempt proceedings, the matter follows directly from the provisions of Articles 129 and 215 of the Constitution. Under the provisions of these Articles, the courts may, as courts of record, take notice of the contempt *suo motu* or at the behest of the litigant or a lawyer. For instance, in Dr. D.C Saxena, the Supreme Court took *suo motu* cognizance of the contempt committed by Dr. Saxena under Article 129 of the Constitution.\(^49\)

The second accentuating feature that widens the contempt power of the court is its de-emphasis on the requirement of the element of *mens rea* in the offence of contempt. This element of a guilty mind or criminal intent is undoubtedly an essential element of an indictable offence, because a person can be imprisoned or fined for contempt. It needs to

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\(^{45}\) This Act repeals the *Contempt of Courts Act*, 1952. The Sanyal Committee was constituted to go into the law of contempt. This Committee gave a comprehensive report on February 28, 1963. On this report Parliament enacted the present *Contempt of Court Act*, 1971.

\(^{46}\) Section 2(b) “civil contempt” means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court;

\(^{47}\) Section 2 (c) “criminal contempt” means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which -

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;


be proved or established affirmatively as such and beyond reasonable doubt, by the prosecution for convicting an offender.\textsuperscript{50}

The third accentuating feature that has enormous potential to widen the court’s contempt power to punish is the judicial holding that the statutory definition of contempt is not exhaustive. This means that the courts are relatively free to decide, according to their discretion, whether or not a given act constitutes contempt.\textsuperscript{51}

The fourth feature that makes the court’s power of contempt instantly efficacious is the quick mode of punishment through summary proceedings. Two cogent reasons are adduced for the summary – mode of punishment. One is that contempt is an offence to the court (and not just to the person sitting as judge against whom disparaging statement is directed); secondly, if the insult or injury is not punished instantly it will create suspicion in public mind about the dignity, solemnity and efficacy of the justice delivery system. Instant punishment, therefore, is highly desired in order to inspire confidence in the public as regards the institution of justice.\textsuperscript{52}

It may be submitted that the law relating to contempt of courts has been designed to protect the functional independence of the courts, so that they are able to maintain the rule of law, which is the very basis of a democratic system of government. However this does not make the judges and their courts absolute, arbitrary, or completely immune from criticism.\textsuperscript{53} Their doings and their decisions are admittedly open to public scrutiny through the powerful medium of press.\textsuperscript{54} The Supreme Court, in a landmark judgement in \textit{Brahma Prakash v. State of U.P.},\textsuperscript{55} held that,

“\textit{The object of contempt proceedings was not to offer protection to judges personally from imputations to which they may be exposed as individuals. The contempt jurisdiction was to protect the public whose interest would be affected if by any act or conduct, the authority of the court was lowered and the sense of confidence which people had in the administration of justice was weakened.”}

V.R. Krishna Iyer J. criticized the contempt of court to the effect that the “Contempt power is functional, not personal. The quintessence of the contempt law is

\textsuperscript{50}See, Chhotu Ram v. Urvashi Gulati and Another, AIR 2001 SC 3468; Anil Ratan Sarkar v. Hirak Ghosh, AIR 2002 SC 1405; Radha Mohan Lal v. Rajasthan High Court (Jaipur Bench), 2003 SC 1467.
\textsuperscript{51}Ahmed Ali v. The Superintendent, District Jail, Tezpur and others, 1987 Cri LJ 1845.
\textsuperscript{52}Virendra Kumar, supra note 48, p.453.
\textsuperscript{54}Virendra Kumar, supra note 48, p.467.
\textsuperscript{55}AIR 1954 SC 10.
protection of the public against interference with public justice, not-repeat, not-drawing an iron curtain with intimidatory missiles to silence people’s freedom of expression, a foremost human right.” Even Lord Denning, in *R. v. Commissioner of Police Ex Parte Blackburn*,56 said:

“It[contempt of court] is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise; more particularly as we ourselves have an interest in the matter…Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice.”57

The criticism of the judicial system or judges should be welcomed, so long as such criticisms do not impair the administration of justice. This is how courts should approach the powers vested in them as judges to punish a person for an alleged contempt.58 In *Special Reference No. 1 of 1964*59 Gajendragadkar C.J. observed:

“…wise judges never forget that the best way to sustain in dignity and status of their office is to deserve respect from the public at large by the quality of their judgements, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct…”

However, the interpretation of the contempt law by the judiciary, in a number of cases, has led to inconsistency and lack of clarity as to the remedies available to persons aggrieved by the wrongful application of the law. In *Anup Bhushan Vohra v. The Registrar General, High Court of Judicature at Calcutta*,60 the Supreme Court held that,

“…we have large powers and, in appropriate cases, can commit offenders to prison for such period as we think fit and can impose fines of such amount as we

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56 (No.2), [1968] 2 Q.B. 150, 154.
59 AIR 1965 SC 745.
60 Available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=38666, visited on 18.06.2014. The Calcutta High Court had found all the appellants (15 of them) guilty of criminal contempt and sentenced them to undergo simple imprisonment for a term of six months and a fine of Rs.2,000 each. The appellants were part of a committee set up by lawyers to agitate for the creation of High Court Circuit Bench at Jalpaiguri and they stated satyagraha in front of the District Court at Jalpaiguri. The agitation was interpreted by the High Court as creating impediment in functioning of the judiciary and restraining the judicial officers from entering into court building.
may judge right. But just as our powers are large, so ought we, I think, to use them with discretion and with moderation remembering that the only object we have in view is to enforce the due administration of justice for the public benefit.\footnote{Para.34. Anup Bhusan Vohra v. The Registrar General, High Court of Judicature at Calcutta.}

In the above verdict the Supreme Court found nothing wrong in accepting the appellant’s unconditional apology and request which was made at the earlier point of time to the High Court. The magnanimity underlying this judgement of the Supreme Court was, however, missing in some of the other cases dealt with by the Supreme Court’s other Benches.\footnote{Contempt Petition Crl.No.10/2009.}

In \textit{Amicus curiae v. Prashant Bhushan},\footnote{V.Venkatesan, \textit{Constitutional Conundrums}, 1\textsuperscript{st} ed., (Gurgaon: LexisNexis, 2014), p.241.} the issue was whether the Supreme Court could proceed with the contempt proceedings without satisfying any of the requirements under the Rules to regulate procedure for contempt of the Supreme Court.\footnote{These requirements are that the Court may take action for Contempt a) \textit{suo motu}, or b) on a petition by Attorney General or Solicitor General, or c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General.} However, despite procedural infirmities, the Court held the proceedings maintainable because the issues had far greater ramifications and impact on the administration of justice and the justice delivery system. Interestingly, in \textit{Biman Basu v. Kallool Guha Thakurta},\footnote{AIR 2010 SC 659.} the Court held that the petition to take action against an alleged contemner, without the written consent of the Advocate General under the High Court Rules, was not maintainable. In \textit{R.S. Sujatha v. State of Karnataka},\footnote{(2011) 5 SCC 689.} the Court stated that contempt proceedings, being quasi criminal in nature, require strict adherence to the procedure prescribed under the rules applicable in such proceedings. In \textit{Bal Thackrey v. Harish Pimpalkhute},\footnote{AIR 2005 SC 396.} the Supreme Court held that in the absence of the consent of the Advocate General in respect of a criminal contempt, taking \textit{suo motu} action for contempt without a prayer, was not maintainable. Obviously, the decision in \textit{Prashanth Bhushan}’s case is inconsistent with these judgements.\footnote{V.Venkatesan, \textit{supra} note 62, p.243.} This has effectively led to a situation of total impunity in the higher judiciary. Not only are corrupt judges effectively insulated from
any action against them, they have also protected themselves from public exposure or wrongdoing by using the threat of contempt.

8.4.1.2 In re Arundhati Roy case

In Re Arundhati Roy case the Supreme Court suo moto initiated contempt for certain statements made by Ms. Arundhati Roy and imprisoned her for a day. The fact is that even if a true statement of corruption is made against the judiciary, the maker of the statement cannot plead truth as a defense. She only protested against what she felt was a thoughtless act of the executive government and the action of the Court in issuing notices for contempt of court for staging demonstrations near the gates of the Court. She thought that she had the right to freedom of expression which included even the right to criticize a court and its orders. All this adds to a serious and legitimate dissatisfaction with this branch of law of contempt. Finally, the Contempt of Courts (Amendment) Act, 2006 made an important addition to Section 13 of the Contempt of Courts Act, 1971, to provide for truth as a valid defence in contempt proceedings.

In its ultimate analysis contempt of court is contempt of the authority of the sovereign State exercised through its courts duly constituted for the administration of justice. The jurisprudence of contempt, in its democratic dimension, demands tolerance of criticism beyond the ‘hubris’ of judges. As V.R. Krishna Iyer J. said “Free criticism is the life-breath of democracy even if it oversteps limits.”

8.4.2 Judicial Accountability- Beyond Retirement

In the context of judicial accountability, post retirement behaviour of the judges is also to be considered. The clamour for post-retirement jobs is also adversely affecting the
impartiality of judges of the higher judiciary.\textsuperscript{77} The Constitution of India shows that where it is intended to secure the absolute independence of any person, he is precluded from holding any office after retirement, as is clear from Articles 148(4)\textsuperscript{78} and Article 319(a).\textsuperscript{79} There is however a danger of the judicial independence being eroded somewhat by the prevailing practice of the government re-employing retired Supreme Court and High Courts judges in various capacities.\textsuperscript{80} The only ban imposed by the Constitution on a Supreme Court judge is that he should not plead or act in any court or before any authority after retirement.\textsuperscript{81} As far as the judges of the High Courts are concerned before 1956, under Article 220, no person who has held office as a judge of a High Court after the commencement of this Constitution shall plead or act in any court or before any authority within the territory of India. After 1956 this Article has been substituted by the Constitution (Seventh Amendment) Act, 1956,\textsuperscript{82} with the following objects:

“It is proposed to revise the article so as to relax this complete ban and permit a retired judge to practice in the Supreme Court and in any High Court other than the one in which he was a permanent judge.”

As a result of the amendment, the prohibition of practice before that court shall not apply to acting or additional judges, appointed under Article 224; this rule (or prohibition) will apply only to permanent judges. In the Constituent Assembly, an attempt to put a restriction on re-employment of a retired Supreme Court judge by the government did not succeed. \textsuperscript{83} Dr. B.R. Ambedkar had then stated that,

“...the judiciary decided issues between citizens and rarely between citizen and the government and, consequently, the chances of the government influencing the conduct of a member of the judiciary were very remote; in many cases


\textsuperscript{78} Article 148(4): the Controller and Auditor-General shall not be eligible for further service either under the Government of India or under the Government of any State after he has ceased to hold his office.

\textsuperscript{79} Article 319(a): The Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State.

\textsuperscript{80} Appointment to several positions such as Chairman/Presidents of Consumer Forum, Customs, Excise and Gold Control Appellate Tribunal, Administrative Tribunals, and Human Rights Commission, debt Recovery Tribunals etc.

\textsuperscript{81} Article 124 (7).

\textsuperscript{82} Article 220. No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.

\textsuperscript{83} \textit{C.A.D.}, Vol.VIII, pp.229-260.
employment of judicial talent in a specialized forum might be very necessary, as for example, the Income-Tax investigation Commission; and that relation between Executive and judiciary were so separate and distinct that the executive had hardly any chance of influencing the judgement of the judiciary.”

It is obvious that Ambedkar unduly minimized the importance of litigation in which government is a party. Today a very large chunk of the Supreme Court’s work consists of deciding cases in which the government figures as a party. Also, the retired judges are not always appointed, as Ambedkar envisaged, to quasi-judicial posts only. Many a time, they are appointed to pure and simple executive posts, for example, as Governors of the States. Even the Law Commission has criticized the prevailing practice of re-employing the retired judges:

“It is clearly undesirable that Supreme Court judges should look forward to other government employment after their retirement. The government is a party in a large number of cases in the highest court and the average citizen may well get the impression, that a judge who might look forward to being employed by the government after his retirement, does not bring to bear on his work that detachment of outlook which is expected of a judge in cases in which government is a party. We are clearly of the view that the practice has a tendency to affect the independence of the judges and should be discontinued.”

The desire of a job after retirement is now becoming a serious threat to judicial independence. The provision of retired High Court judges presiding over the special courts, at the pleasure of the executive, is ‘subversive of judicial independence’. In Nixon M. Joseph v. Union of India, a writ petition sought a ban on the retired High Court and Supreme Court judges from contesting elections to the legislatures and accepting appointments as commissions of inquiry. The argument was that this compromised their independence. K. Karayana Kurup J., has expressed a firm opinion against post-retirement job of judges saying that, “To maintain the dignity and independence of the judiciary as well as public confidence in the judiciary, it is necessary that a judge should now allow his judicial position to be compromised at any cost. Justice

89 AIR 1998 Ker. 385.
must not only be done but seen to be done.” K. Karayana Kurpup J., had made the following pithy remarks:

“...the general public reposing absolute faith in the judiciary, see in it, justifiably an institution, that can rein in, if not eliminate, the rapacity, nepotism and corruption, especially at high places which have come to be associated with governance. The judiciary should continue to merit the exalted position it occupies in the minds and hearts of the people as the ‘saviour of democracy’. It cannot be gainsaid that the one necessary condition for this is its independence. Independence in the sense free from the executive, meaning the bureaucracy and politicians interference and influence of every type. And fundamental to freedom from such influence and pressures on the judiciary is to eschew active politics and acceptance of positions by judges after retirement.”

In the above case, while the learned judge was definitely of the opinion that judges be precluded from taking up jobs, or moving into active politics after retirement, he refrained from giving a definitive ruling in the case. As the matter is of national significance, the judge dismissed the petition in *limine* and left the matter to the Central Government for consideration and necessary action.

The Constitution prohibits a person who has held office as a judge of the Supreme Court from practicing law before any court in the territory of India. However, chamber practice, consultancy, giving of legal opinion, arbitration and conciliation cases etc. are not barred. Some of the retired judges of the Supreme Court thus remain busy in these spheres or as chairman etc. of commissions or committees. In *Common Cause v. Union of India*, a PIL was filed in the High Court of Delhi on the post-retirement activities of Supreme Court judges that violate the spirit of Article 124(7) of the Constitution, which prohibits retired Supreme Court judges from acting or pleading in any court or before any authority. The petition sought the prohibition of the prevalent practice of retired judges tendering legal opinions, which were produced in various forums of adjudication to influence the outcome of the proceedings. The petition also sought a direction that, retired Supreme Court and High Court judges appointed as Chairman/members of statutory commission and commissions of inquiry, should not take up the work of arbitration. In this case the High Court, thereupon, instructed its registry to follow suit and refuse to accept writ petitions in which opinions of retired judges were annexed. The

91 WP(Civil) No. 866 of 2010.
High Court also directed the Union of India to take a final decision on its proposals to formulate uniform rules regulating the terms and conditions of service of the Chairman/members of tribunals and statutory authorities, under which they would be barred from taking up arbitration work.  

The judges, who join legal profession immediately after their retirement, do not bring any laurels to the dignity and status which they had held while on the Bench. How ridiculous does it look when they are seen visiting the lawyer’s chambers, looking for briefs, and appearing before a bench consisting of judges, with whom they had shared the Bench, while in office? It appears that the code of conduct framed by the judges for themselves in 1999 is silent on their post retirement vocation or activities. It is unfortunate that same over-ambitious judges, after their retirement, or even some time before their retirement start looking for their future clients or beneficiaries. In that over-enthusiasm, some time they do falter in delivering impartial judgments in the hope of getting some lucrative assignments after their retirement. In some cases it has been seen that the judges start engaging themselves in political activities immediately after they demit this august office.

8.4.3 Judicial Activism - The New Question of Accountability

The need of accountability becomes far more justified when the power exercised under judicial review takes the shape of activism and interferes more and more with the province of the other organs of State. The Supreme Court, after 1980, has changed its direction with a view to securing the rights of citizens from arbitrary actions of the executive and creating a human rights jurisdiction by an enlarged meaning of Articles 14 and 21. Public Interest Litigation, or PIL as it is conveniently called, has become a major and prominent segment of the jurisdiction of the Supreme Court and High Courts in India.

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92 Ibid.
94 Ibid, p.197.
97 The Supreme Court virtually rendered right to life a repository of various human rights. Thus, it includes: the right to live with human dignity (Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746: (1981) 1 SCC 608), right to healthy environment (M.C. Mehta v. Union of India,
It is true that there is a misconception, not only in the public but also in courts, about the function of judiciary under the Constitution, particularly when PIL is employed. It appears that the public has developed a syndrome of routine recourse to the courts for every perceived failure of government and the courts on their part have come to believe that it is their judicial duty to intervene in such failures by making orders for correcting or improving the government. There is a vast catalogue of such micro-managing orders made by the Supreme Court itself, which cannot be justified by any principle of judicial review. They include orders for making roads in hilly areas, wearing of helmets and seat belts to avoid accidents in cities, cleanliness in housing colonies, disposal of garbage, control of traffic, control of unmanned railway crossings, prevention of pollution of rivers, action plans to control and prevent menace of monkeys in cities, control of breeding of animals in zoos, measures to prevent ragging of students, collection and storage of blood in blood banks, control of noise and banning of fire crackers. At times, committees set up and empowered by the courts, have effectively displaced government’s administration in those areas. Such PIL petitions are filed in the Supreme Court in its original jurisdiction under Article 32 of the Constitution, which is for enforcing fundamental rights. It is hard to find any genuine enforcement of any fundamental right in such PIL petitions. The petitions make a formal invocation of Article 14 in its liberal interpretation of non-arbitrariness or of Article 21 in its vast expanse of a right to life. Article 32 seems to have lost its meaning for all practical purposes.


Ibid.
In Supreme Court judgements on environmental issues, investigation into political corruption cases, compensatory jurisprudence etc., there is no doubt that there is need for clear the laws in those areas, where chances for violation of rights are more. But the chances for violation of rights alone should not drive the courts to these judgements. They should be concerned with the enforceability of their judgements. They should be concerned with resources of the government to set right things in these areas. It is generally felt that the courts do not engage themselves in a dialogue with the public as normal in these cases by way of their discourses- judgements. This gives an impression that the courts have come up with some ‘platitudinal’ statements without having any regard for practicability or enforceability of their suggestions/orders. It is also the court’s legitimate function to enforce the law, not of each and every infraction, but in those cases where its disregard has grave consequences to the public; no question of the court overreaching its powers, can arise in such cases. In matters relating to environment, where irreversible damage may be done unless the actions of the authorities are immediately corrected, the court may take prompt corrective measures, but not take over the administration itself or supplant the law. Such powers as entrusted to the judiciary require to be exercised with wisdom and restraint if the Courts are to command the confidence and respect of the public and the government. But a grave abuse of such judicial power would cause injuries to the country immeasurably less grave than the inflicted by the abuse of the legislative, executive and amending power. The justification on the basis of the need for having good judges cannot shelter the court from

104 T.R. Andhyarujina, supra note 96, p.16.
the criticism of impropriety and overstepping of jurisdiction. It should be remembered that during debates in Constituent Assembly, it was stated by Mr. Alladi Krishnaswamy Ayer thus: “the doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a king or super legislature or super executive.” The PIL jurisdiction should not exceed the permissible limits and parameters of judicial review by the court over the actions or omissions of government, legislatures or public bodies, or transcend the basic separation of powers underlying the Constitution. Further, in the process, the judiciary cannot override the legal norms set by the founding fathers of the Constitution. This view has been affirmed by the Apex Court in its observation that ‘the court itself is not above the law.’

8.4.4 Right to Information

Right to information is not only a fundamental right but also an essential facet of democratic governance. On the one hand, it ensures a citizen’s access to obtain information from public authorities; on the other, this process itself leads to transparency and accountability in government-functioning and administration. Even the Supreme Court, in its various decisions, has stressed the importance of right to information in a democracy. As is well known, in 2005, the Parliament enacted one of the most liberal and powerful statutes viz. the Right to Information Act, 2005 (hereinafter called the RTI Act) with the object of providing for the practical regime of right to information for citizens and to ensure access to information on any given issue.

Accesses to judicial records and to information about the judiciary are an important, yet an often overlooked aspect of transparency and access to information.

106 K.N. Chandrasekhar Pillai, supra note 103, p.286.
112 Act No. 22 of 2005.
Three categories of information are relevant to judicial transparency. The first concerns the adjudicative work of the courts— including transcripts, documents filed with the court (pre and post), trial exhibits, recordings, settlements, opinions, and dockets. This information may be further categorized, for example, based on whether the proceedings are criminal or civil in nature, whether minors or adults are involved or whether information of a private or intimate nature is involved. The next category is information of an administrative nature, like court budget; personnel and human resources; contracts between the court and third parties and organizational matters. The third and most crucial set of information relates to information about salaries, assets and liabilities, appointments, transfers, and disciplinary matters regarding judges. Why is access to judicial information crucial for transparency and good governance? In India, the judiciary has had its increasing share of controversies. In addition to promoting public confidence in the judiciary, allowing the public access to judicial proceedings and records, would require judges to act fairly, consistently and impartially and enable the public to ‘judge the judges.’

Several High Courts have framed rules, in violation of the RTI Act, stating that no administrative or financial information would be given. The application fees for RTI applications in the courts are sometimes 50 times that of other public authorities. The courts have, therefore, refused information about appointments of employees of the courts, about appointment and transfer of judges and about complaints against judges. According to resolution passed unanimously by Supreme Court judges in 1997, judges need to declare their assets as a measure of self-regulation. But when Mr. Subash Chandra Agarwal, an RTI activist filed an application seeking information on asset declaration made by the Supreme Court judges, the Supreme Court registry denied the information. Then Mr. Subash Chandra Agarwal approached the Central Information Commission (CIC). The CJI maintained that his office was not a public authority under

115 The Ghaziabad Provident Fund Scam; the impeachment proceedings against Soumitra Sen J. of Calcutta High Court for alleged misappropriation of funds; the contentious issue of disclosure of judges’ assets, and the row over the move to elevate P.D.Dinakaran J. All these cases have raised the issue of judicial accountability and transparency.  
116 Dr. Sairam Bhat, supra note 113, pp.190-191.
the RTI Act and therefore he was not bound to answer the query. The CIC held that the CJI was a public authority under the RTI Act and was, therefore, bound to answer RTI queries. Then the matter was taken up through a writ petition filed at the Delhi High Court by the Registrar General of the Supreme Court who felt aggrieved by the order of the CIC. A single judge bench of the Delhi High Court, in *Secretary General, Supreme Court of India v. Subhash C. Agarwal,* upheld the order of the CIC and gave the most sensible and logical verdict in favour of transparency and accountability. Later the decision of the single judge was challenged and the matter was heard by three judges of the Delhi High Court. The Court fully agreed with the conclusion of the single judge and declared that the ‘information’ as held by the CJI could not get blanket exemption under the RTI Act and where ‘public interest outweighs protected interest’ the same should be disclosed. The Court held that the office of the CJI was a public authority under the RTI Act.

In the past, the Supreme Court of India, in its judgement has upheld the high moral principle that the rule of law should operate uniformly; that the Constitution is above every one, that right of citizens guaranteed under Article 19(1) (a) of the Constitution of India, i.e., right of expression, should outweigh the personal difficulties and hardships that can be pleaded by persons occupying high positions and serving as public servants. It must be remembered that the Supreme Court had emphatically ruled that no immunity can be claimed by any person, including one holding a constitutional position on the ground of any possible exposure to harassment and consequential difficulties if the particulars of the assets held by persons in such high public positions are revealed and made public. Thus, the criticism is that the higher judiciary could only preach accountability to other organs of State, but when it comes to following their own

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118 The Supreme Court, for the first time, was a petitioner before the Delhi High Court, the first appellate court which is itself subject to the Supreme Court’s superior appellate jurisdiction.


121 Dr. Sairam Bhat, *supra* note 113, p.194.

122 Under Article 19(1)(a), the Supreme Court in a number of cases has held that right to free speech and expression also includes the ‘right to know’. See *Benett Coleman v. Union of India,* AIR 1973 SC 106; *State of U.P. v. Raj Narain,* AIR 1975 SC 515; *L.K.Koolwal v. State of Rajasthan,* AIR 1988 Raj. 2; *M. C. Mehta v. Union of India,* AIR 1992 SC 382; *R. Rajagopal v. State of Tamil Nadu,* AIR 1995 SC 264.
preaching, they have fears. Finally, however, they declared the assets of the judges after the judgement of the Delhi High Court.

8.5 Corruption in Judiciary

The past 20 years has also seen the eruption of a large number of judicial scandals; the Ghaziabad Provident Fund scam; the impeachment proceedings against Soumitra Sen J. of Calcutta High Court for alleged misappropriation of funds; the Punjab and Haryana High Court cash-delivery-to-door scam; the contentious issue of disclosure of judges’ assets, and the row over the move to elevate P.D.Dinakaran J. All these cases have raised the issue of judicial accountability and transparency. A Transparency International Report released in 2007 says that 77% of respondents, in a survey in India, believe the judiciary is corrupt and once, the then Chief Justice of India, Bharucha J. said that 20% judges are corrupt in the higher judiciary. The corruption in judiciary affects not merely lawyers and litigants but the entire nation. As Nani Palkhivala says “Corruption in the upper reaches of the judiciary is illustrative of the incredible debasement of our national character.”

8.6 In-effectiveness of Formal and Informal Methods of Accountability

Constitutional provisions for the removal of a High Court or a Supreme Court judge have proved to be highly ineffectual in the case of V. Ramaswami J. issue. Its applicability for the first time reflected the impracticability of the procedure envisaged for holding judges accountable. The incident was enough to show the loopholes in the prevalent system. The lacuna in the Judges (Inquiry) Act, 1968 is also one of the reasons for lack of judicial accountability, i.e. the Act provides only the procedure for the removal of judges, but not disciplinary action for the minor misconduct of the judges.

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124 Harnish R Gadhia, supra note 75, p.34.
126 Ibid, p.221.
127 Kauveri Haritas, supra note 70, pp.6-11.
There have been a series of instances in the recent past wherein allegations against judges of the higher judiciary have been probed through an in-house mechanism devised by judges themselves and resulting in resignation or voluntary retirement of the judges concerned.\(^{131}\) In the process of in-house mechanism for dealing with minor misconduct, the judges often behave like a trade union and do not take kindly to brethren being accused of misconduct.\(^{132}\) The in-house procedure due to lack of transparency, has not been able to achieve the desired result and the rising numbers of misconduct cases reflect the ineffectiveness of peer-pressure.\(^{133}\) Other than removal as prescribed under Article 124(4), there is no institutionalized mechanism to investigate complaints against judges.\(^{134}\) Stopping work being assigned to the errant judges is an \textit{ad hoc} and ineffective measure.\(^{135}\) Using the transfer policy- now abandoned, does not satisfactorily deal with serious allegations against judges, as Mr. Rajeev Dhavan describes it “Corruption is transferred, not dealt with.”\(^{136}\) Neither the Constitution, nor any other law has created any institution or system to examine the performance of judges or examine complaints against them.\(^{137}\) It is felt that the Indian judiciary has failed to instill a sense of institutional discipline among its members particularly at the appellate level.\(^{138}\) As Prof. N. R. Madhava Menon has said, “If, in the initial four decades there were hardly any allegations of judicial misdemeanor, in the last two decades there have been many uninvestigated allegations of judicial misbehavior which, no doubt, sullied the image of the judiciary as a whole.”\(^{139}\) It was also mentioned that the 1997 resolution\(^{140}\) had no force of law and that there was no legal or constitutional requirement to file the assets’ declarations. It was pointed out that the 1997 resolution did not contemplate any sanction

\(^{131}\) N.R. Madhava Menon, \textit{supra} note 1, p.477.
\(^{133}\) Dr. Arti Puri, \textit{supra} note 129, p.109.
\(^{134}\) Prashant Bhushan, \textit{supra} note 132.
\(^{138}\) K.N. Chandrasekhar Pillai, \textit{supra} note 103, p.288.
\(^{139}\) N.R. Madhava Menon, \textit{supra} note 1, p.477.
\(^{140}\) 1997 resolution and the resolution adopted at the 1999 Conference of Chief Justices of high Courts and Judges of the Supreme Court on the \textit{Restatement of Values of Judicial Life}.\)
or in-house procedure in the event of non-filing of an asset declaration.\textsuperscript{141} Recent history shows that where there is a will, constitutional amendments are possible. But, there is a lack of political and judicial will to introduce changes. The senior lawyer of the Supreme Court, Mr. Rajeev Dhavan describes it thus:

“Today judges collectively and in judicial orders make all kinds of suggestions on their pay, salary, perks and other things. But no consensus suggestion to interrogate judicial indiscipline emerges with credible clarity. Individually India’s Chief Justices provide evasive and contradictory answers.”\textsuperscript{142}

In \textit{K.Veerawasmi v. Union of India},\textsuperscript{143} the Supreme Court laid down that no judge of a superior court could be subjected to a criminal investigation without the written permission of the Chief Justice of India. This judgement has been very often used to prevent the investigation and prosecution of many judges against whom there was documentary evidence of corruption, fraud, misappropriation, etc.; this has also increased the impunity of judges who have now got used to the feeling that they can get away with any kind of misconduct or even criminal conduct, without any fear of any criminal action or action for removal.\textsuperscript{144} All this makes for an alarming picture of lack of accountability of the higher judiciary in India. It cannot practically take any disciplinary or criminal action against misconduct or crimes committed by judges.\textsuperscript{145} This lack of accountability had led to considerable corruption of the higher judiciary which is evident from the recent spate of judicial scandals which have erupted in India.\textsuperscript{146}

\section*{8.7 Measures Attempted to Infuse Judicial Accountability}

After having witnessed an insistent public demand for an independent body to hold judges of the higher judiciary accountable in view of the escalating number of misconduct cases, the government has introduced the \textit{Judges (Inquiry) Bill, 2006},\textsuperscript{147} for replacing the \textit{Judges (Inquiry) Act, 1968}, which has been drafted, keeping in view the 195th Report of the Law Commission of India. Even the Second Administrative Reforms

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\item \textsuperscript{142} Rajeev Dhavan, \textit{supra} note 136, p.136.
\item \textsuperscript{143} (1991)3 SCC 655.
\item \textsuperscript{144} Prashant Bhushan, \textit{supra} note 132.
\item \textsuperscript{145} Kalraj Mishra, “NJAC was the people’s will,” available at http://indianexpress.com/article/opinion/columns/njac-was-the-peoples-will/, visited on 20.11.2015.
\item \textsuperscript{146} Prashant Bhushan, \textit{supra} note 132.
\item \textsuperscript{147} Bill No.97 of 2006.
\end{itemize}
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Commission, endorsed that ‘the independence of the 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.’ Even M.N.Venkatachalaiah J., who headed the NCRWC, recommended that a statutory committee be appointed for deviant behaviour by the judges.

Again, in Parliament, the Judges (Declaration of Assets and Liabilities) Bill, 2009, was introduced to provide for the declaration of assets and liabilities by the judges. But it was not enacted. Then the government introduced the Judicial Standards and Accountability Bill, 2010; and again, with minor amendments, the Judicial Standards and Accountability Bill, 2012 was introduced 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 a mechanism for the removal of judges. The Bill requires judges to practice universally accepted values of judicial life.


Bill No.XXI of 2009.

Bill No.136 of 2010.

Bill No. 136-C of 2010.

The procedure of removal of judges is presently regulated by the Judges (Inquiry) Act, 1968. The Bill seeks to repeal the Act.

The procedure of removal of judges is presently regulated by the Judges (Inquiry) Act, 1968. The Bill seeks to repeal the Act.

Section 3 (1) Every Judge shall continue to practice universally accepted values of judicial life as specified in the Schedule to this Act.

(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 or close social interaction 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;
(Restatement of Judicial Values) are outdated and suggested and defined judicial standards in an exhaustive manner and recommended that Government should remain alert and willing to update the judicial standards as and when required in future.\textsuperscript{156} Under Section 4 of the Bill, judges will also be required to declare their assets and liabilities and also that of their spouse and 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.

\textit{Explanation.}\textsuperscript{-} For the purposes of this sub-section, “relative” means-

(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;
(vi) any lineal ascendant or descendant of the spouse of the Judge;
(vii) spouse of the person referred to in clauses (ii) to (vi).

The Complaint Scrutiny Panel was constituted at the Supreme Court and every High Court level to scrutinise the complaints against a judge under this Bill.\(^{157}\) As far as the composition of the Scrutiny Panel\(^ {158}\) is concerned the Standing Committee felt that it would not be prudent to reserve the membership of Scrutiny Panel only to members of the judiciary merely in the name of preserving judicial independence; rather, the principle of judicial independence needs to be balanced with the ideal of judicial accountability.\(^ {159}\)

It was observed that if a Scrutiny Panel member has a soft corner for the judge under scrutiny, this panel could sabotage the entire stressful exercise because a case returned with “No substance” will never be re-examined by the Oversight Committee.\(^ {160}\) The Standing Committee suggested that at the High Court level, the Scrutiny Panel should include judges from another High Court so as to ensure the element of impartiality in the inquiry process. The Standing Committee therefore recommended that the expression "two judges of that High Court" should be replaced by "two judges of another High Court."\(^ {161}\) And most importantly, sitting judges would find it difficult and embarrassing to hold their brother judges (sometimes their seniors), with whom they share the Bench every day, guilty of misdemeanors- not impossible, but unlikely!\(^ {162}\) The judges, acting as the members of the committees, will have to spare time from their regular work as judges, thus leading to delays in judicial functioning.\(^ {163}\)

The composition and nature of the National Oversight Committee\(^ {164}\) was one of the main debating issue – it was maintained that the composition should be made more

\(^{157}\) Section 10.

\(^{158}\) Section 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.

\(^{159}\) Supra note 156, para.16.4.


\(^{161}\) Supra note 156, para.16.5.

\(^{162}\) Prashant Bhushan, “Judicial Accountability or Illusion?,” *EPW* 2006, p.4849.


\(^{164}\) Section 18 (1) The National Judicial Oversight Committee shall consist of the following, namely:-

(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;

(d) the Attorney- General for India- *ex officio* Member;

(e) an eminent person nominated by the President- Member:
representative and should be more broad based; the Standing Committee suggested that, at least one member from the Bar should be included.\textsuperscript{165} The National Judicial Oversight Committee should be a permanent and independent body; the concern was also raised that the sitting judges, who are members of the Oversight Committee, would be busy with enough judicial work. In that case, if they have to enquire into complaints against some other judge, it would take a lot of time.\textsuperscript{166} It is also possible that the Oversight Committee would not even be able to meet easily when required.

Section 22 of the Bill provides for an Investigation Committee to be constituted by the Oversight Committee for the purpose of inquiry into misbehaviour by a judge. The Standing Committee is constrained to note that the Bill provides no guidelines for the Oversight Committee in the matter of the constitution of the Investigation Committee.\textsuperscript{167} Composition of the Investigation Committee should be clearly mentioned for the sake of objectivity and uniformity as also to prevent uncertainty and the exercise of unnecessary discretion. There should be guidelines for selecting the Members of the Committee. Shri. Prashant Bushan, criticized, the formation of an in-house body of sitting judges to deal with complaints against judges; experience, shows that such in-house bodies and self-regulation rarely works, whether in the judiciary or the Bar or with the Medical community.\textsuperscript{168} About the punishment for frivolous and vexatious complaints- the Standing Committee recommends that Government should substantially dilute the quantum of the punishment so as not to discourage people from taking initiatives against the misbehaviour of a judge.\textsuperscript{169}

The provisions in the Bill, though a step in the right direction, do not inspire confidence. The Bill has already attracted serious criticism for its short comings and adverse impact on independence of the judiciary. It is alleged that when complaints are

\textsuperscript{165} Supra note 156, para.14.1.
\textsuperscript{166} Jyotika Yog, supra note 163, p.17.
\textsuperscript{167} Supra note 156, para.17.
\textsuperscript{168} Prashant Bhushan, supra note 132.
\textsuperscript{169} Supra note 156, para.18.
made, there will, definitely be a large pool of disgruntled litigants (the losers) ready to file complaints against judges who have decided against them. Judges may also start trembling in fear of possible complaints which can lead to besmirching their reputations, even if the complaint is ultimately thrown out. They must get ready to face charges, file replies and defend themselves. It was also criticized that the complaint procedure marks the beginning of the end of the fearlessness and independence of the judiciary and with the enactment of the new Bill, self-respecting and upright judges may feel compelled to leave the judiciary because they do not want to be subjected to the unconstitutional complaint procedure and the errant and deviant judges will seek out ways of preventing complaints against them. K.G. Balakrishnan J. criticized the Bill as under:

“Under our constitution, the High Court is not subordinate or subject to supervisory jurisdiction of the Supreme Court. If the judge’s work has to be watched by another body, I doubt if they can maintain the same independence which they enjoyed earlier prior to this bill. The High Court is the highest court in the State with almost concurrent powers in the matter of judicial review and issue of writs along with the Supreme Court.”

A.P. Shah J. said the Bill would create an atmosphere of total secrecy, more regressive than the present system and there did not appear to be any rationale for the change. He criticized that, “The composition and tenure of the Investigation Committee was undefined. Theoretically, therefore, it was possible for a layperson without any knowledge, experience and standing to be part of an inquiry panel against a sitting judge of a superior court and the idea of ‘minor’ punishment was unworkable and it had the potential to seriously undermine judicial status.

**8.8 A Comparative Analysis with United Kingdom and United States of America**

It can be seen that the constitutional provision in India for the removal of a Supreme Court judge is modeled on the English provision, it is more rigid insofar as – (i) it requires a special majority in both the Houses; in England no special majority is prescribed; (ii) while in India the grounds have been specified on which an address for the removal of a judge can be presented, there is no such provision in England; (iii) in

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170 Vinod A. Bobde, *supra* note 130, p.18.
India, there is provision for investigation into the allegations before presenting an address, no such provision exists in England. Therefore, it appears that the provision in England for the removal of judges is more flexible than that in India.\textsuperscript{174}

As far as minor misconduct of judges is concerned, in UK the \textit{Constitutional Reforms Act}, 2005, creates an Office of Judicial Complaints, which receives complaints about judges. The Office of Judicial Complaints investigates complaints from members of the public, litigants, professionals (or on referral by the Lord Chancellor or Lord Chief Justice) about judicial conduct that falls within its limit.\textsuperscript{175} In addition to the creation of formal mechanisms for dealing with and overseeing complaints and discipline in \textit{Constitutional Reforms Act}, the \textit{Guide to Judicial Conduct} was adopted. It is on intended to offer assistance to judges rather than to prescribe a detailed code and to set up principles.\textsuperscript{176}

In United States, historically, impeachment is the only method of removing a federal judge from office. As there was no procedure for disciplining federal judges, other than impeachment process, the \textit{Judicial Councils Reform and Judicial Conduct and Disability Act}, 1980 (herein after called the Act)\textsuperscript{177} was enacted. The stated goal of the Act was to improve judicial accountability. Under the Act the Judicial Conference and Judicial Councils were established to discipline the judges. Under this Act any person may file a complaint alleging that a judge or magistrate, excluding Supreme Court Justices, is engaged in conduct inconsistent with ‘the effective and expeditious administration of the business of the courts.’\textsuperscript{178}

The vast majority of states in United States still permit removal by impeachment, and some additionally still allow joint address, but several other states now permit removal by recall election and by judicial - conduct commissions. Like the federal judicial councils, states have adopted similar disciplinary procedure for accountability of judges. California took the first major step in this direction and created the Commission

\textsuperscript{175} See Chapter IV.
\textsuperscript{176} See Chapter IV.
\textsuperscript{177} H.R.Rep.No.1313, 96\textsuperscript{th} Cong, 2d Sess.6 (1980).
\textsuperscript{178} 28 U.S.C. s.372 (c) (1)(1982).
on Judicial Performance. The Commission on Judicial Performance imposes democratic public accountability upon the judiciary, for various allegations.\textsuperscript{179}

When compared to UK and USA, in India there is no institutionalized mechanism to deal with the minor misconduct of judges of the higher judiciary. The working of the judicial accountability mechanism in UK and USA is far better when compared with Indian system. It is also worth to note that in UK and USA (both at federal and state levels) the regime ensuring judicial accountability is updated from time to time. It is desirable that India emulate this proven process and enact a law for regulating minor misconduct of judges at the earliest and make judicial accountability effective.

\subsection*{8.9 Judicial Independence versus Judicial Accountability}

The judicial accountability and judicial independence are two faces of the same coin and cannot be separated. Transparency in functioning and accountability with respect to duties are fundamental in a democracy and the judiciary is no exception.\textsuperscript{180} As Benjamin N. Cardozo said, “...the content of constitutional immunities is not constant but varies from age to age. The needs of successive generations may make restrictions imperative today which ere vain and capricious to the visions of times past.”\textsuperscript{181} This is the crux of the matter. The expectation from the judiciary is indeed very high in view of the nature of its role in the Constitution. The independence of the judiciary is meant to empower it as the guardian of the rule of law. It is not merely for its honour, but essentially to serve the public interest and to preserve the rule of law.\textsuperscript{182}

Judicial accountability and judicial independence are complimentary to each other. Judicial accountability helps safeguard the independence and integrity of the judges. Sometimes judicial accountability can be misconstrued as it is context-based. It is very difficult to define judicial accountability and it has to be appreciated from the view of its objectives. It can be said to have three main functions; firstly, to promote the rule of law by deterring any conduct that might hinder judicial independence, secondly, to advance public confidence in the judiciary and lastly to promote institutional

\textsuperscript{179} See chapter V.
responsibility of the judiciary, as a whole, towards the public.\(^{183}\) Seen in this perspective, judicial accountability seems if not more significant, at least, is as significant as judicial independence. Judicial independence is a value which underlines the existence of rule of law, breach or infringement of which gives rise to a cause of action whereas accountability is a facet of judicial independence.\(^{184}\) Benjamin Franklin’s statement applies equally to the judiciary, “only a virtuous people are capable of freedom. As a nation becomes corrupt and vicious, they have more need of masters.”\(^{185}\)

Absolute immunity may be conducive to independence, but it may give protection to corrupt judges or to gross forms of misconduct.\(^{186}\) Judges should not be held accountable for upholding the rule of law. This canvasses a picture of conflict between judicial independence and judicial accountability, but they are inseparable and not inconsistent with each other; in fact they nourish each other.\(^{187}\) As Subhash C. Kashyap says, “Judicial accountability is a facet of judicial independence. Still, in certain situations, they may conflict.”\(^{188}\) Neither judicial independence nor judicial accountability are ends in and of themselves. Both are means towards the construction of a satisfactory process of adjudication.\(^{189}\) The judges can no longer oppose calls for greater accountability on the ground that it will impinge upon their independence.\(^{190}\) Independence and accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality.\(^{191}\)

In the end, judicial independence can be preserved only if judges exert the moral leadership and strength of character required to ensure judicial accountability. As Ronald

\(^{183}\) Vijayalakshimi Madanabhavi, ‘Impeachment and Judicial Accountability,” \textit{IBR} 37(3&4)2010, p.199.
\(^{185}\) Cited in Benjamin N. Cardozo, \textit{supra} note 181, p.170.
Dwarkin said, “law is not separate from morality; law is a department of morality.” Thus, there is a long way in achieving the goal of judicial accountability and transparency because of the impediments.

8.10 Conclusion

The Indian judiciary is perhaps the most powerful judiciary in the world and the societal perception of it is very high; accountability mechanisms particularly in the disciplining of judges of superior court have not matched with its powers and esteem. The list of corruption cases is growing and poses a serious threat to the integrity of Indian superior judiciary. As Nani A. Palkhivala said, “If you lose faith in politicians, you can change them. If you lose faith in judges, you still have to live with them. The fact is that the conduct of some judicial officers in different courts has been far from exemplary in terms of ethics.”

There needs to be an independent statutory and full time body for performance audit and disciplinary control over judges. The Judicial Standards and Accountability Bill provides statutory backup to Judicial Standards, hitherto having sanction of the Restatement of Values as adopted in the Conference of Chief Justices in 1999. Though it needs some minor modifications, it is clearly an initiative in the right direction and endeavours to strike a reasonable balance between the demands of accountability and of judicial independence. At the earliest it should be enacted into a law. Finally, aptly quoting V.R. Krishna Iyer J., “a judiciary is a democratic instrumentality, not an occult class of divinity.”