CHAPTER - IX
CRITICAL EVALUATION AND CONCLUSION

9.1 Critical Evaluation
Liberty, democracy and the rule of law are the most important elements in the establishment of a free and civilized society. The significance of the rule of law to the process of democratization creates a uniquely important role for the courts in ‘transitional states.’ It would be impossible to think of a truly democratic society if it does not provide for an independent judiciary. The independence, it is widely argued, has two components; the first, a separation of powers component, involving the judiciary’s status as a co-equal branch, free from the domination of the legislature or the executive; the second being, a due process-related component, concerning the rights of the litigants to impartial decision-making under the rule of law, free from extraneous interference. The demand for judicial independence rests upon a belief that the judicial function demands impartiality. Strict impartiality is, of course, unattainable, for it involves not merely the absence of control, but the absence of prejudice. Judicial independence implies that, the judicial task of the judge must be free from whatever influence from outside, be it the government, the parliament, the electorate, or public opinion.

Coming to the question of accountability, one must keep in mind the conceptual difference between judicial independence and judicial accountability. Judicial accountability is a facet of the independence of the judiciary in a republican democracy. In a democracy all organs of the state are responsible and accountable to the people at large. Cappelletti reflects this democratic ideal when he says “power should never be uncontrolled and that even the controlling power should not be irresponsible, that is, itself

uncontrolled.”

As the role of judges has expanded in liberal democracies, in consequence of their increasing numbers and influence on policy-making, demands for greater political and social accountability have grown. The philosophical purpose of accountability, therefore, is to ensure that power must be responsive and responsible to the community, just as its pragmatic purpose is to ensure that institutional and individual functions are carried out in an efficient way.

It is often said that judicial independence and judicial accountability are inconsistent. The inconsistency I think is exaggerated. As we have seen, judicial independence is merely a means to an end; the end being the benefits that flow to the people from an effective democratic government. Accountability actually reinforces independence; the link between the two being public confidence which is the bedrock upon which judicial independence rests.

International standards on judicial independence are an integral part of international and domestic initiatives to promote the rule of law in emerging and mature democracies around the globe. Numerous instruments have been drafted and adopted by international organizations and groups of experts, highlighting the importance of the rule of law to democratic governance, respect for fundamental rights and freedoms and the reduction of poverty and social inequality. These instruments reflect the emerging international consensus on how to best establish and regulate institutions that support the rule of law, such as an independent, efficient and accountable judiciary. The notion of accountability is intrinsic to the rule of law and is often used in international and regional instruments to encompass the concepts of responsiveness, responsibility, liability, controllability and transparency in the justice-system. The Bangalore Principles of Judicial Conduct, 2002 was developed in order to establish an international standard for the ethical conduct of judges, to provide guidance on universal judicial ethics and to strengthen judicial integrity. As such, they represent an important attempt to fill the gap in the international legal framework regarding judicial accountability.

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9 See Chapter III, pp.50-74.
The Judicial Appointments Commission (hereinafter called JAC) has been functional in the United Kingdom. The United Kingdom model has been exemplary, where politicians have no role whatever, in the JAC. The United Kingdom had a long history of judicial appointments which were by and large made by the Lord Chancellor, a key member of the Executive. Section 3(1) of the Constitutional Reforms Act, 2005 also imposes a duty on the executive government to uphold judicial independence. The present JAC in the United Kingdom adopts a wider consultative process, a transparent selection procedure, a conscious effort to encourage diversity and to ensure that the selection of candidates in based solely on merit. It is important to note that United Kingdom’s JAC is composed of a diverse section of people who are non-politicians in contrast to South Africa’s JAC which has 15 politicians and 8 lawyers. The Office for Judicial Complaints was set up as an associated office of the Ministry of Justice and is accountable jointly to the Lord Chancellor and the Lord Chief Justice for the effective and efficient operation of the system of judicial complaints and discipline.

In the United States the appointment of justices to the Supreme Court is the product of a constitutional power sharing between the executive and legislative branches. The involvement of the President and the Senate, in judicial appointments, inevitably gives that process a political cast. The form that the politics of judicial selection takes differs for the different levels of courts, and has differed over time as well. Political influence on judicial selection almost certainly affects judicial behaviour after appointments.

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11 See Chapter IV, pp.92-97.
12 The Lord Chancellor’s office was the very negation of Montesquieu’s doctrine of separation of powers. Even though the British preached doctrine of separation to the rest of the world, they were one of the last to implement it as late as in 2005.
15 See Chapter IV, pp.100-104.
16 The Constitution Provides: The President… shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art.II, Sec.2.
The President is empowered to nominate ‘judges of the Supreme Court.’ The confirmation of nomination, however, is subject to ‘the advice and consent of the Senate.’ Given the role of seeking out and designating a candidate, the executive branch is an active force in the selection process. The Senate’s confirmation process is the only opportunity that the legislative branch and the public have to participate in this selection process.\textsuperscript{18} The Senate, given largely a veto function, exercises influence to the extent that it may reject a nomination.\textsuperscript{19} Standards for rejecting a nominee are not constitutionally defined. A review of Senate’s responses to Court nominations reveals considerable variation in pattern and criteria. In its most combative moments, the Senate has spurned multiple nominees for the same seat.\textsuperscript{20} During the last century, the Senate rejected or tabled Supreme Court nominations for virtually every conceivable reason, including the nominee’s political views, political opposition to the incumbent President, a desire to hold the vacancy for the next President, senatorial courtesy, interest group pressure and on occasion, even the nominee’s failure to meet minimum professional standards.\textsuperscript{21} Some commentators have suggested that the Senate should limit its advice and consent-role to determining whether the nominee is intellectually competent and possesses integrity.\textsuperscript{22}

In the States of the federation in United States, for the first 50 years after the American Revolution, legislative and gubernatorial appointments were the norm. Beginning in the mid-nineteenth century, partisan judicial elections became the preferred procedure for both new and existing states. Nonpartisan judicial elections were introduced in the early twentieth century, replacing partisan elections as the favoured method. Since then, nonpartisan elections have been largely superseded by the merit plan, which has been the procedure of choice for court reforms over the last half-century.\textsuperscript{23} A majority of the States in USA have established various forms of so-called Merit

\textsuperscript{20} \textit{Ibid.}, p.552.
Commissions, with a view to removing politics and replacing it by selection on merit. 24 Each new procedure was developed in order to increase the independence of State judges and was then superseded by a newer procedure, owing in large part to unanticipated agency problems. However, not all States changed procedures when the opportunity arose. 25 As judicial elections achieve greater legitimacy as elections, they will increasingly undermine the judiciary’s distinctive role and broader democratic processes. 26 There is today a strong consensus that, of all the procedures, the merit plan best insulates the state judiciary from partisan political pressure. 27

Judicial elections in the United States have undergone a dramatic transformation. For more than a century, these state and local elections were relatively dignified, low-key affairs. Campaigning was minimal; incumbents almost always won; few people voted and cared. Over the past quarter century and especially the past decade, however, a rise in campaign spending, interest group involvement, and political speech have disturbed the traditional paradigm. In the new era, as commentators have dubbed it, judicial races routinely feature intense completion, broad public participation, and are high salient. 28

Under the Constitution of the United States, the only explicit method of judicial accountability is promoted by an impeachment mechanism. 29 In 1980, the Congress passed the Judicial Councils Reforms and Judicial Conduct and Disability Act, 1980. The Act creates a formal procedure, which the Judicial Councils of the Circuits are empowered to use to correct or discipline inappropriate judicial conduct. 30 Its purpose was to promote uniformity and the expeditious conduct of court business. 31 The Act subjects federal judges to suits brought by any person for improper conduct in the administration of justice. 32 The Act is significantly clear on one point: impeachment is viewed as the only proper method of ‘removal’ of a sitting federal judge. Congress had

25 Andrew F. Hanseen, supra note 23, p.431.
28 David E. Pozen, supra note 26.
29 Article III, s.1; Article IV.
the opportunity both to examine the exclusivity of the impeachment process and to abrogate it, but chose not to do so. Instead, Congress granted to the judicial council, the power to supervise, not the power to remove.\textsuperscript{33} Federal judges are rarely disciplined because they are generally quite well-qualified and temperate in their behaviour. The screening provided by the nomination and confirmation process helps to reduce the probability that an injudicious judge will take the Bench.\textsuperscript{34} Nearly every State in US provides for judicial removal by means of impeachment and conviction, typically for one of a list of offenses such as ‘malfeasance’ or ‘gross misconduct’. The near absence of removal by means of impeachment does not indicate that there are no problems of judicial performance in the States. They are dealt with by judicial conduct commissions, typically composed of judges, lawyers and non-lawyer public members. Ordinarily judges hold only a minority of the seats on these commissions.\textsuperscript{35}

The judiciary in India is one of the important limbs of the government and as such an integral part of good governance. The Indian judicial system has come down through the ages by harnessing traditions and wisdom from generation to generation for the edification of the present and future.\textsuperscript{36} The Indian Constitution makes ample provisions to ensure the independence of the judiciary.\textsuperscript{37} The independence of the judiciary is the most vital and indispensable condition for keeping alive and meaningful, the rights enshrined in the Constitution.\textsuperscript{38} That is why our Founding Fathers, with a profound commitment to the common people, designed a unitary judicative instrument vesting the largest powers in the highest deck of the institution.\textsuperscript{39}

The quality of justice depends upon the quality of those who administer it.\textsuperscript{40} Articles 124(2) and 217(1) of the Indian Constitution deal with the appointment of judges to the Supreme Court and High Courts respectively. Although the provisions are theoretically simple and clear, their practical implementation has been highly

\textsuperscript{33} \textit{Ibid}, p.129.
\textsuperscript{34} Mark Tushnet, \textit{supra} note 17, p.142.
\textsuperscript{35} \textit{Ibid}, p.148.
\textsuperscript{36} Justice M.Y. Eqbal, “How To Bring Back Old Glory of Indian Judiciary?,” \textit{Nyaya Deep} 10(2) 2009, pp.11.
controversial. There has been an unfortunate power struggle on the question of supremacy or primacy in the matter of appointment of such judges.\textsuperscript{41} Under the Indian Constitution, the power of appointment of the higher judiciary textually resides in the top executive after ‘consultation’\textsuperscript{42} with the Chief Justice of India and such other judges of the Supreme Court and High Courts as he deems fit.\textsuperscript{43}

The prior ‘consultation’ envisaged in the first proviso to Article 124(2) and Article 217(1) in respect of judicial offices, is a reservation or limitation on the power of the President to appoint the judges to the superior courts. The context in which the expression “shall always be consulted” used in the first proviso to Article 124(2) and the expression “shall be appointed … after consultation” deployed in Article 217(1) denote the mandatory character of ‘consultation’, which has to be and is of a binding character. It leaves no room for any doubt, that the “consultation” in Articles 124(2) and 217(1) was not a simplicitor “consultation” and since, the highest functionary in the judicial hierarchy was obliged to be consulted, a similar respectability needed to be bestowed on him. What would be the worth of the mandatory “consultation”, with the Chief Justice of India, if his advice could be rejected, without any justification? It was therefore, that in all conceivable cases, consultation with the highest dignitary in the judiciary, the Chief Justice of India, will and should be accepted and in case it was not so accepted, it would be permissible to examine whether such non acceptance was prompted by any oblique consideration.\textsuperscript{44} It is also important to mention that if consultation with the public service commission regarding appointment and discipline of civil servants has to be considered sincerely by the government, a \textit{fortiori}, the advice given by judges of the superior courts

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\item[42] The Constitution speaks of ‘consultation’ by the President in three situations in so far as judicial appointments are concerned: (i) Article 124(2) provides that every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal ‘after consultation’ with such of the judges of the Supreme Court and of the High Courts in the States, ‘as the President may deem necessary for the purpose.’ (ii) The 1\textsuperscript{st} proviso to Article 124(2) requires that in the case of appointment of a judge other than the Chief Justice, ‘the Chief Justice of India shall always be consulted.’ (iii) Article 217(1) provides that every judge of a High Court shall be appointed by the President by warrant under his hand and seal, ‘after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. Subhash C. Kashyap, \textit{Constitutional Law of India}, Vol.1, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2008), p.1223.
\item[44] The \textit{Supreme Court Advocates on Record Association and another v. Union of India}, W. P. (Civil) No. 13 of 2015, para.99. (per majority by Kehar J.).
\end{itemize}
to the President in the appointment of a High Court judge would have to be considered even more respectfully.\textsuperscript{45}

In continuation with the foregoing analysis, the matter can be examined from another perspective as well. The term “consultation” (in connection with, appointments of judges to the higher judiciary) has also been adopted in Article 233 on the subject of appointment of district judges. Under Article 233, the power of appointment is vested with the Governor of the concerned State, who is empowered to make appointments (including promotions) of district judges. The Supreme Court, through a five-judge Bench, in *Registrar (Admn.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy*,\textsuperscript{46} has held, that recommendations made by the High Court in the consultative process envisaged under Article 233, is binding on the Governor.\textsuperscript{47} In the face of the aforesaid binding precedent, on a controversy, which is startlingly similar to the one in hand, and has never been questioned, it is quite ununderstandable how the Union of India, desires to persuade the Supreme Court, to now examine the term “consultation” differently with reference to Articles 124 and 217, without assailing the meaning given to the aforesaid term, with reference to a matter also governing the judiciary.\textsuperscript{48}

In the background of the above factual and legal position, the meaning of the word ‘consultation’ cannot be confined to its ordinary lexical definition. Its contents greatly vary according to the circumstances and context in which the word is used as in our Constitution.\textsuperscript{49} A plain, but of course, an analytical reading of the constitutional provisions shows that Constitutional democracy demands that no power for selection of superior judges should be vested in a single individual howsoever high, great, honest and well-meaning he may be. Selection as well as appointment of judges of superior courts should be by a ‘plurality of hands’ rather than a ‘single individual.’\textsuperscript{50}

\textsuperscript{46} (1999) 7 SCC 725.
\textsuperscript{48} The *Supreme Court Advocates on Record Association and another v. Union of India*, W. P. (Civil) No. 13 of 2015, para.100. (per majority by Kehar J.).
\textsuperscript{49} *Ibid*, para.196. (per majority by Kehar J.)
In the *S.P. Gupta v. Union of India*\(^{51}\) (hereinafter called the *First Judge’s Case*), the Supreme Court, held that the power of appointment of judges resided solely and exclusively in the Central Government subject to full and effective consultation with the Constitutional functionaries, mentioned in Article 124(2) and Article 217(1) including the Chief Justice of India. It was observed that a view was expressed in the *First Judges case* that the government of the State could initiate a proposal for the appointment of a judge but that the proposal could not be sent directly to the Union Government, but should first be sent to the Chief Justice of the High Court. Notwithstanding this clear exposition, the procedure was being distorted by the executive and a proposal for the appointment of judge of the High Court was being sent directly to the Union Government.\(^{52}\)

The experience of giving primacy to the executive in the matter of appointment of judges after the *First Judges’ Case* had, within a short period of less than a decade, proved that the interpretation of the provisions in that case had gone against the expectations of the Constitution makers of providing an independent and competent judiciary.\(^{53}\) In 1993, the Supreme Court had delivered its verdict in *Supreme Court Advocates on Record Association v. Union of India*\(^{54}\) (hereinafter called the *Second Judges Case*). By judicial legislation, it became the only Supreme Court in the world which could select and appoint its own personnel. These ended decades of tussle between the executive and the judiciary to gain supremacy in the power to make appointments to the higher judiciary.\(^{55}\) The decision in the *Second Judges Case* was criticized to the effect that the ‘consultation’ in Articles 124(2) and 217(1) does not mean ‘concurrence’ and the power of appointment was wrested from the executive by the judiciary, contrary to the plain words used in the Constitution.\(^{56}\) It was also criticized that the method of selection of judges by a collegium of Supreme Court judges finds no place in the Constitution. It was criticized that this judgement was a prime example of overreaching by the Supreme

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\(^{52}\) The *Supreme Court Advocates on Record Association and another v. Union of India*, W. P. (Civil) No. 13 of 2015, para.113, (per majority by Madan B. Lokur J.).


\(^{54}\) AIR 1994 SC 268.


However, the decision of the *Second Judges Case* was defended stating that the Supreme Court has performed that job without any offence to the text of Article 124(2) and 217(1) but rather looking at it in its setting. It does not bring back the concurrence of the Chief Justice of India which had been rejected by the Constitution makers primarily because the Chief Justice of India - as an individual unaided by any one - could also err. Under the law laid down by the Court, the Chief Justice has to act in a Collegium whose proceedings would be maintained in writing. Even while so acting, his opinion may not have the expected effect. In appropriate cases, for adequate reasons, it may still be rejected.

It is important to mention that the 1993 and 1998 decisions of the Court in the *Second* and *Third Judges’ Cases* respectively did not impact the independence of Supreme Court judges, or structural independence. Instead, what these decisions did do was to enhance the Court’s institutional independence- in other words, rather than making Supreme Court judges independent, these cases made the Supreme Court itself independent of executive checks and balances, not in a structural sense impacting individual justices, but in an institutional sense from a separation of powers standpoint. The same can be said about transfers. The executive could interfere with the independence of High Court judges by transferring them from one court to another, whether he is the Chief Justice or any judge. By seizing this power in the *Second* and *Third Judges Cases*, the Supreme Court enhanced the independence of the High Court, but not that of the Supreme Court. This is because, once appointed to the Supreme Court, judges cannot be transferred. For this reason, 1993 and 1998 decisions enhanced the structural independence of High Court judges, while enhancing the institutional independence of the Supreme Court. The law laid down in the *Second* and *Third Judges Cases* seems to be sound in principle and deserves a fair trial in practice.

The decisions in the *Second* and *Third Judges Cases* were welcomed by most sections of the society barring a few exceptions. It was perceived as a welcome step in securing the independence of the judiciary. The following two decades saw the Supreme

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59 *Ibid*, p.3.
Court exercise its powers with complete confidence in its independence. In two decades, the societal consensus on the primacy of the Chief Justice in making judicial appointments has broken down and the voices which welcomed the decision became its vocal critics.

Even after the judgements in the Second and Third Judges Cases where reconstructed, Articles 124(2) and 217(1) in the guise of interpreting it, it is now no secret that selections could not be implemented in the spirit in which the new doctrine was propounded. As Ruma Pal J., describes the working of the collegium, “It has just changed the actors without any change either in the roles or the method of acting.” The working of the collegium system of appointments has invited near universal criticism. Some of the criticisms are legal and technical- it is suggested that the Constitution envisages a very different appointments process, but, for the most part, the criticism has been that the effort towards independence has come at the serious cost of accountability. The current system suffers from, the argument goes, a major lack of transparency.

In the Supreme Court Advocates on Record Association and others v. Union of India (hereinafter called the Fourth Judges Case), leading opinion of Khehar J. provides, broadly, five reasons why the Second Judges Case was correctly decided. At the outset, he argues that judicial primacy in appointments was repeatedly accepted by the Court since the case of Shamsher Singh. The First Judges Case, which held that the veto lay with the executive, and which was overruled by the Second Judges Case,
thus a long aberration in a continuous line of precedent. Secondly, he argues that the collegium does not violate the constitutional scheme by effacing the participation of the executive, since the President (acting on the aid and advice of the council of ministers) can still object to recommended names and provide his reasons, only ‘the last word,’ in case of a stalemate, is with the collegium.\textsuperscript{68} Thirdly, in the Constituent Assembly Debates, judicial appointments were specifically discussed in the context of judicial independence, making it clear that the constitutional scheme regards appointments as an integral part of judicial independence.\textsuperscript{69} Fourthly, in the Constituent Assembly Debates, while the word “consultation” was being discussed, Dr. Ambedkar clearly stated that it was intended to ‘curtail the will of the Executive.’\textsuperscript{70} Consequently, if the idea was to ‘shield’ the appointments process from the executive, the Second Judges Case was correct in giving “consultation” a meaning that went beyond its ‘dictionary equivalent.’\textsuperscript{71} At the same time, Dr Ambedkar was hesitant about giving a complete veto to one individual – the Chief Justice. The collegium achieves the desired balance between the two positions, by placing primacy in the hands of a plurality of judges and fifthly, consistent practice since independence allowed the Chief Justice the final say in judicial appointments.\textsuperscript{72}

In the Forth Judges Case, Madan B. Lokur J. observed that “…the collegium system had failed and that it needed replacement would not be a correct or a fair ‘post mortem.’ It is true that there has been criticism (sometimes scathing) of the decisions of the collegium, but it must not be forgotten that the executive had an equally important participative role in the integrated process of the appointment of judges; that the executive adopted a defeatist or an ‘I-don’t-care’ attitude is most unfortunate. The collegium cannot be blamed for all the ills in the appointment of judges - the political executive has to share the blame equally if not more, since it mortgaged its constitutional responsibility of maintaining a check on what may be described as the erroneous

\textsuperscript{68} Para.68. (per majority by Kehar J.).  
\textsuperscript{69} Para.76. (per majority by Kehar J.).  
\textsuperscript{70} Para.78. (per majority by Kehar J.).  
\textsuperscript{71} Para.79. (per majority by Kehar J.).  
decisions of the collegium.”73 It was also observed that the Memorandum of Procedure74 provides for a participatory role, to the judiciary as well as the political-executive. Each of the authorities in Memorandum of Procedure, are responsible for contributing information, material and data, with reference to the individual under consideration. While the judicial contribution is responsible for evaluating the individual’s professional ability, the political-executive is tasked with the obligation to provide details about the individual’s character and antecedents.75

On the composition of the NJAC, Kehar J. observed that “…it was imperative to exclude all executive participation in the proceedings of the NJAC for two reasons. Firstly, the executive is the largest individual litigant, in matters pending before the higher judiciary, and therefore, cannot have any discretionary role in the process of selection and appointment of judges to the higher judiciary and secondly, the same would undermine the concepts of ‘separation of powers’ and ‘independence of the judiciary,’ whereunder the judiciary has to be shielded from any possible interference, either from the executive or the legislature.”76

To exclude the executive in the appointment process, Madan B. Lokur J. reasoned that “…it is true that inputs from the executive are important in the process of taking a decision whether a person should or should not be appointed as a judge of a High Court or the Supreme Court. But providing inputs by the executive is quite different from the process of taking a decision by the executive or the executive being involved in the process of taking a decision. While it must be acknowledged that the Law Minister is only one of six in the NJAC but being a Cabinet Minister representing the entire Cabinet and the Government of India in the NJAC, the Law Minister is undoubtedly a very important and politically powerful figure whose views can, potentially, have a major impact on the views that other members of the NJAC may hold. Since the Law Minister is, by virtue of the office held, potentially capable of influencing the decision of a member of the NJAC, it would be inappropriate for the Law Minister to be a part of the

73 Para.188. (per Madan B. Lokur, J.).
74 A Memorandum of Procedure for Appointment of Judges and Chief Justices to the Higher Judiciary was drawn by the Ministry of Law, Justice and Company Affairs on 30.6.1999.
75 Para.65. (per majority by Kehar J.).
76 Para.243. (per majority by Kehar J.).
decision-taking process. The selection process must not only be fair but must appear to be fair.” 77

With reference to the inclusion of two ‘eminent persons’ 78 in the NJAC, the majority pointed out that “the term ‘eminent person’ had been left vague and undefined, in Article 124A.” The eminent persons were to be selected by the Prime Minister, the Leader of Opposition and the Chief Justice of India. It was important to mention that one possibility was that two politicians would join hands and make the CJI’s opinion irrelevant as there was no mention that the selection should be unanimous or alternatively the CJI in the hope of becoming Lokpal, Governor or NHRC Chairman would join the Prime Minister. It is worth quoting Jackson J. who said, “Judges are more often bribed by their ambition and loyalty than by money” 79 and make the opinion of the Leader of Opposition insignificant and the conferment of a veto to any member of the NJAC, eminent person or otherwise, is clearly an unconstitutional check on the authority of the President and the Chief Justice of India. 80

As far as appointment of the Chief Justice of India is concerned, the majority observed that section 5(1) of the NJAC Act, provides that the NJAC would recommend the senior-most judge of the Supreme Court, for being appointed as Chief Justice of India, subject to the condition, that he was considered “fit” to hold the office. It was contended, that the procedure, to regulate the appointment of the Chief Justice of India, was to be determined by Parliament, by law under Article 124C. It was contended, that the term “fit”, expressed in Section 5 of the NJAC Act, had not been elaborately described. And as such, fitness would have to be determined on the subjective satisfaction of the Members of the NJAC. 81 The Parliament should never be allowed the right to create uncertainty, in the matter of selection and appointment of the Chief Justice.

77 Para.516. (per Madan B. Lokur, J.).
78 It was sought to be asserted, that in approximately 70 Statutes and Rules, the expression “eminent person” has been employed. Out of the 70 Statutes, in 67, the field in which such persons must be eminent, has been clearly expressed. Only in three statutes, the term “eminent person” was used without any further qualification. para.25.
80 Para.509. (per Madan B. Lokur, J.).
81 Para.61. (per majority by Kehar J.).
of India, because the office of the Chief Justice of India was pivotal, as it shouldered extremely serious and onerous responsibilities.\textsuperscript{82}

The Supreme Court verdict striking down the NJAC legislation as “unconstitutional and void,” has evoked mixed reactions from the legal fraternity. While some have deemed it “an error” and “a flawed judgment ignoring the unanimous will of the Parliament, half the State Legislatures and the will of the people for transparency in judicial appointments,” others welcomed it as necessary to preserve the independence of the judiciary.

As far as power of rule making assigned to the Parliament and NJAC under the NJAC laws is concerned, it is true that the Constitution cannot specify and incorporate each and every detail, particularly procedural details, at the same time, the substantive requirements of the NJAC scheme must be apparent from the 99th Constitution Amendment Act read with the NJAC Act, particularly when it seeks to overthrow an existing method of appointment of judges that maintains the independence of the judiciary. Vital issues cannot be left to be sorted out at a later date through supplementary legislation or supplementary subordinate legislation; otherwise an unwholesome hiatus would be created, making matters worse.\textsuperscript{83}

The independence of the judiciary is one of the cornerstones of the rule of law. Rather than being elected by the people, judges derive their authority and legitimacy from their independence from political or other interference. It is clear from the existing international standards\textsuperscript{84} that the selection and appointment of judges plays a key role in the safeguarding of judicial independence and ensuring that the most competent

\textsuperscript{82} The Chief Justice plays a prominent role in appointing new judges, filtering PIL, assigning cases to judges, and is the Court’s best-know spokesperson. He performs a similarly dominant role in relation to constitution Benches. The composition of a Bench will impact on its institutional processes on judicial output. He is also the administrator, the manager and the leader of the Court. In addition, he is normally consulted by the government in all matters relating to the judiciary and in particular to the Supreme Court. All appointments of the officers and servants of the Court are to be made by the Chief Justice. Nick Robinson & Anjana Agarwal et al., “Interpreting the Constitution: Supreme Court Constitution Bench since Independence,” \textit{EPW} 46(9) 2011, p.31; Madhav Khosla & Sudhir Krishnaswamy, “Inside Our Supreme Court,” \textit{EPW} 46(34) 2011, p.29; Vijay K. Gupta, \textit{Decision Making in The Supreme Court of India}, (Delhi: Kaveri Books, 1995), p18.

\textsuperscript{83} Para.481. (per Madan B. Lokur, J.).

\textsuperscript{84} \textit{See} Chapter III, pp.50-74.
individuals are selected. Independence of the judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary. The composition of the Commission will shake confidence of people in judiciary if executive or legislature has a dominant voice in the selection process. The politicization of the process of selection and appointment of judges to the higher judiciary, would lead to a dilution of the independence of the judiciary and the considerations in different countries are, to put it simply, different. We need to have our own indigenous system suited to our environment and our own requirements. In today’s world, there was a strong consensus, that of all the procedures, the merit plan (in US States) insulated the judiciary from political pressure. Judicial Commissions/Councils created in different countries were, in their view, measures to enhance judicial independence, and to minimize political influence. It was their view that once given independence, judges were more useful for resolving a wider range of more important disputes, which were considered essential, given the fact that more and more tasks were now being assigned to the judiciary. At this stage, it may be mentioned that any perceived shortcoming in the working of existing mechanism of appointment of judges cannot by itself justify alteration or damage of the existing scheme once it is held to be part of basic feature. It must remain that the Indian Constitution is an organic document of governance, which needs to change with the evolution of civil society. Undoubtedly, it is open to the Parliament, while exercising its power under Article 368, to provide for some other alternative procedure for the selection and appointment of judges to the higher judiciary, so long as, the attributes of “separation of powers” and “independence of the judiciary”, which are “core” components of the “basic structure” of the Constitution, are maintained.

86 Para.335, (per Kuldip Singh J.).
87 Para.509. (per Madan B. Lokur, J.).
88 Para.18.10. (per Adarsh Kumar Goel J.)
89 Para.195. (per Madan B. Lokur, J.).
There are innumerable instances when the Courts have had to deal with the validity of Legislative or Executive decisions of a far reaching nature. It is the faith of the people in the impartiality and competence of judiciary which sustains democracy. If appointment of judges, which is integral to the functioning of the judiciary, is influenced or controlled by the executive, it will certainly affect impartiality of judges and their functioning. The faith of the people in impartiality and effectiveness of the judiciary, in protecting their constitutional rights, will be eroded.\textsuperscript{90} The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in \textit{K.Veerawswami v. Union of India},\textsuperscript{91} it said,

“A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system...a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.”\textsuperscript{92}

The independence of the judiciary must be reflected in the independence of the selecting instrumentality and its process while elevating to the Bench, those who are to administer public justice to the people of India.\textsuperscript{93} Transparency, in the mechanism of judicial appointment, is of paramount importance to ensure appointment of the best available persons to judicial offices and to enhance public confidence in the judiciary.\textsuperscript{94} The appointment of judges is an important aspect of judicial independence which requires that the judges in administering justice be free from direct or indirect interference or influence.\textsuperscript{95} The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence.\textsuperscript{96}

Constitutional provisions are required to be understood and interpreted with an object-oriented approach; a Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, have to

\textsuperscript{90} Para.18.10. (per Adarsh Kumar Goel J.).
\textsuperscript{91} (1991) 3 SCC 655.
\textsuperscript{96} Subhash C. Kashyap, \textit{supra} note 42, p.1225.
be appreciated, considering the true context in which the same are used and the purpose which they seek to achieve.\textsuperscript{97} There is an old Roman adage based on natural justice which says ‘Whatever touches us all should be decided by all’. Therefore, consider that appointment of judges must be a public process, not a matter of secrecy of the judicial collegiums as now. This idea may be elaborated for public debate. There must be guidelines based on which the selection may be made and this principle must be in implementation of the values of the Constitution.\textsuperscript{98}

The superior judiciary in India enjoys virtually absolute and unchecked power unrivalled by any court in the world. Now the Indian superior judiciary has evolved from a positive judiciary into an activist judiciary.\textsuperscript{99} If we want the rule of law value to be effective in a new setting, new forms of control and accountability for the judiciary may be warranted. The recent spate of cases where judges all over the nation have faced serious allegations of misbehaviour has made it necessary that an efficient system to check judicial accountability be finally put in place. In these circumstances, it is absolutely vital that judges of the superior judiciary be accountable for their performance and their conduct, whether it is for corruption or for disregard of constitutional values and the rights of citizens.\textsuperscript{100} Indeed, absence of judicial accountability may lead to loss of public confidence, unpredictability of judicial decisions and effectiveness of the institution.\textsuperscript{101}

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. Contrary to the common belief, Subhash C. Kashyap observes:

“There is no provision in our Constitution for the impeachment of a judge. The impeachment is provided for the President and none else. Also, there is a fundamental difference between removal procedure and impeachment procedure


\textsuperscript{98} V.R. Krishna Iyer, supra note 93, p.7.


\textsuperscript{101} Suraj Narain Prasad Sinha & Dr. Ajay Kumar, “Corruption in Judiciary & Code of Ethics for Judges, IBR, 34 (1to 4)2007, p.5.
and between the impact of the adoption of a motion for impeachment and the passing of a motion for presenting an address to the President seeking orders for the removal of a judge. The grounds for the impeachment of the President have to concern ‘violation of the Constitution’ while an address for removal of a judge has to be on the ground of ‘misbehaviour or incapacity’. In case of impeachment, the moment the motion is passed by the two Houses, the President forthwith ceases to be the President. But in case of the motion for removal, it is for the President to consider issuing necessary orders.”

The expression ‘misbehaviour’ in Article 124(4) does not mean that a judge has committed errors; even gross errors in judgement cannot amount to misbehaviour. So, every judge tries to impose his own personal philosophy and ideas in his judgments. This has led to a vast number of contradictory judgments on the same issues. Somehow many of them have forgotten that their decisions should be backed by reason and not by personal ideas. As Karl Marx said, “Judges are free to make the law, but not just as they please.” According to learned author H.M. Seervai, “…if judges who abuse their power to ‘interpret’ earlier judgements of Constitution Bench by basing their ‘interpretation’ on half-truths and by turning a blind eye to those parts of earlier judgements which are destructive of their pet theories, they are liable to be removed and for that purpose, Article 124(4) and (5) and Article 218 should be amended.” According to the learned author, under Article 141, the law laid down by the Supreme Court is binding on all courts in India. When that law is laid down by Constitution Benches of five or more judges, judges of smaller benches cannot flout the law so laid down with impunity under the guise of ‘interpreting’ them. The well known saying ‘Be you never so high, the law is above you’ applies to judges as well as to persons holding high public office. Despite a code of judicial values and various laws regarding the same, judges over and over show complete disregard for the law of the land. For example a judge should not decide a case whereby he might have certain vested personal interests. Nevertheless judges hear and decide cases which directly or indirectly affect their individual interests and escape any kind of punishment or disciplining due to a complete lack of enforcement machinery for the same.

102 Subhash C. Kashyap, supra note 42, p.1228.
An impeachment proceeding in the Parliament is the only constitutional way of removing a judge of a High Court or the Supreme Court from his office and is a procedure, not to be resorted to lightly. It is enormously cumbersome and is likely to bring political passions into play. 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. Another example of the malfunctioning of the democracy is afforded by the fact that the impeachment proceeding be started in the Parliament against one of the finest judges, J.C. Shah J., a judge of impeccable integrity. It was a move commenced by a disgruntled, dishonest civil servant against whom J.C. Shah J., had given a judgement in the Supreme Court and who cunningly managed to secure as many as 199 signatures of members of Parliament for an appeal to the Speaker of the Lok Sabha to start impeachment proceedings against the judge.

The Constitution provides for the removal of a judge for ‘proved misbehaviour’. This has not been defined. In many cases the conduct of a judge requires an investigation and discipline for undesirable behavior not amounting to misbehaviour. There is no machinery for disciplining the judges for such deviant behavior. The Restatement of Values of Judicial Life adopted in 1999, forms part of the code of conduct in addition to declaration of assets by judges. It is not clear as to how to secure the enforcement of all these instructions or clauses in case of breach. The in-house procedure for enforcement is not known and it is unfortunate that the sanction for these guidelines is absent. There is no adequate method or machinery to enforce the code of conduct. The in-house

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106 The word impeachment has been derived from the Latin roots expressing an idea of becoming caught or entrapped, and has its analogues in the modern French verb ‘empecher’ (to prevent) and the modern English ‘impede.’ It is said that the word ‘impeachment’ is the British invention. To specify it more clearly, the process of it was first used by the English Good Parliament in the second half of the 14th century.


108 J.C. Shah J. was the 12th Chief Justice of India from 17 December 1970 until his retirement on 21 January 1970.


111 Dr. Sunil Deshta & Kamal Jeet Kaur Sooch, supra note 6, p.59.

112 Ibid.
procedure due to lack of transparency has not been able to achieve the desired result and the rising number of misconduct cases reflects the ineffectiveness of peer-pressure.\textsuperscript{113}

In the absence of an effective method of disciplining judges, advocates have resorted to passing resolutions demanding their resignation and boycotting their courts. In some cases such unconstitutional methods did yield results by forcing the errant judges to resign. Removal of a judge by forced resignation is unconstitutional which affects the independence of the judiciary. The Bar Council or Bar Association is not entitled to pass a resolution demanding a judge to resign. Allowing adoption of such demands by collective pressure rudely shakes the confidence and competence of judges of integrity, ability, moral vigour and ethical firmness, which in turn, sadly destroys the very foundation of democratic polity;\textsuperscript{114} another important issue is that of continuing a judge found to be guilty of deviant behaviour by transferring him to another High Court; this is unethical and highly objectionable. A judge found guilty of misdemeanour should not be foisted on the litigant public of another State. No option to resign should be given to those found guilty of misbehaviour.\textsuperscript{115} Transfer can never be a solution to tackle judges of doubtful integrity.\textsuperscript{116}

To institutionalize the mechanism to investigate complaints for minor misconduct against the judges of the superior judiciary, the \textit{Judicial Standards and Accountability Bill, 2012}\textsuperscript{117} was introduced to replace the \textit{Judges (Inquiry) Act, 1968}.\textsuperscript{118} The Judicial Accountability seeks to provide a straightjacket definition of ‘misbehaviour’ under section 2(j),\textsuperscript{119} it was criticized that it tends to lose its elasticity and become both under-

\begin{itemize}
\item Bill No. 136-C of 2010.
\item Act of 51 of 1968.
\item Section 2(j) “misbehaviour” means,—
\begin{enumerate}
\item conduct which brings dishonour or disrepute to the judiciary; or
\item wilful or persistent failure to perform the duties of a Judge; or
\item wilful abuse of judicial office; or
\item corruption or lack of integrity which includes delivering judgments for collateral or extraneous reasons, making demands for consideration in cash or kind for giving judgments or any other action on the part of the Judge which has the effect of subverting the administration of justice; or
\item committing an offence involving moral turpitude; or
\end{enumerate}
\end{itemize}
inclusive and over-inclusive. A minor, inadvertent breach of judicial standards could constitute misconduct and in so far as the definition is exhaustive it is incapable of catching within its fold any ‘misbehaviour’ that might not be covered by this provision and section 4 of the Bill seeks to make it mandatory for judges to declare their assets and liabilities as well as those of his/her spouse and dependent children. There is no mechanism prescribed in the Bill to scrutinize whether the declaration is proper or not. It was suggested that the Bill should specifically mention about a mechanism to regularly scrutinize the declaration made by the judges and it was also criticized that as per the disciplinary action under the Bill, a situation where sitting judges were publicly censured but they were still sitting on the Bench and deciding cases would damage the credibility of the entire system.

It was criticized that the proposed Bill will therefore, be unconstitutional quite apart from being unwise. It will constitute a grave threat to the higher judiciary of the nation. As it is, it is difficult to attract good talent to the judiciary and irresponsible use of provisions pertaining to making complaints against judges by a disgruntled litigant may endanger the judicial independence and may cripple down the entire administration of Justice. But, the judge can no longer oppose calls for greater accountability on the ground that it will impinge upon their independence. Balanced independence and accountability strengthen judicial integrity for effective judicial impartiality.

One of the important critical reasons for the low accountability of judges in India is the power of the Courts to punish for its Contempt. What is scandalizing the authority of the court has nowhere been defined and judges have time and again taken great advantage to silence even bona fide criticism advanced against them or the working of the judiciary. The judges enjoy almost complete protection under the laws of contempt; laws that are administered and interpreted solely and finally by the judges themselves. But Mr. Nani A. Palkhivala defended the contempt power as under:

(vi) failure to furnish the declaration of assets and liabilities in accordance with the provisions of this Act; or
(vii) wilfully giving false information in the declaration of assets and liabilities under this Act; or
(viii) wilful suppression of any material fact, whether such fact relates to a period before assumption of office, which would have bearing on his integrity; or
(ix) wilful breach of judicial standards;

“It would be foolish as well as dangerous to relax the rigour of the Contempt of Courts Act, 1971 and permit truth to be pleaded as a defence when an allegation of corruption is made against a judge. Character assassination is the national sport of India, and some dissatisfied litigants and lawyers will have no hesitation in making allegations which would scandalize the court and then inviting the judge to face a public inquiry.”

The law of contempt, although necessary in extreme cases, constitutes a standing threat to a cherished fundamental right— the freedom of expression. It leaves too much to the predilections of the individual judge (or judges). Even the decisions rendered in contempt cases sometimes give the uncanny feelings that the status of the person who ‘scandalizes’ the court may well have influenced the ultimate result. This is one of the problems with the exercise of this totally arbitrary power. It allows a judge to sit in judgement over his own cause. That is another reason why this newly introduced defence of truth does not solve the problem with this jurisdiction of the court.

In the context of judicial accountability, post-retirement jobs are also adversely affecting the impartiality of judges of the higher judiciary. Judges should not have to look to the executive for further post-retirement jobs. It is true that Supreme Court judges are suited to posts like Chairman of the Law Commission. Though the usefulness of utilizing the talents of the retired judges cannot be questioned, it cannot be denied that frequent employment of retired judges to executive or diplomatic posts has posed a danger to the independence of the judiciary. The problem has arisen because an age of retirement has been fixed. In USA, such a problem has not arisen as no age of retirement for judges is being prescribed in the Constitution. There is a vast pool of post-retirement jobs that awaits a retiring judge from the Supreme Court, in the form of membership of statutory tribunals and commissions, yet there is no mechanism to evaluate the suitability of former judges to evaluate bodies.

The most important feature of the functioning of a court is its certainty and stability in relation to the major and vital questions of law. This is very important so far

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121 Nani A. Palkhivala, supra note 109, p.222.
122 Fali S. Nariman, supra note 120, p.351.
125 V. Venkatesan, “Judges have to watch their scorecard,” The Hindu, Hubli edn., 27.05.2013, p.10.
as the highest court of our nation is concerned. The essence of constitutionalism is also that no organ of State may arrogate to itself powers beyond what is specified in the Constitution. By and large, the orders of the Supreme Court have been considered necessary and welcomed by the public, but the question which arises is can judges ignore the separation of powers in the Constitution and become administrators? And do they have the competence to make policy choices and run administration? Regrettably, creative judicial activism in Indian courts seems to have become dormant and displaced by a poor substitute of routine judicial correction and monitoring of governmental functions by courts in PIL. It is also important to mention that 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.

Over the years, the true objective of PIL, as originally conceived, has been lost sight of, and it is believed to be the general jurisdiction for correcting government action or inaction, regardless of constraints of established principles of judicial review. As the court cannot disregard the law in judicial review or disregard the fundamental separation of powers underlying the Constitution to appropriate executive or legislative powers, PIL orders cannot disregard law, take over the administration by government or by public authorities, in the name of improving governance or preventing misuse of power. It is this aspect of misplaced judicial activism, which a bench of two judges of the Supreme Court in Aravali Golf Club v. Chander Hass, criticized in rather strong words of reprimand. The judgement was timely and has brought misplaced judicial activism into focus, but in

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the process it did not advert to the permissible scope of judicial intervention. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy-making by adding something to the policy by way of issuing a writ of mandamus.

Judicial restraint is a virtue, which shall be concomitant of every judicial disposition. It is an attribute of a judge which he is obliged to keep refurbished from time to time, particularly while dealing with matters before him whether in exercise of appellate or revisional or other supervisory jurisdiction. No person, however high, is above the law. No institution is exempt from accountability, including the judiciary. Accountability of the judiciary, in respect of its judicial functions and orders, is vouchsafed by provisions for appeal, revision and review of orders. So, constant vigilance of court performance is fundamental. As Jackson J. of the U.S. Supreme Court once remarked, “We are not final because we are infallible; we are infallible because we are final.”

The limits of judicial intervention should be discussed and should be defined by law. Also, it is for consideration whether judges should be held accountable for any attempt to exceed their powers and to encroach on the territory of the executive. The judgement of the Supreme Court is not final because it is infallible. It is infallible because the Constitution has made it final. The purpose is not to be critical of judges. On the whole they work hard but speedy social justice with concern for the pockets of the have-nots will go a long way in liquidating judicial independence. Courts need discretionary powers to make meaningful decisions. It needs structural mechanisms that protect judges from internal and external pressures. Courts cannot be made instruments of state rule.

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135 V.R.Krishna Iyer, supra note 93, p.2.
136 Ibid.
9.2 Conclusion

The independence of the judiciary is a concept developed over centuries to benefit the people against arbitrary exercise of power.\textsuperscript{138} A strong and independent judiciary is the pillar for upholding the rule of law in a democratic form of government.\textsuperscript{139} The centrality of a strong justice mechanism lies in its essential contribution to fostering economic stability and growth and enabling all manner of disputes to be resolved within a structured and orderly framework. As a result, judicial and legal reforms are consistently a priority on the agenda of nations regardless of their state of development. It is, therefore, important to have regard to the independence not only of the judges but also of the judiciary as an institution. The latter may provide traditions and a sense of corporate responsibility which are a strong guarantee of independence compared to the private conscience of individual judges.\textsuperscript{140}

The evolution of the role of the judiciary has led to its increased importance in the political, social and economic spheres. It has spurred reforms in many states that are intended to meet these new challenges through innovations in various spheres of the judicial system that are crucial for the quality and efficiency of its performance: recruitment, initial and continuing education, professional evaluation and discipline of judges, as well as in other areas that are functionally connected to the proper and expeditious performance of the judicial function, such as the managing and monitoring of court work by means of organizational and technological innovations. Naturally, reforms or reform initiatives in these areas have to be carried out with a view to striking a proper balance between the values of judicial independence and judicial accountability, both being equally crucial for the proper working of the judicial system in a democratic society and for adequate service to citizens seeking justice. However, the men at the helm of judicial affairs are not elected, but selected. This is why the institutional scheme of selection and evaluation of performance attains greater significance in the judiciary than in other branches of constitutional democracy.\textsuperscript{141}

\textsuperscript{138} Para.447, (per Madan B. Lokur J.).
\textsuperscript{139} Rajeev Dhavan & Thomas Paul, Nehru and the Constitution, (Bombay: N. M. Tripathi Pvt. Ltd., 1992,), p.64.
\textsuperscript{140} Justice H.R. Khanna, “Need to Preserve Image of Judiciary,” \textit{JBCI} 9(2)1982, p.245.
\textsuperscript{141} Kaleeswaran Raj, “Beyond the scorecard, the judicial system needs mending,” \textit{The Hindu}, Hubli edn., 04.06.2013, p.10.
In all democratic systems, accountability has always been of prime importance. Institutions, including the judiciary, are expected to carry out their roles and responsibilities with integrity and efficiency in the service of the public. As Nani A. Palkhivala once said:

“World history moves in cycles. High ethical times are succeeded by low, decadent decades. Today we are at the nadir of moral values. The size of the crime wave and armed violence, which is so huge as to baffle criminologists, is symptomatic of our ethical degradation…. A commercial recession can be quickly transformed into a buoyant economy; but a moral recession cannot be shaken off for years. It has spread so far as to contaminate the higher judiciary which is the soul of any democracy. Judges are the indispensable servants of society: without them, its most fundamental equilibrium cannot be maintained.”

As the role of judges has expanded in liberal democracies in consequence of their increasing numbers and influence on policy-making, the demands for greater accountability have grown worldwide.

In the United Kingdom, the latest development of the ‘abolition’ of the office of Lord Chancellor (followed by a modification of this office), the establishment of the Judicial Appointments Commission, the opening up of some judicial appointments to public competition and the creation of the new Supreme Court for the United Kingdom, have served to ensure better separation of powers and a safeguard for the independence of the judiciary.

In the United States, the judicial selection process that raised critical tensions in the balance between executive and legislative continues even till today. Judicial institutions were therefore structured so as to make courts significantly subordinate to elected politicians. Life tenure given to judges to preserve their decisional independence may cause significant problems when judges, for whatever reason, become unwilling or are unable to perform their function in an honest and efficient manner.

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142 Justice S.H. Kapadia, supra note 137, p.20.
143 Nani A. Palkhivala, supra note 109, p.218.
147 Andrew F. Hanseen, supra note 23, p.445.
Judges, occasionally may also abuse their office. These can undermine the democratic principles of accountability. It could also undermine the very judicial integrity which the protection of judicial independence was designed to assure.\textsuperscript{148}

In the United States, historically, Supreme Court justices have come to the court from a wide range of prior positions. Today’s Supreme Court has only one justice who held an important position in the national government and every other Justice had been a court of appeals judge when nominated. Some substantial amount of prior judicial experience may have become an implicit qualification for a seat in the Supreme Court, although we can expect occasional deviations. A significant portion of the federal judiciary is likely to consist of people with careers as judges and little else.\textsuperscript{149} However, the impeachment mechanism supplemented by disciplinary mechanisms founded under the \textit{Judicial Councils Reform and Judicial Conduct and Disability Act}, 1980. This has established a self-regulatory model for the US federal judiciary (other than the Supreme Court) to control judicial misconduct.\textsuperscript{150} Another feature of the accountability process found in several of the US States, is the use of performance evaluations for the judiciary. The US performance evaluation is designed to serve one of two purposes, that is, either to assist in the judicial re-election process or to improve judicial performance.

Under the scheme of the Indian Constitution, the final interpreter of the law is the court, not the legislature or the executive.\textsuperscript{151} The Founding Fathers have assigned the judiciary a place of pride in the Constitution and insulated it against any interference so as to protect its independence.\textsuperscript{152} Judicial independence, it was said by R. V. Ravindran J., “…is not a privilege enjoyed by judges, but is the reflection of the privilege of the people to the rule of law in a democracy….”\textsuperscript{153} So, high-calibre judges and an independent judiciary were essential to the Constitution’s preservation.\textsuperscript{154} As Nani A.


\textsuperscript{149} Mark Tushnet, \textit{supra} note 17, p.149.

\textsuperscript{150} Note that the US Supreme Court is not subject to the 1980 Act or the Code of Conduct for US judges.


Palkhivala analyses, “The final guarantee of the citizen’s right is not the Constitution but the personality and intellectual integrity of the Supreme Court judges.”

Appointment of judges is seen as a crucial mechanism to achieve judicial independence. The members of the Constituent Assembly of India were very much concerned with the question of independence of the judiciary and, accordingly, made several provisions to ensure this. Under Articles 124(2) and 217(1) of the Indian Constitution the President of India is to appoint judges of the Supreme Court and the High Courts after consultation with the Chief Justice of India and with such other judges and authorities mentioned in respective Articles. In the initial two decades, though the executive technically had the power to appoint Supreme Court and High Court judges and the Constitution only required the President of India to consult judges of the Supreme Court and High Courts as he deemed necessary, in practice, appointments were almost always made with the consent of the Chief Justice of India.

Successive governments were not very happy with the manner the Supreme Court dealt with social, economic, political and other issues. During the emergency, judges of the High Courts who displayed independence and had made decisions without fear and favour were sought to be muzzled by arbitrary transfers from one High Court to another. Additional judges were appointed by the Government to the High Courts pending their confirmation on a vacancy occurring. During the emergency, however, several additional judges in the High Courts were denied confirmation or were given extensions for short periods. Dubious appointments of judges of the High Court were made by the government. Hence, the two supersessions of the Supreme Court judges in 1973 and 1976 and arbitrary actions of government in the appointment, confirmation and transfer of High Court judges during the emergency period had a powerful impact on the principle of judicial independence. Executive interference in the appointment process had started before emergency, peaking towards the end of the 1980s. For the first time, on the issue of appointment of judges to the superior judiciary, the Supreme Court in the First Judge’s Case, held that the power of appointment of judges resided solely and exclusively in the President subject to full and effective consultation with the

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156 AIR 1982 SC 149.
Constitutional functionaries, mentioned in Article 124(2) and 217(1) including the Chief Justice of India and ‘consultation’ didn’t necessarily mean ‘concurrence’ and conferred the final power of judicial appointments on the political executive. Taking advantage thereof, government packed the courts with committed judges acceptable to the ruling party at the Center. Instances of supersession of senior judges, elevation of a favoured few to the higher courts and easing out the inconvenient ones as a sort of punishment became all too frequent. Only one instance known to public, pre the First Judges case was where an appointment as a judge of the High Court was made without the concurrence of the Chief Justice of India. Post the First Judges Case, as many as seven such appointments were made. This is a clear indication that the ‘ultimate power’ theory propounded in the First Judges case translated into ‘absolute executive primacy’. The ‘executive primacy’ system was, unfortunately, abused by the executive. The dream of the Founding Fathers became a nightmare. In the meantime, the judiciary was suffering from a crisis of credibility. Allegations of corruption were also beginning to emerge against sitting Supreme Court judges, these show that the judiciary was facing a crisis of credibility. All this goes to prove the first hypothesis that ‘the principles relating to judicial independence and judicial accountability have been adversely affected over a period of time.’

In the Second Judges’ Case, the Supreme Court held that the opinion of the collegium consisting of the Chief Justice of India and two most-senior judges, would bind the President, that is, consultation means ‘concurrence.’ Hence, the majority decision in the First Judges’ Case was overruled. In the Second Judges’ Case, the majority maintained that appointment of judges to High Courts and the Supreme Court forms an integral part of the basic structure of our Constitution, and therefore, the executive cannot interfere with the primacy of the judiciary in the matter of appointments and the Supreme Court emphasized that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The Supreme Court of India asserted its

158 AIR 1994 SC 268.
159 Ibid, p.437 (per Verma J.).
‘primacy’ over the executive, and its power to control its own composition. The judgement in the Second Judges’ Case is innovative and unparalleled in as much as it shifted the power of appointment and transfer of judges from the executive to the judiciary. The concern of the judgements of the Second and Third Judges Cases was to eliminate political interference during the stage of appointment. Now the ‘ultimate power’ theory or the ‘absolute executive primacy’ theory is diluted and the last word in the appointment of a judge of the Supreme Court is vested with a collegium.

To replace the collegium system, the Constitution (Ninety-Ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014 (the NJAC Act) were passed with a rare majority. Finally, the laws on NJAC were struck down by the Supreme Court as unconstitutional in the Fourth Judges’ Case. The verdict was not based purely on the interpretation of the text of the Constitution but on the basis of a fundamental Constitutional principle that an independent judiciary is one of the basic features of the Constitution and the procedure for appointment of the judges of the Constitutional Courts is an important element in the establishment and the nurturing of an independent judiciary. The NJAC’s flawed composition consisted of the fact that it merged certain components, reflected in the inclusion of Law Minister and two eminent persons and giving any two members the power to veto the decision of the other four. Under the new scheme, the Law Minister has been given a role, equal to the CJI. Equal participation by the Law Minister and two outsiders in the final decision for initiation or appointment can be detrimental to the independence of the judiciary. Had the Parliament maintained the primacy of the judiciary while providing for the entire scheme of working of the NJAC, the decision may have been different. But the NJAC laws, which were enacted by the government hastily without consulting the CJI and other legal

162 See Chapter –VII, pp.212-221.
163 No.49, the Gazette of India (Extraordinary) Part II, Section 1.
164 No.40 of 2014.
166 Para.19.13.(per Adarsh Kumar Goel J.).
experts to replace the collegium system, was devoid of all such significant features and thus attracted ‘judicial burial.’ 168 In sum, with all its shortcomings, the present collegium system is definitely superior to the NJAC. The attempt to restore the predominant voice of the political class in judicial appointments and transfers will amount to subverting the basic structure of the Constitution. All this goes to prove the second hypothesis that ‘the Supreme Court has tried to restore the independence of the judiciary through successive Judges Cases and in the process, has affected the scheme enshrined in the Constitution.’

It is important to mention that neither the executive-appointment model, which prevailed till 1993, nor the judges-appointing-judges (collegium) model, as practised till recently, have been found satisfactory to preserve the independence of the judiciary while promoting efficiency and accountability in the system. The decision of the Fourth Judges Case is important, because it recognises its present failings in the collegium system. Its true worth will be tested only when the Supreme Court implements the urgent reform that is needed, with the absence of which, existing problems will get further and perhaps irreversibly, entrenched.169 The Supreme Court is now hearing views and suggestions from the government, the Bar and civil society on how to reform the process while keeping control over the appointment of judges with the judiciary itself.

The independence of the judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the higher judiciary and that, to expect an independent judiciary when the power of appointment of judges vests in the executive, is illogical. It was also important that in the process of evolution of societies across the globe, the trend is to free the judiciary from executive and political control, and to incorporate a system of selection and appointment of judges, based purely on merit. Judges must be independent to fulfill their role in the constitutional order - independent, in the real sense of the term and not afflicted by subservience to the rulers of the day.170 There is no doubt that the judiciary has to work with the executive and the legislature, but

170 H.R. Khanna, supra note 38, pp.18-19.
it would be a sad day when it starts working for them. The highest institution of this nation cannot but become a creature of the government of the day. The day when the higher judiciary ceases to be independent, democracy and the rule of law will collapse.

The government of India is the single largest litigant in the whole nation. It has more cases pending against it than any other party or authority. If this litigant can select judges suitable to itself, that would be the end of the judicial system which has till now served so admirably as the citizen’s palladium against unconstitutional laws and arbitrary executive action. As the Supreme Court held “The Constitution is a precious heritage and, therefore, you cannot destroy its identity.” We are one of the very few nations where actions of the political executive in diverse fields, ranging from violation of human rights to wrongful distribution of natural resources and a wide range of issues which have huge political ramifications, are brought before the superior judiciary in the Public Interest Litigation. It becomes difficult to trust judges who are appointed with the direct say of the government to deliver neutral and high-quality decisions in such matters. It is no exaggeration to say that appointment processes shape the ability of courts to hold political institutions to account.

A Constitution is not merely a black letter document, it is rather a ‘living creature’- this life comes to it through reading/interpretation, giving nourishment to the people who establish it (or for whom it is established). A Constitution is a living organic document, which, of all instruments, has the greatest claim to be construed broadly and liberally. The provisions of our Constitution should be worked out in the spirit in which they were drafted. If the very independence of the judiciary is

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174 Ibid, p.100.
176 R.M. Lodha, supra note 167.
compromised, we will be living under nothing short of a ‘one party authoritarian state.’ The judiciary has to be representative of the aspirations of the people of this nation, rather than of the ideology of the ruling party.

For appointment of judges to the higher judiciary, a transparent procedure is to prescribe the norms and standards expected of candidates seeking to be appointed as judges and invite applications from them. Alternatively, they can be nominated by retired judges, senior advocates, Bar Councils or Bar Associations, etc., testifying to their possession of qualifications prescribed. On receipt of applications, a system of shortlisting based on comparative merit, again according to pre-determined norms and procedures can follow to identify those who are meritorious. Both the original list of applicants/nominees and those shortlisted along with their details can be posted on the website of the court for a reasonable period to elicit objections, if any, from the government as well as the public. There can be a technical committee of retired judges to shortlist the applications and to respond to objections/grievances in the initial stage of selection. This part of the procedure should be open to Right to Information Act queries as well.¹⁷⁹

The collegium will then sit to verify and decide the final selection of candidates who deserve to be appointed. The list of selected candidates can be more than the number of vacancies and also be in the order of merit. Naturally, personal interaction through interviews may be necessary at this stage to prepare the final list. The list may be valid for a two-year period and the process can be repeated every two years. There are standardised psychological tests to measure the extent of integrity, independence, sense of equality and other values essential for adjudicative independence. The whole process can thus be made transparent and fair and less prone to abuse. Naturally, the process is long, time-consuming, technical and professional, which sitting judges of the collegium cannot undertake by themselves; hence, the need for permanent secretariat.¹⁸⁰ The tasks involved are of a continuing nature involving professional and technical expertise to be supported by secretarial services. Small secretariats at the level of the Supreme Court and High Courts and supervised by collegium judges become necessary for the purpose. They

¹⁷⁹ N.R. Madhava Menon, supra note 151.
¹⁸⁰ Ibid.
will have a small technical panel of retired judges known for their integrity, efficiency and independence to gather from High Courts the positions to be filled, to invite applications/nominations from eligible candidates, to do the short-listing according to the norms and standards set by the law/collegium, and to respond to objections and queries, etc. from the public/governments. They will prepare a manual for streamlining procedures and develop software to digitalise and expedite the processes. The processing can be perhaps done centrally, after receiving the applications/nominations from States. The High Court will only do “a post office job” initially. Later, when the shortlisting is completed at the Central level, the list will be sent back to the respective High Courts/State governments where the collegium/government will make its/their choices and recommendations to be sent directly to the Supreme Court Collegium. Since the shortlist has been on the websites for a considerable period of time and governments would have adequate opportunity to raise their objections, if any, it may not be necessary for the appointments to be delayed for further clearance from the executive. As the collegium secretariat, in due course, will develop a databank of all judges and aspirants to judicial posts across the country, it can well handle their transfers and promotions under the guidance of the Chief Justice and collegium of judges.\(^\text{181}\)

As judicial independence is both an individual and collective responsibility, it is important to involve the full court in the selection, appointment and transfer processes of judges. Towards this end, it is necessary to broaden the membership of the collegium. As most High Courts have nearly 50 or more judges, and their numbers are increasing, it is not possible to have the entire body of judges sitting in the collegium to deliberate on issues of appointments. At the same time, it is not acceptable to have the Chief Justice and only two or three of his senior colleagues deciding the issues which are of importance to the entire body of judges. As such, broad basing the collegium by accommodating all judges on a rotational basis is something that has to be evolved. It is possible to enlarge membership of the collegium in each High Court and Supreme Court to a third of the total strength of the court. Such an enlarged body has possibilities of being inclusive of women, minorities, Scheduled Castes and Scheduled Tribes, and therefore promotive of the constitutional goal of social justice in judicial appointments as

\(^{181}\) *Ibid.*
well. A third of members can retire every two years thus bringing into the collegium fresh minds and wide representation.\textsuperscript{182}

It is difficult to accept the theory that all advocates selected through the processes prescribed, will turn out to be competent judges from the day they join the high bench. According to a study, it takes five to ten years for an advocate to transform himself/herself into becoming a competent judge. The duration can possibly be reduced through institutionalised education and training. In addition, the time for an All India Judicial Service has come and the government should legislate for the purpose. Let the window of opportunity provided by the Supreme Court in looking at suitable procedures for selecting judges be utilised to push for other structural changes necessary in order to give the country a judicial system which will decide disputes competently, and within a reasonable time and with reasonable expense.\textsuperscript{183}

The quick succession of judges and the Chief Justices in the Court have also caused fluctuations in its membership as well as its leadership. The reason underlying this malady has been the appointment of judges in their fairly advanced age, which, because of the mandatory retirement at the age of 65 years, leaves them with exceedingly short tenures on the Bench. Although, there were a few exceptions where judges were appointed with tenure of ten years or more, yet the Court has, by and large, suffered from institutional instability. Judges with short tenures apparently found themselves close to their impending retirements even before they could adapt to the new institutional environment. This kind of situation, therefore, hardly leaves much scope for many judges to grasp the institutional needs of the court and respond accordingly.\textsuperscript{184} Similarly, High Court Chief Justices have occupied their positions for as little as three to six months \textit{en route} to the Supreme Court. Little concern has been shown for the effect that these short-term appointments have on administration in the High Courts. Nor has there been too much worry about the quality of recommendations for judicial appointments by the collegiums presided over by such short-term Chief Justices, who would really have had no occasion to assess the competence of such persons. There have also been instances where senior judges have been appointed as High Court Chief Justices for just a few days

\textsuperscript{182} \textit{Ibid.}
\textsuperscript{183} \textit{Ibid.}
before their retirement, so that they do not lose out on the benefits of retirement from that higher position.\textsuperscript{185}

The Supreme Court of India is perceived by the lay public as the most potent institution in the Constitution by its appellate authority over all courts and tribunals and by its striking orders correcting and supervising government actions.\textsuperscript{186} The Indian Supreme Court is an extraordinarily powerful institution in the world. It can make and unmake laws; it can keep the executive accountable, and seek to ensure the autonomy of institutions. It can rewrite the Constitution the way it wants, through its creative interpretation yet remain largely unaccountable for its omissions and commissions.\textsuperscript{187} At the same time, the only constitutional method of disciplining a judge of a superior court \textit{viz}, by his removal for proved misbehaviour by an address given by both the Houses of Parliament to the President for his assent is unwieldy and in one case,\textsuperscript{188} was shown to be politicised. There is also no method for disciplining a judge of a superior court for deviant behaviour not amounting to misbehaviour.

The impeachment procedure in the present political system may never be a practical methodology of disciplining errant judges of superior courts. Motions in the Parliament and even debates in the Parliament, of late, have not necessarily been merit based and on objective evaluation, but only on political considerations. That virtually leaves the judges of the superior courts immune from any accountability. Misbehaviour by any judge, whether it takes place on the Bench or off the Bench, undermine public confidence in the administration of justice and also damage public respect for the law of the land, if nothing is seen to be done about it, the damage goes unrepaired. A judge is always a judge and he cannot have a split personality with different traits at different times. All actions of a judge must be judicious in character. A dichotomy in the nature of functions performed by a judge is impermissible for this purpose.\textsuperscript{189} As of now, other than removal as prescribed under Article 124(4), there is no institutionalized mechanism to investigate complaints against judges. Ironically, the higher judiciary in India has

\textsuperscript{185} Raju Ramachandran, “The importance of the outsider,” \textit{The Hindu}, Hubli edn., 27.08.2013, p.10.
\textsuperscript{187} V.Venkatesan, \textit{supra} note 125.
\textsuperscript{188} Impeachment process of V. Ramaswami J.
powers of control over every organ under the Constitution but there exists no effective method of disciplining its own members. Public confidence in the higher judiciary which stands high at present may, in the long term suffer, if effective means of disciplining judges of the superior courts is not found.\textsuperscript{190}

An in-house mechanism was evolved by the Supreme Court, for taking suitable remedial action against judges who, by their acts or omissions, did not follow universally accepted values of judicial life including those included in the \textit{Restatement of Values of Judicial Life}. The Supreme Court, cannot have any say in the matter of the functioning of the High Courts; the only authority of the Supreme Court \textit{vis-à-vis} High Courts is on the appellate side, as provided under the laws and under the Constitution. It is not possible under the Constitutional scheme to vest the Chief Justice with any control over the puisne judges with regard to their conduct either personal or judicial. It can be easily noticed that in case of breach of any of the rules or code of conduct prescribed in the resolution of the Chief Justices, the only action can be taken by the Chief Justice is not to post any cases before a particular judge against whom there are some well-founded allegations. If such a course is adopted by the Chief Justice it is possible to criticize that decision on the ground that no enquiry was held and the judge concerned had no opportunity to offer his explanation particularly when the Chief Justice is not vested with any power to decide about the conduct of a judge. So, there is no adequate method or machinery to enforce the code of conduct and 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.\textsuperscript{191}

The other major contributory factors, in the context of judicial accountability being not in vogue in the higher judiciary, are the misuse and abuse of the power to punish persons committing contempt of court and some instances of post-retirement activity of judges. \textit{viz.} chamber practice of giving written opinions by name to be used by litigants/parties before a court/tribunal or any authority; arbitrations for high fees; doing arbitrations even while heading commissions/tribunals availing the salary, perquisites and benefits of a sitting judge/CJI are some activities inviting adverse comments and seen as

\textsuperscript{190} T.R. Andhyarujina, \textit{supra} note 110, p.127.
\textsuperscript{191} See Chapter VIII, pp.299-301.
eroding judicial independence. The conflicting opinions on same issue, abuse
discretionary powers, the failure of judiciary in implementing RTI Act provisions and
transparency measures to itself and rising of corruption cases in judiciary will all prove
the third hypothesis that the “Institutional and individual accountability have been diluted
due to various factors like the lack of strict adherence to the doctrine of precedent, rules
of practice, etc.’

It is high time to consider whether the removal of judges should depend on the
vote in Parliament. The perception of corruption by a large number of members of
Parliament is likely to be different from the perception of the Chairman and members of
the Inquiry Committee under the Judges (Inquiry) Act, 1968. Members of the Parliament
who notice large scale corruption right under their nose day in and day out may or may
not appreciate that the misbehaviour of a judge found by the committee warrants his
removal. The question also arises as to whether, under prevailing circumstances, Parliament is best suited to take a final view on judges’ misbehavior. In any event, so long as impeachment is uncertain, it cannot be a deterrent. Irremovability tends to encourage corruption, indiscipline and irresponsibility.

The various measures envisaged in the Judicial Standards and Accountability
Bill, 2012 will increase accountability of judges thereby further strengthening the
independence of the judiciary. The said Bill provides statutory backup to judicial
standards, hitherto having sanction of the Restatement of Values of Judicial Life 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. The disciplinary process must be
transparent, fair and accessible and include the procedure for filing complaints, carrying
out investigations and decision-making. Once these matters become statutory, the parties
complaining will get a right to know the outcome of their complaint and even seek
information under the Right to Information Act, 2005. Such aggrieved parties may in the
event of closure of the complaint approach the law courts for redressal of their grievance.

192 For example while granting of bail and awarding of compensations etc.
193 See Chapter VIII, pp.276-310.
194 P.P. Rao, supra note 126, p.29.
It is high time that this unhappy situation is corrected by reforms in the law and amendments in the Constitution.

The power to punish for contempt is of narrow scope and is not really meant to be taken seriously as a defensive weapon to guard the independence of the judiciary as such.\textsuperscript{195} Today, in states like the United Kingdom and USA, the concept has been liberalized. But India still follows the old British-rule norms, which undoubtedly was not a free democracy. It should be obvious to anyone that respect for the courts cannot and does not depend on the existence of this power. It depends entirely on how the actions of the judges and the courts are perceived by the people. The frequent use of the contempt powers may damage the judiciary itself. It would be fair to say that every exercise of this power to punish a criticism, however fierce, of a judge or court, will only be used to stifle criticism and exposure of misconduct. It is high time that the Courts interpret the \textit{Contempt of Courts Act} more liberally and realize that justice is more important than individual egos. The time has therefore come to expressly do away with this power by amending the Constitution and the \textit{Contempt of Court Act}. In a healthy democratic state, public opinion, discussions, awareness and debates are imperative to the progress of the nation. This is impossible in a system where the media, jurists and other citizens are silenced due to the fear of being subjugated to contempt laws. The judiciary has to earn reverence through the test of truth and not by fear. So, serious reforms are needed in the law of contempt.

As far as post-retirement behaviour of judges of superior judiciary is concerned, there should be a cooling period of six months or a year before the appointment of a retired Supreme Court judge to a tribunal or any other judicial body. This should dispel apprehensions in the matter and sustain public confidence in the integrity of the judicial system and the independence of our Supreme Court judges.\textsuperscript{196} The solution of the problem appears to lie in increasing the age of retirement of a Supreme Court judge from 65 to 70 years, to make liberal pension provisions for the retired judges, to put a legal ban

\textsuperscript{195} V.R. Krishna Iyer, \textit{supra} note 43, p.131.
on a Supreme Court judge accepting an employment under any government after retirement, and to use his judicial talent in an honorary, and not is a salaried, capacity. 197

All citizens are vitally interested in an unpolluted stream of justice. 198 Integrity is the hallmark of a good judicial system. Integrity means “uprightness and honesty.” It is imperative that transparency be ensured whenever aspersions are cast on judicial conduct. 199 Self restraint is the very soul of judicial impartiality. 200 The task of the judge is to give meaning to constitutional values and he does that by working with the constitutional text, history and social ideals.

It is also important to mention that judicial integrity is more important than judicial independence. The accountability mechanism should not only develop highly ethical and professional standards but also generate social legitimacy. The functioning of the judiciary is, at the end of the day, based on the doctrine of public trust. If judges are to acquire judicial authority, they need the people to believe in their integrity and capacity to deliver socially meaningful judgements. 201

We must also recognize that maintaining the highest standards in terms of judicial work and justice delivery is also inherent to the ideal of judicial accountability. This essentially requires that the judiciary, at all levels, is not only highly skilled but also keeps abreast with the latest developments in the law and practice. Thus constant training and up-gradation of skills must be part of any judges’ schedule. Such training modules must necessarily include subjects such as international human rights, humanitarian law, refugee law, intellectual property law and environment law. A judicial officer must also be in constant touch with and know the social and economic reality of his country to ensure that his judgements are practical as well as acceptable to the public.

Independence rests not merely on law and its protection but equally and surely and also more, on the judge himself. Self restraint, decorum, circumspection, balance, conscience, dignity, objectivity, aloofness are among the preservatives of the independence of a judge. He holds a high office and immense power of the laws as a

197 Gopal Subramanium, “When judges don’t adjudicate enough,” The Hindu, Hubli edn., 1.05.2013, p.10.
198 Nani A. Palkhivala, supra note 109, p.220.
201 Justice S.H. Kapadia, supra note 137, p.23.
judge, not as an individual, and has, therefore, a duty to uphold it in ways which would help hold its place in public interest, not the least swayed by anything from what justice dictates. In this regard, judges can stimulate the Gandhian principle initiated in South Africa, viz., truth shall be the first priority of an advocate and settling dispute will be a necessary forensic experiment. It is to be primarily understood that every law and legal institution has to function through the medium of ‘human beings.’ Therefore, the challenge before the Bar and the Bench in the 21st century, is regarding the personnel who are made to run the institution of judiciary. Special care is required to be given to their selection, education, training and mental makeup. This is imperative to meet every other challenge before the Bar and the Bench. In 1920 Gandhiji writing in Young India said: “legal practice is not and ought not to be-a speculative business. The best talent must be available to the poorest at reasonable rates.” Much of the independence of the judiciary depends upon the traditions of the Bar which are the real contributors to a decision. Informed, well read and a vigilant bar is sine qua non for judicial independence and tradition. The decline in standards at Bench-level is but a reflection of declining standards at the Bar. And declining standards at the Bar, lawyers glibly accept, attributing them to declining standards in public life; as for standards in public life in India, the less said the better.

9.3 Suggestions

As the research concentrates on the issues related to judicial independence and judicial accountability, it identifies some solutions based on the arguments advanced throughout the thesis. The following solutions are proposed in order to strengthen judicial independence and to ensure judicial accountability in India. In summary, it is suggested that:

1. The mechanisms for judicial appointment to the higher judiciary should be made transparent and open to public scrutiny. The criteria for appointment of judges should be made explicit and publicly known. Among the many reforms

needed in the judiciary is full-time and independent institution for selecting judges to the higher judiciary.

2. For the appointment to the post of the Chief Justice of India, the matter should be referred to a panel consisting of all the sitting Supreme Court judges. The principle of seniority existing today can be set-aside, only if the above panel finds sufficient cause for such a course.

3. The different retirement ages of judges in High Courts and the Supreme Court encourages sycophancy and unhealthy competition amongst prospective appointees. It must be removed, and brought at par (ideally, this may go up to 70); increase in the age of High Court judges will also widen the field of selection. At present, successful lawyers in the age group of 50-55 are reluctant to accept judgeship because of early age of retirement.

4. In the interest of judicial purity, impartiality and independence, a judge of a High Court after retirement should not be permitted to practice in any Court within the territory of India and similarly a judge of the Supreme Court also should not be allowed to do chamber practice after retirement. On retirement from service a judge of the Supreme Court or of a High Court should not be permitted, to accept any executive or diplomatic appointment. A two year ‘cooling-off period’ must be introduced, to ensure that judges are not independent only in fact, but are also seen as being independent of the executive. Ideally, such post-retirement appointments, say, to a Tribunal or to a Commission, should be made by a panel specially constituted for this purpose.

5. No one should be appointed to the Supreme Court or High Court as a judge, unless, for a period of not less than five years, he has snapped all affiliations with political parties and unless during the preceding period of five years he had distinguished himself for his independent and dispassionate approach and freedom from political prejudice, bias or leaning. There should be no scope for alleging that a judge is a ‘committed’ judge.

6. At the earliest the Judicial Standards and Accountability Bill, with some minor modifications, should be enacted into a law to strike a reasonable
balance between the demands of accountability and of judicial independence and to regulate the minor misconduct of the judges. It was suggested that the judicial standards should be updated from time to time in future. The composition of the Scrutiny Panel, Oversight Committee should be made more representative and broad based.

7. A good mechanism to promote accountability through statistical reporting should be instituted to provide descriptive statistics on judicial activity, such as how many cases were presented to the courts for decisions and how many, the courts disposed, what methods were used for disposal, etc. Data such as these create a good benchmark or a framework or even a pre-existing standard of the efficient functioning of courts, which must be emulated by other courts. Such reporting exerts some amount of pressure on judges to change their methods and conform to the norm and dispose off cases expeditiously so as to avoid the embarrassment of a public report.

8. It is suggested that the judges should sit in benches of five or more in the Constitutional Division in the Supreme Court. The purpose behind this new proposed structure is to make the jurisprudence of the Supreme Court more integrated and coherent. This would also clear the workload of the court. It would improve the institutional viability of the court. And it is suggested that the creation of a separate national court of appeals, distinct from the Supreme Court, in which appeals from High Courts and Tribunals can be entertained.

9. Renewed attention on constitution of Benches should also address other concerns. The court should endeavour for clearer decisions, which might sometimes involve shortening of judgements. Further, selection for the constitution of Benches can be random to ensure that the Chief Justice does not have too much power in deciding which judges should sit on these Benches.

10. The *Contempt of Courts Act* need to be amended. An endeavour should be made to confine the definition of the contempt within the four limits of a statutory definition and specify clearly the liability for contempt. The
contempt of court should be made a criminal offence and punishable only by regular criminal courts.

11. Structural and procedural reforms, to suit Indian conditions, are the urgent need; primarily, procedures and functioning of the courts should be simplified. The old procedural codes are to be re-enacted reducing the delay in, and expenses for, judicial process. There is good reason to shorten the hierarchy of the judiciary. One appeal by competent judges may perhaps be enough instead of appeals, second appeals, revisions and reviews which aggravate the long pendency and make the poor litigant a casualty. Too many appeals are injurious to justice and shake the credibility of the system.

12. To make available to a judge a proper atmosphere in which he may be free to act according to his conscience, it is necessary to ensure that the judge is not overburdened with pressure of work. This necessity suggests that the ‘judge-strength’ should be adequate to current requirements and must remain under constant review in order that commensurate judicial strength may be provided.

13. Delay defeats justice. In the absence of good governance, courts are bound to be overcrowded and, consequently, the right to speedy trial gets frustrated. Comprehensive reforms are needed to provide good governance. There should be a curb on frivolous litigation by proper checks at entry and quick disposal. Delay breeds frivolous litigation and artificial arrears, it should be identified and eliminated.

14. Professionalism in judiciary should be enhanced through intensive training and orientation programmes for the members of the judiciary at all levels at the time of entry and subsequently also. Initial training should be followed by regular continuing education.

15. Abolition of the colonial legacy of summer and winter vacations is prudent. Likewise, it has become necessary to increase the number of working days of the court and avoid absenteeism except for an unavoidable good cause. It has to be introduced at all levels of judicial hierarchy and it must start from the Apex Court.