CHAPTER-6
JUDICIAL ACCOUNTABILITY IN INDIA:
ISSUES AND CHALLENGES

"Judges are the essential equalizers; they serve neither majority nor any minority either. Their duty is to the law and to justice. They do not bend the knee to governments, to particular religions, to the military, to money, to tabloid media or the screaming mob".

Justice Michael Kirby, Australian High Court

I. Introduction

The edifice of Indian democracy is built upon the three main pillars namely-Legislature, Executive and Judiciary. These three institutions are independent and equal and one cannot encroach or interfere with the functions of others. However, it is to be accepted that judiciary is first among the equals. When the Executive and the Legislature act beyond their constitutional boundaries, the judges correct them.¹ The judiciary is one of the institutions on which the noble edifice of democracy and rule of law rest. It is the judiciary which keeps every organ of the state within the limits of the power conferred upon it by the Constitution. It protects the rights of the citizens giving equal justice to all. It controls the Legislature and the Executive through "Review Power".² It has thus creative role to play in the society as the guarantor of the rights and arbiter of differences.

Judiciary is the repository of public faith. It is the trustee of the people. After knocking at all doors, when one fails to get his grievance redressed, judiciary is the only hope which comes to one’s rescue. It is the only temple worshipped by the citizens of the country regardless of

religion, caste, creed or place of birth. In a federal state, there is
division of powers between the Centre and States. In any dispute
between the Centre and the State, it is the judiciary that settles such
dispute. Thus, when the judiciary is playing such an important role in
our democracy, its independence and dignity have to be upheld and
safeguarded.

Judicial independence indeed, is founded upon public trust and to
maintain this sacred trust. Judges must shape themselves and also to
be trained suitably to uphold the highest standards of integrity and
honesty and act without fear or favour and held accountable to all
their acts and decisions and thus make the entire system of judiciary
transparent.

Judicial accountability is in fact a corollary of the independence
of the judiciary. Simply put, accountability refers to taking
responsibilities for your actions and decisions. It generally means
being responsible to any external body; some may insist
accountability to principles or to oneself rather than to any authority
with the power of punishment or correction. Since accountability is a
facet of independence the Constitution has provided in Article 235, for
the ‘control’ of the High Court over the Subordinate Judiciary clearly
indicating the provision of an effective mechanism to enforce
accountability. Thus, entrustment of power over subordinate judiciary
to the High Court preserves independence as it is neither accountable
to the executive or the legislature.

II. Nature and Concept of Judicial Accountability

The concept of judicial accountability is as old as the
independence of judiciary. In India, independence and impartiality

3 Ibid.
4 Supra n.1 at 113.
have always been considered to be the essential qualities of a Judge from earliest times.\(^7\) During the Modern Period, the independence of the judiciary has been accepted as a cardinal principle world-wide and has found place in their Constitution. It is with this spirit in mind that the wise founding fathers of our Constitution have intended to uphold the principle of accountability of courts in India which is evident from the reading of Schedule III which imposes in the judge a duty to preserve the sovereignty and national integrity. There is no doubt in it that the judiciary has been accorded a position of independence under the Constitution but at the same time, it is also true that the judiciary like other institutions, those exercise public power and accountable to the people, must be made accountable to the people.\(^8\)

As the notion of accountability permeates the public life, today each and every citizen expects the government to be accountable in every field. It is true that in the past history, judicial branch of government was the most accountable areas of government. In the 19\(^{th}\) Century, the traditional function assigned to the judiciary was to be an arbitrater of disputes between citizens *inter se*.\(^9\) The concept of judicial accountability in India is considered into two ways. Firstly, accountability of the higher judiciary in India, for their judgements. Have the judges in India been responsible and felt necessities of time in the past and at present to the constitutional goal? Secondly, the institutional methods of appointing the Judges, removal and the inhibitions to criticism of their work by the law of contempt.\(^10\)

**Judicial Accountability has been manifested in various different ways:**\(^11\)

i) The business of all the courts is counted in public except in extraordinary circumstances. Judges resolve the dispute


\(^8\) *Ibid.*


\(^11\) *Supra n.9* at 192-193.
because they will be under an obligation to publish the full reasons for their decisions. Sometimes, there can be the media attending hearing and even sometimes they are given a legal right to be heard in relation to the closure of the court. And hence with regard to such an exposure of the business of the courts for legal examination and the glare of public scrutiny, it is considered that the judicial branch needs to be still more accountable.

ii) Accountability of the judicial branch has been described as legal, public and informal (professional) accountability. Here, legal as well as the public accountability refers to the accountability which takes place through the process prescribed. And informal accountability is the obligation which the judicial branch has to discharge its function before the legal practitioners and fellow Judges whose confidence has to be maintained by performance to the standards who are recognized by them as professionally high.

III. Meaning of Judicial Accountability

Judicial accountability as a concept is much debated since it is very difficult to explain it in precise words. The ordinary meaning of judiciary accountability is the answerability or responsibility. It’s conception and methods vary from one nation to other, depending on the situations prevailing. Judicial accountability of a Judge is twofold:

(i) One, which arises as a result of the requirement for every judicial officer to give reasons for his/her decision. Valid reasons bestow transparency on the decisions.

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(ii) **Second,** which related to tenure and, in particular, to circumstances which give rise to disciplinary measure, including removal from office.

Accountability, as per the *Oxford Advanced Learner's Dictionary (Sixth Edition, 2000)* means being **"responsible for your decisions or actions and expected to explain them when you are asked"**. In *Webster's Dictionary*, accountability is defined as **"the quality or state of being accountable, liable, or responsible"**. Generally speaking, accountability implies the necessity to justify or explain one's past conduct, behaviour or action. Thus, the word 'Accountability' means responsibility with respect to the powers, functions and duties in any system. Judicial accountability is a philosophy, a concept with wide separate wings. In the very nature of the function performed by the Judge, the office held by him, the power and discretion vested in him and the independence enjoyed legally and traditionally by him, it will be more correct to say that the Judicial Accountability would mean the **conduct and behaviour** of a Judge both inside and outside the court. President Barak Obama sums up his concept of independence and accountability in four principles:

(i) The Judge ought to be aware of his power and his limits. He must know that his power should not be abused and that a Judge cannot obtain everything he wants.

(ii) A Judge must recognise his mistakes. Like all mortals, judges err. A Judge must admit this. The professional integrity of a Judge requires him to admit his mistakes if he is convicted that he has indeed erred.

(iii) In his writing and in his thinking, a Judge must display modesty, and absence of arrogance.

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15 *Ibid*.
16 *Ibid. at 62-63.*
(iv) Judges should be honest. Public confidence in the judiciary increases where the message goes to public (by words and conduct) that the Judges are truthful.

IV. Need for Judicial Accountability

As per the Campaign Statement issued by the People’s Convention on Judicial Accountability and reform.17 “The Judicial System of the country, far from being an instrument for protecting the rights of the weak and oppressed has become an instrument of harassment of the common people of the country. In fact it has become the leading edge on the ruling establishment for pushing through near liberal policies by which the resource such as land, water and public spaces left with the poor and being increasingly appropriated by the rich and the powerful. While the system remains dysfunctional for the weak and the poor when it comes to protect their rights, it functions with great speed and alacrity when involved by the rich and powerful, especially when it is appropriating the land and public spaces from the poor. The courts are increasingly displaying their elitist bias and it appears that they have seeded from the principles of the Constitution which set up a republic of the people who were guaranteed “Justice—social, economic and political”.

“All power is a trust that we are accountable for its exercise—that from the people and for the people, all springs and all must exist”.18 In a ‘democratic republic’ power with accountability of the individual enjoying it, is essential to avert disaster for any democratic system.19 The accountability must be comprehensive to include not only the politicians, but also the bureaucrats, judges and everyone invested with power. Power and position in a democracy is depicted as attendant with responsibility, and every incumbent of a public office must remain constantly accountable to the people, who are the

17 Held in New Delhi on 10th and 11th March, 2007. See also Mona Sukla, Judicial Accountability, 3 (2010).
18 Supra n. 12 at 17.
19 Ibid.
repository of political sovereignty. The judicial system deals with the
administration of justice through the agency of courts. Judges are the
human stuff which presides over the courts. They are not merely
visible symbols of court. They are actually their representatives in
flesh and blood. The manners in which judges discharge their duties
determine the image of courts and the creditability of judicial system
itself. In India from time immemorial judges have been held in high
esteem and revered as super humans but coming across incidents in
Bihar (like killing of an under trial in the court itself and lynching a
suspected thief to death) depicts that frustrated by the failure to get
justice, people are slowly losing faith in judiciary and are taking law
into their hands. This is highly deplorable. A need definitely is these to
make judiciary accountable, as derogation of values in judiciary is far
more dangerous than in any other wing of the government as judiciary
has to act as the guardian of our Constitution.20 Judicial
accountability and answerability of the judges is not a new concept.
Several Countries in their Constitutions have already provided for
ensuring accountability of judiciary. This to prevent concentration of
power in the hands of a single organ of the state especially in
Countries where judicial activism interferes with and invades into the
domain of other organs. But at the same time Judicial independence
is a pre-requisite for every Judge whose oath of office requires him to
act without fear or favour, affection of ill-will and to uphold the
Constitution and laws of the country.

V. Principles and Standards of Judicial Accountability

For any objective assessment of Judges 'accountability, one
must be clear about the principles and standards against which the
performance is to be assessed. To whom is he accountable? What is
the machinery by which accountability can be established? What are

20 Ibid. See also Corruption in India, The Economist, Uncompromising Global
the sanctions available to enforce accountability against erring judges of superior courts?21

It is said that the very nature of judicial process ensures accountability of judges. Court proceedings are held in public. Judges have to give reasons for their orders and judgements.

Judgements may be appealed against and corrected by the appellate court. It is open to the public to criticize judgements and contend that they are wrongly decided. Litigants can demand the recusal of judges if they reasonably suspect bias on their part or can seek transfer of hearing to another bench. Advocates on opposite sides constantly oversee judicial conduct and oppose improprieties, if any, in the conduct of proceedings. All these are built in safeguards intended to ensure accountability in terms of fairness and impartiality in administration justice.22

Accountability for all branches of government is the hallmark of rule of law and therefore judiciary no doubt, has to be accountable. But unlike politicians and legislators, judges cannot be accountable to the electorate. Their accountability can only be to the law of the land and to their own judicial conscience. The question is on what principles and standards are they to be tested if doubt arises. These principles and standards naturally have to be far above the ordinary in view of the enormous power judges enjoy to sit on judgement on life and property and over other wings of government. The standards, therefore, must be such as to attract complete public confidence on the impartiality and independence of the judiciary.23

The independence of judiciary which the Indian Constitution enjoins in full measure allows a unique procedure in appointments, guarantees tenure and service benefits, and gives certain privileges and immunities to judges while in office. They are needed for efficient

21 Supra n.1 at 4.
22 Ibid.
23 Ibid.
discharge of responsibilities and shall not be diluted in the name of accountability. If this is to be the case, judges themselves have to set the standards and ensure their scrupulous observance by self-discipline and internal arrangements. An attempt was made in this regard by the Conference of Chief Justice in 1996 which resulted in a Code of Conduct being adopted by a Full Court Meeting of the Supreme Court under the title "Restatement of Values of Judicial Life". The sixteen point-Charter states as follows:

(i) The behaviour and conduct of members of the higher judiciary must reaffirm the People's faith in the impartiality of the judiciary.

(ii) A judge should not contest the election to any office of a club or society and he shall not hold such elective office except in a society connected with the law.

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

(iv) A judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar to appear before him or even be associated in any manner with a cause to be dealt with by him.

(v) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the judge actually resides or other facilities for professional work.

(vi) A judge should practice a degree of aloofness consistent with the dignity of his office.

(vii) A judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.

\[24 \text{ Id at 4-6.}\]
(viii) A judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or likely to arise for judicial determination.

(ix) A judge is expected to let his judgement speak for themselves; he shall not give interviews to the media.

(x) A judge shall not accept gifts or hospitality except from his family, close relations and friends.

(xi) A judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.

(xii) A judge shall not speculate in shares, stock or the like.

(xiii) A judge shall not engage directly or indirectly in trade or business, either by himself or in association with any other person.

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

(xv) A judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available.

(xvi) Every judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

Along with the Code of Conduct, a Full Court Meeting of the Supreme Court on May 7, 1997 adopted two other Resolutions which are significant steps towards curbing judicial misconduct.

A. **Firstly**, it was resolved that an in-house procedure should be devised by the Chief Justice of India to take suitable remedial
action against judges who violate judicial norms including those mentioned in the sixteen point "Restatement of Values of Judicial Life". Accordingly a Committee of Judges was constituted by the Chief Justice of India which evolved an acceptable in-house procedure. The Committee felt that such a procedure would serve a dual purpose. In the first place, the allegations against a Judge would be examined by his peers and not by an outside agency and thereby, the independence of the judiciary would be maintained. Secondly, the awareness that there exists a machinery for examination of complaints a judge would preserve the faith of the people in the independence impartiality of the judicial process.

B. The second resolution relates to declaration of assets by judges. It says that every judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be to the Chief Justice's Court. The Chief Justice should make a similar declaration for the purpose of the record.

VI. Factor for Demand of Judicial Accountability and Transparency

In context of social accountability of Indian higher judiciary the following are some of the factors due to which today there is a strong demand of judicial accountability and transparency\textsuperscript{25}:

(i) Changing demands in Modern Welfare State

Due to increase in literacy rate more and more citizens are aware of their fundamental rights, therefore they come to courts to

\textsuperscript{25} Supra n. 1 at 42-45
redress their grievances and want speedy justice, but the judiciary is slow in this regard.\textsuperscript{26}

(ii) **No Remedy Against Misbehaviour**

Judges of superior court commit mistakes or misbehave, but such misbehaviour or mistakes are not corrected hence the feeling that the Judges of superior court protect their own men and it is in vain to make complaints.\textsuperscript{27}

(iii) **Demand of Accountability**

Today the demand is that like every other institution dealing with the public welfare functions, the judicial arm of the government also shall be accountable.\textsuperscript{28}

(iv) **Legitimacy of Judicial Process**

As the judges are makers of law they should be held accountable for their decisions in order to bring legitimacy to their law making functions.

(v) **Question of Standard of the Judges**

The standard of the Judges has, no doubt, gone down. Many persons of doubtful integrity and political affiliations have been appointed. It is now openly talked that one can get a judgeship or get

\begin{footnotesize}
\textsuperscript{26} Judicial Independence and Accountability- A speech delivered by Hon'ble Dr. Justice Arijit Pasayat, Judge, Supreme Court of India on 24 November 2007 at New Delhi, which is published in *NYAYA DEEP* the official *Journal of National Legal Service Authority*, New Delhi, 4 October 2007, Volume VIII, pp. 42-48.

\textsuperscript{27} See, Judgements of the Supreme Court-{(1) namely Sub-Committee on Judicial Accountability v. Union of India, 1991(4) SCC 699, (2) Sarojini Ramaswami v. Union of India 1991(4) SCC 506;(3) krishnaswamy v. Union of India, 1992(4) SCC 605; and (4) Lily Thomas v. Speaker of Lok Sabha 1993 (4) SCC 234.}

\textsuperscript{28} Datu Param Cumaraswamy Vice-President International Commission of Jurists in his speech in Nov. 2004 at Chennai on "Judicial Accountability" stated that "Accountability and transparency are the very essence of democracy. No one single public institution or for that matter, even a private institution dealing with public, is exempt from accountability. Hence, the Judicial arm of the government too is accountable". See further an article “Independence of Judiciary"- a speech delivered by Hon'ble Mr. Justice K.G. Balakrishnan, Chief Justice of India at society of Lincoln's Inn, London, which is published in *NYAYA DEEP* the official journal of National Legal Services Authority, New Delhi, October 2007 Vol. VIII Issue 4, pp. 04-13.
\end{footnotesize}
transfer from one High Court to the other by canvassing for it or with the blessings of political heavy weights.29

(vi) Demand of Reservation in Judiciary

It is argued that the weaker sections of society consider law their enemy if the instrument of law is in the hands of the higher class. Therefore, there is demand for reservations in the appointment in higher judiciary by treating judicial service as a single cadre on the line of UPSC to make the judiciary socially accountable.30

(vii) Demand for Efficiency

Today people are professing quality over quantity. The Supreme Court started with seven or 10 judges. Now there are 31 judges,31 but how many qualitative judgements are given? Therefore, people prefer other illegal measures to resolve their disputes as they are not sure that they will get quick justice. It is needless to say, that when institutions fail to provide justice to common people, the institution runs into deep moral crises.

(viii) Demand of Transparency

Indian Judiciary strongly adheres to the Official Secret Act, 1923 by denying right to information. Chief Justice of India recently opined that the Right to Information Act, 2005 is not applicable to the judiciary, being a constitutional machinery.

(ix) No Provision for the review of the Supreme Court Decisions

In India there is no other supreme body or council to review the decision of the Supreme Court except the Supreme Court itself. The Supreme Court thrives on the wrong decisions for years together.32

30 See also S.P. Gupta v. Union of India, AIR 1982 SC 149 (First Judge's Case) case in which Supreme Court of India referred the speech of Dr. B.R. Ambedkar given in Constituent Assembly Debates regarding transfer of judges.
31 Article 124(1) there shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges, by 45th Amendment in 1986 number of Judges increased to 25.
32 In USA the decisions of Supreme Court review after every 20 years.
Therefore, after perusal of the above demands of accountability we can realise that the justice system involves complex inter-relationships among the three organs of the Government, and the judiciary cannot resist demand for scrutiny, accountability, openness and transparency.

In short we would like to say that in today's 21st Century the real question is not only speedy justice but due to the emergence of era of good governance, consumerism or right to information, it is also the question of just, honest, qualitative, integrated consistent, efficient and accountable judiciary.

VII. Relation between Judicial Accountability and Judicial Independence

It is universally accepted that the judiciary has to be independent and impartial and to be so it must also enjoy some degree of immunity.33 The objective of judicial immunity is stated in an American judgement,34 thus

"Judges should be permitted to administer the law under protection of the law, independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences".

The principle of judicial independence is fundamental to the rule of law and, therefore to the liberal democratic system of government. The principal of judicial independence is not meant to benefit the Judges; it is meant to guarantee a fair and impartial hearing and an unswerving obedience to the rule of law.35 Taking a conservative meaning of judicial Independence, it may mean that the

34 Bradley v. Fisher 80 U.S.335, 352 (1872) and 800 U.S. (13 wall) 335 (1871) and 20 L.Ed. 646 (1872).
35 Supra n.33 at 60.
judges must have security of tenure and their service conditions and status cannot be altered to their disadvantage. Such guarantee is available to judges under the Constitution of India so as to secure Judicial Independence. To ensure Judicial Independence as a means of enforcing the Rule of Law, it is necessary to protect the judges from any pressure from the members of other branches of the Government as also the parties, public or private, whose matters come before them for decision. The judges have to uphold neither the interest of the ruling party nor of persons; they are obligated to protect and serve the interests of justice. Yet it has to be clearly borne in mind that Judicial Independence cannot be equated with absolutism. Indeed, Judicial Accountability and Judicial Independence are complementary to each other.36

Accountability functions on the framework of seeking integrity which is essential for the efficient functioning of any authority entrusted with responsibility.37 It primarily entails instilling a sense of transparency and subjecting the judicial regime to a strict public scrutiny so as to prevent any judicial delinquency. Judicial Independence cannot have an isolated existence because the faith of the citizenry can be reposed only in an accountable judiciary. Only an increased public perception of judicial accountability which is directly dependent on personal accountability can determine the degree of acceptable judicial independence.38 Thus, judicial accountability is a necessary means to reinforce independence and to ensure an effective judiciary. It is, therefore, submitted that Independence and Accountability are two sides of the same coin and complement each other.39

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36 Ibid.
38 Ibid.
39 Id at 78.
VIII. Problems in Regards to Making Judiciary Accountability

There are several reasons that have been identified for the failure of accountability:-

(i)  **Impeachment**

The only available mechanism is too impractical. According to the Indian Constitution, the only way through which the members of the Higher Judiciary that is the Chief Justices and Judges of Supreme Court (SC) and High Courts (HCs) are accountable or can be removed is through impeachment. Many regard impeachment as a failure, but before moving into that it is important to see the constitutional provisions. Under Article 124(4) & (5) and Article (1) (a) (b), the process of impeachment is carried out only on the grounds of proved 
"misbehaviour or incapacity". The word 'misbehaviour' is defined under Section 2(j) of the Judges (Inquiry) Bill, 2006 so as to mean:

A. Wilful or persistent conduct which brings dishonour or disrepute to the judiciary;
B. Wilful or persistent failure to perform the duties of a judge;
C. Wilful abuse of judicial office;
D. Corruption;
E. Lack of Integrity;
F. Committing an offence involving moral turpitude;
G. Violation of Code of Conduct being the guidelines issued by the National Judicial Commission (NJC) under Section 36(1) and till they are issued, "the Reinstatement of Values of Judicial Life adopted by the Chief Justice’s Conference of India, 1999," as provided under Section 36(3).

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40 See Article 124(4) (5) and Article 217(1) (a) (b) of Constitution of India.
“Incapacity” means physical or moral incapacity, which is or is likely to be of a permanent character.

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. Generally, impeachment is a formal process in which an elected official is accused of an unlawful activity and which may or may not lead to the removal of that official from the office.

Impeachments as a process has been successful only in United States, with 13 Federal Judges have been impeached so far. The Supreme Court has held the view that impeachment unlike US is not a political question because the proceedings before the Inquiry Committee are judicial in nature so impeachment is not purely a political process and hence is subject to judicial review.

The Judges Inquiry Act, 1968 states that a complaint against a judge is to be made through a resolution signed either by 100 members of the Lok Sabha or 50 members of the Rajya Sabha to their respective presiding officers. There is a three member Committee comprising two judges one from Supreme Court (SC) and the other Chief Justice of India if it is against a High Court Judge; and two Supreme Court judges if is against a sitting judge at the apex court. Investigations are carried out before making a recommendation to the House. If the Committee has concluded for the impeachment process to take place, the matter is discussed in both House. The alleged

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judge is also given opportunity to rebut the charges. After the debate is done and the judge is heard, the House decides to put the motion to vote, a resolution passed by 2/3\textsuperscript{rd} majority in both Houses. The whole process has to be completed in a single session. After the resolution is passed, it is sent to the President who then orders for removal.

Given this provision, the story ends with no one being judge has been impeached till date. However it will be a misjudgement if one thinks that the judiciary is free from corruption. The loophole is the entire process of impeachment itself. It is undoubtedly lengthy and cumbersome. Many have been regarded this as a complete failure.

**Reasons**

To begin an impeachment one needs signatures to pass the resolutions. However, that becomes quite an impossible task since many MPs have their own pending individual or party cases in these judges court, so they are not willing to risk themselves. Conclusive documentary evidences are also required before they put their signatures to the motion. In one of his interview, Prashant Bhushan cites an example where in an impeachment proceeding against Justice Bhalla, the BJP declined to sign because L.K. Advani had been acquitted by him in the *Babri Masjid Demolition Case*.\footnote{46 Shoma Chaudhary, Half of the last 16 Chief Justices were corrupt, p.1, in http://www.judicialreforms.org/files/tehalka%20with%20Prashant%20Bhuahan .pdf accessed on 4\textsuperscript{th} of July, 2011.} One can also not forget the *Justice Ramaswamy case*, who had been charged with misusing of court's fund, yet the Congress refused to cast their vote. Few points that definitely proves his misbehaviour-

a) That he is misappropriated some of the furniture, carpets, and some other items purchased from the court's funds for his official residence costing more than Rs.1,50,000 and did not account for the same at all.

b) That he misused public funds to the extent of Rs. 9.10 Lakh by making the court pay for non-official calls made on his
residential telephones at Chandigarh during his 22 months in office as a Chief Justice of Punjab and Haryana High Court.

c) That he gave unjustified promotion to several members of subordinate staff of the High Court whom he misused for aiding and abetting his acts done for his personal gain.⁴⁷

d) The investigating Committee comprising the judges themselves does not seem the correct mechanism. It has often been said that the judges act together like a *trade union*, so they generally would not like to charge their fellow colleagues of corruption. A solution to this can be the National Judicial Commission, an independent institution. Such a Commission will have their own investigating machinery. Thus, it will also not harm the independence since the judiciary is not accountable to the either the executive or legislature. It is important to understand that at the end of the day judiciary is an important organ with huge responsibilities.

(ii) The Veeraswamy Case

The problem of judicial accountability has been compounded by the Supreme Court’s judgement in the Veeraswamy Case, in which it declared that no judge of the High Court or Supreme Court could be subjected to even investigation in any criminal offence of corruption or otherwise, unless one obtains the prior written consent of the Chief Justice of India. This has resulted in a situation whereby no sitting judge has been subjected to even investigation in the last 15 years since that judgement, despite public knowledge and complaints of widespread corruption in judiciary. The police does not dare approach the Chief Justice for permission to investigate, unless they already have clinching evidence, which they cannot get unless they

⁴⁷ Frontline, Motion for presenting an address to the President under clause (4) of the Article 124 of the Constitution, May 22-June 4, 1993, Vol.1, No. 11, p.18. Also see website: http:// www. judicialreforms. org/files / Motion % 20of % 20Impeachment%20-20% Ramaswami. pdf accessed on 5th of July, 2011.
investigate.\textsuperscript{48} Again, it's not likely that Chief Justice of India will allow such permission, as it can bring shame to the entire judiciary.

(iii) Contempt of Court

The Contempt of Court may be seen as a means to protect the independence of the court, however, it is mostly seen that the court has used this as a means of shielding themselves from any criticism. Contempt of Court is defined as any act that is offensive and critical to the dignity and the authority of courts. According to Osward, \textit{“contempt of court is so manifold in its aspect that is difficult to lay down the exact definition of the offence.”}\textsuperscript{49} Contempt can be classified into two groups:\textsuperscript{50}

A. Civil Contempt

\textit{“Civil contempt” means wilful disobedience of any judgement, decree, direction, order, writ or other process of a court or wilful breach of an understanding given to a court;}

B. Criminal Contempt

\textit{“Criminal contempt” means the publication of any matter or the doing of any other act whatsoever which Scandalizes or tends to scandalize or tends to lower the authority of, any court, or prejudice, or interferes or tends to interfere with, the due course of any judicial proceedings, or interferes or tends to interfere with or, obstructs or tends to obstruct, the administration of justice in any other manner”}.

It has often been referred that Contempt of Court for much part is a hangover from the British rule. During the British rule, India was not free and democratic, but today the situation has changed. Questions therefore arise as to how can laws of those days be applicable today. There is also problem with the definition, as there is no definition as to what constitutes scandalizing the court; as what

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  \item \textsuperscript{48} Prashant Bhushan, Judicial Accountability or Illusion, Economic and Political Weekly, November 25, 2006. p. 4847.
  \item \textsuperscript{49} Mona Shukla, Judicial Accountability, 10 (2010).
  \item \textsuperscript{50} Id at 12.
\end{itemize}
constitutes scandalizing; as what was regarded scandalous earlier may not be regarded today. The **Contempt of Court Act, 1952** has also been criticized on the basis that it infringes **two important fundamental rights** of the citizen, namely, **the right to personal liberty**\(^{51}\) and **the right to freedom of expression**.\(^{52}\) Given this allegation one is reminded of two important cases that took place;

**Arundhati Roy Case**

Further, the judiciary is even insulated from public criticism by the threat of Contempt of Court, which can be used in a very draconian manner by the very judges towards whom the criticism is directed, as we saw in the **Arundhati Roy Case**. The problem arose as a result of the decision of the Supreme Court, which ordered the concerned State Government to raise the height of the **Sardar Sarovar Dam** upto 90 ft. This came as a great disappointment to the **Narmada Bachao Andolan** as it would lead to more submergence of the nearby villages. This was reviled criticised and a notice of Contempt was served against Arundhati Roy, Medha Palkar and Advocate Prashant Bhushan. The three however asserted that they were exercising their freedom enshrined in the Constitution. The Court held Arundhati Roy guilty and sentenced her to one day imprisonment and a fine of Rs. 2000.\(^{53}\) What was shocking and rather patriarchal was condescendingly referring her as a **“woman”** whom they had treated leniently by giving her one day punishment.\(^{54}\)

**Mid-Day Journalists Case**

**Mid-Day Journalists** had published documentary evidences against Justice Y. K. Sabharwal, who passed the orders of sealing commercial properties in residential areas in Delhi, after his sons had got partnership with leading shopping malls. These orders stood for

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\(^{51}\) Article 21 of the Constitution of India.

\(^{52}\) Article 19 (1) (a) & Article 19 (2) of the Constitution of India.


\(^{54}\) *Ibid.*
their benefits. Yet no action was taken against him. It was only after the convictions of four Mid-Day Journalists for Contempt, by Delhi High Court, that the news got coverage in the mainstream media. This shows a fear in the media which has deterred them from investigation against corruption in judiciary. The fact is that this power is like a 'Damocles’ sword which hangs over the neck of the people, particularly the media.

(iv) Exemption from the Right to Information (RTI)

The Right to information Act, 2005 was passed in India with an objective of promoting transparency in governance. The Act provides that every public authority shall provide access to its documents, proceedings.55 The Act defines public authority as “any and every body constituted under Constitution or any law of the Government.”56 Hence, it brings judiciary also within its purview. But the judiciary is seeking to effectively remove itself from the purview of the RTI Act. The Supreme Court has said that Chief Information Commissioner cannot direct it to disclose any information, and it recommended amending the Act, further that any information interdicted by the CJI on the ground of independence of the judiciary will not be provided.57 On the one hand the Right to Information Act provides for access to information; whereas on the other hand it provides for exemption under Sections 8, 9, 11 and 24.58

Right to Information Act has become as weapon in the hands of citizens to badger and make authorities respond to their queries and problems. It injected an element of transparency to governance in a way that would have been unimaginable earlier. Just after it’s

55 Refer, Section 4 of the Right to Information Act, 2005.
56 Id Section 2 (h).
57 Supra n. 43 at 54.
58 Section 8 of the RTI provides for “Exemption for disclosure of Information.”
Section 9 of the RTI Act provides for “Grounds for rejection to access in certain cases.”
Section 11 of the RTI Act provides for “Third party information”.
Section 24 of the RTI Act provides, “Act not to apply to certain organizations.”
enactment the Supreme Court of India sought exemption from Right to Information Act.⁵⁹

There are in fact, in many Countries where public disclosure of asset is required as a measure for good government. In the US, the Ethics in Government Act, 1976 requires the annual disclosure of financial information by all related to policy making responsibility. This issue of asset declaration arose when Subash Agarwal, inquired about the information whether the judges were complying with the 1997 “Code of Conduct.” The Central Information Commission had directed the information officer of the Court to obtain the information from the Chief justice of India’s office and provide it to the applicant. This promoted the Supreme Court to file a writ petition in the Delhi High Court, claiming that asset disclosure was exempted under RTI Act on the basis that this information was disclosed by the judges to the Chief Justice under “fiduciary relationships”. The double standard of the court on Right to Information Act was seen when although the courts were included in the definition of Public Authorities. Most of the High Courts did not appoint Public Information Officers (PIOs) even months after this Act came to force. Moreover, information regarding the appointment of class 3 and 4 employees by the High Court had been denied under the Delhi High Court Rules. Thus, the information specified under Section 8 of the Act shall not be disclosed and made available and in particular the following information shall not be disclosed i.e. such information which is not in the domain or does not relate to judiciary functions and duties of the court and matters incidental and ancillary thereto. Therefore, the Delhi High Court Rules provides that no administrative information, which is not in the public domain, will not be given.⁶⁰

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⁶⁰ Supra n. 48 at 4848.
In India from times immemorial Judges have been held in highest esteem and reversed as super humans. But of late there are instances of corruption infecting the judicial system also. There is a great danger that such instances can erode the faith that people have in the judiciary.\(^6^1\) A need definitely is there to make Judiciary accountable, as derogation of values in Judiciary is far more dangerous than in any other wing of the government- as Judiciary has to as "Guardian of our Constitution." Judicial accountability or answerability of the Judges is not a new concept. Several countries in their Constitution have already provided for ensuring accountability of Judiciary. ‘Judicial Independence’ is a pre-requisite for every Judge whose oath of office requires him to act without fear or favour, affection or ill-will and to uphold the Constitution and laws of the Country.\(^6^2\)

It is not that there is no provision for judicial accountability under our Constitution. As per Article 125 (4) in case of *proved misbehaviour* or *incapacity* a Judge can be impeached in Parliament and removed from office by the Parliament upon an address by the Parliament. Again under Article 124 (5) Parliament is empowered to make laws regulating the procedure for presentation of an address and for the investigation and proof of *misbehaviour* or *incapacity* of the Judge.\(^6^3\)

**The judges Inquiry Act, 1968** where reference procedure could be initiated upon a ‘Notice of Motion’ praying for removal of a Judge signed by:–

A. In case of a notice given in the "House of the People" by not less than 100 members

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\(^6^1\) Supra n.1 at 88.
\(^6^2\) Ibid.
\(^6^3\) Ibid
B. In case of a notice given in the "Council of States" by not less than 50 members.

But the main lacuna of the 1968 Act was that there was no 'permanent authority' to deal with the instances of misbehaviour. The impeachment procedure was also criticized to be time consuming, impracticable and allegedly politicized.\textsuperscript{64} The Law Commission in its 195\textsuperscript{th} Report of the Judicial Commission of India recommended that Statutory Committee be appointed for the specific purpose of dealing with cases of deviant behaviour of the Judges.

The judiciary claims that any outside body having disciplinary powers over them who compromise their independence so that have set upon ‘in house mechanism’ investigation corruption.\textsuperscript{65} This was proposed by the Judges (Inquiry) Act Amendment Bill, 2006 which provided for a National Judicial Council consisting of Chief-Justice of India, two senior-most Judges of the Supreme Court and two Chief Justices of High Courts as members to enquire allegations.\textsuperscript{66} The problem which arises is that in this in-house procedure the judges regard themselves as a close brotherhood and therefore are unwilling to take any step against them. What is objectionable in Section 33, which says not to disclose any information in relation to the complaint to any person to any proceeding except when directed by the Council. This will make it impossible to publicise the charges. Moreover, even if it finds a judge guilty of serious misconduct, it can only recommend impeachment which again goes for voting in the Parliament ultimately failing as seen in Ramaswamy’s case.\textsuperscript{67} The only positive feature of the Bill is that it initiates an enquiry into the allegations of misconduct of a judge.

\textsuperscript{64} Id at 89.
\textsuperscript{65} Prashant Bhushan, Securing Judicial Accountability; Towards an Independent to Commission, Economic & Political Weekly, October 27, 2007, p. 16.
\textsuperscript{66} Supra n. 49 at 62.
\textsuperscript{67} Supra n. 65 at 16.
(vi) Judicial Activism

The lack of accountability has been especially egregious when in recent times we see the higher judiciary making inroads into and passing orders which are within the domain of the execution and legislature. "Judicial Activism" is a common facet to almost all the branches of law, the Public Law, the Civil Law, the Criminal Law, the Labour Legislations, the Human Rights, the Civil Liberties, the policy decisions, disputes relating to constitutional functionaries, realm of contractual field, Political Rights, conflicts and confrontation in relation to Union-State, State-State Relationship in the quasi-federal set up and the like. Judgements of the courts in general and the superior courts in particular are quite often being criticized as being beyond the limits of the court's purview on several ground. The concept of "judicial activism" though quite often is being discussed in the field of law for sufficiently a long time, this concept, in fact, became more popular after 1970s and from 1980s onwards simultaneously, with the growth of liberalization of concept of locus standi and growth and expansion of the "public interest litigation" in the public law field in particular.

It is true that the failure of the Higher Judiciary to rise to the expectation of the public at large on a couple of occasions remain in Indian history as "black spots" and "unpardonable wrongs" done by the judges towards the society. Any attempt to weaker Judiciary would be landing the other wings inclusive of public governance into utter disorder. For instance laying down policy regarding demolition of Huggis from Yamuna Pushta, hawkers, cycle rickshaws etc. are to name a few. Last year the Supreme Court directed the Centre to release five million tons of food grains immediately for distribution

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68 Supra n. 1 at 299.
69 Ibid.
70 ld at 306.
71 Prashant Bhushan, (on half of the Committee on Judicial Accountability), Committee on Judicial Accountability, p. 1. See also website http://www.judicialreforms.org/files/4%20comments%20of%20COJA.pdf accessed on 4th July, 2011.
because millions of tons of food grains were lying in the open for years because of inadequate storage capacity.\textsuperscript{72}

To cite another striking example is when the Supreme Court issued a notice to the Union Government regarding the steps taken by it to ameliorate the plight of India students who were being racially attacked in Australia. It is to be noted foreign policy is non-justifiable, but that did not put a step to the court\textquoteright action. Another example of interference was when the Supreme Court issued a notice questioning the proliferation of the Mayawati\textquoteright statues, worth cores of rupees, in Uttar Pradesh. Just like foreign policy, budgetary allocations are non-justifiable. In 2006, Supreme Court issued guidelines to reform the police administration which is completely a state subject.\textsuperscript{73} A more recent case being the judgement given by the Supreme Court in appointing two former justices to superintend the Special Investigating Team (SIT) on black money issue of the government.\textsuperscript{74} The Supreme Court is right in holding the government accountable, but imposing such a judgement is not justified. It is in a way encroaching in the spheres which is not allocated to it by the Constitution. Second the Special Investigating Team (SIT) comprising of only judges also does not seem the correct mechanism; the members should belong from both judicial and non-judicial background. Third, the Supreme Court should have examined the claim of charges, initiated by the petitioners against the Reserve Bank of India (RBI), legitimizing it. After all it has questioned the integrity of an institution. If someone had alleged the Supreme Court in a similar manner of having close association with any other institution (like the way the RBI has been associated with the UBS, it would have counter

\textsuperscript{72} Justice Venkatesan, Release 5 Million tonnes of food grain; Supreme Court in http://Indialawyers.wordpress.com/category/judicial-activism/ accessed on 8\textsuperscript{th} July, 2011.

\textsuperscript{73} Abhinav Chandrachud, Dialogic judicial activism in India, in http://www.hindu.com/2009/07/18/stories/2009071852820800.htm accessed on 8\textsuperscript{th} July, 2011.

\textsuperscript{74} Pratap Bhanu Mehta, overreaching, in http://www.Indian.express.com/news/overreaching/813221/accessed on 8\textsuperscript{th} July, 2011

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attacked it, with its power of Contempt of Court. It is to be noted that although the decisions may be well intentioned, but the ‘micro-managing’ nature of the judges has to be curbed.

(vii) Other Causes

A. Appointment System

In 1993, nine judges Bench of Supreme Court laid down a new system for making appointments of judges in High Court by Supreme Court. This gave enormous powers to the Collegium of senior judges of the Supreme Court to select and make recommendation to the government for these appointments.75

The public disclosure of assets by judges, though a welcome first step is certainly not the end of the serious problem of judicial accountability or the lack of it. The main problem is the absence of an independent credible institution, which could entertain complaints against judges, investigate them and take action against errant judges.76 This needs to be a full time body which is independent of the government as well as of the judiciary. Institutionalising an in-house body of sitting judges as a Judicial Council to entertain judges as proposed in the Judges Inquiry Amendment Bill not serve the purpose.77 In-house bodies of lawyers, i.e, the Bar Council, and of doctors, i.e, the Medical Council have notoriously failed to seek accountability of lawyers and doctors for misconduct. Moreover, a body of sitting judges would be able to devote the time required to properly enquire into complaints against judges, which have been growing.78

Apart from this, there is a serious problem with the method of appointing judges to the higher judiciary. There is not only no

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76 Prashan Bhushan, judicial accountability; Asset Discloses and Beyond, Economic & Political Weekly, Volume XLIV, No. 37, p. 10.
77 Ibid
78 Ibid.
transparency in the process, there is also no system or method followed for preparing shortlists or for choosing among eligible candidates. The whole process is totally arbitrary and *ad hoc*, which has led to political favouritism when appointments were in the hands of the executive, and nepotism when appointments have been with the judiciary.\textsuperscript{79}

**B. Political Threats to Judiciary**

Judicial system of a country reflects its cultural ethos and ethical norms adopted for its governance. The outcome of judicial proceedings be it between private individual or involving governmental or state interest cannot be affected by political, economic or other social forces. Judicial independence is, therefore, constitutionally assured by two important protections contained in Article 51 and Article 124 of the Constitution.\textsuperscript{80} Need for judges to keep out of politics and to avoid socially divisive issues is obvious. Politicians have a good nose for other politicians even when they are disguised in judge’s robes. Politicians face elections while the judges do not. Potential political threat to judicial independence can be warded off by consistently independent approaches of deciding cases as per the constitutional and legal provisions that would lead credibility to legislation. In normal political atmosphere the dependence of judiciary on legislature or executive does not acutely surface. The politicians will exhibit responsibility by showing deference to the decisions of the highest courts more as a strategy to maintain their electoral popularity, rather than striking constitutional balance of independence of three wings of state machinery.\textsuperscript{81}

The executive in normal circumstances would execute judicial orders and show respect for judicial processes. However, in the times of crisis, political or economic powers can show how vulnerable the constitutionally independent judiciary can become to the collective

\textsuperscript{79} Ibid
\textsuperscript{80} Supra n. 13 at 19.
\textsuperscript{81} Ibid.
whims of powerful political forces controlling the other constitutional entities. For example, Parliament can lower the hurdle for removal of judges by widening the meaning of the word 'misbehaviour'. During political crisis the tensions become visible in form of complaints against particular judges and their decisions. Appointments can be delayed till the desired candidate is picked up by suitable procedural arrangements. The independence of judiciary as opposed to that of the individual judges, is dependent on the willingness of the popular branches to refrain from using their ample constitutional powers to impinge on judicial authority. Therefore, Judges make wrong decisions all over the world, but questioning the judge’s integrity without valid reasons would undermine the entire judicial process and deprive judges from the freedom of making conscientious decisions.

The above problems, are evidence of the grave situation in the judiciary and it certainly calls for accountability, it is important to have accountability will slightly compromise the judge’s independence than to have an increase in corruption due to lack of accountability.

IX. Solutions in Regard to Making Judiciary Accountable

The basic principle in a democratic republic is that the people are Supreme. Once this concept of popular sovereignty is kept in mind, it becomes obvious that the organs of the State have been created to secure the people of this country. It follows that all the trinity of authorities whether judges, legislators or executives are the service providers of all the service providers. Of all the service providers, the most trusted and powerful should be more responsive, transparent and accountable. So, out of all the three organs of the State, judiciary should be more responsive, transparent and accountable. An informed public criticism of judicial misconduct and incompetence or institutional turpitude or dysfunctionalism creates corrective public opinion through vigilant scrutiny and media.

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82 Id at 19-20.
83 Ibid
84 Supra n. 59 at 25
Therefore, the need of the time is to come up with solutions before there is a decay of the judiciary. Some of them are discussed below:

(i) **Restatement of Values of Judicial Life: Code of Conduct**

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

A. Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, an act of a judge of the Supreme Court or a High court, whether in official or personal capacity, which erodes the credibility of this perception, has to be avoided.

B. A Judge should not contest the election to any office of a club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

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

D. A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

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85 *Id* at 25-26.
86 *Supra* n. 45 at 209
87 *Id* at 210
E. No member of his member who is member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.\textsuperscript{88}

F. A Judge should practice a degree of aloofness consistent with dignity of his office.

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

H. A Judge shall not enter into public debate on express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

I. A Judge is expected to let his judgement speak for themselves; he shall not give interview to the media.

J. A judge shall accept gifts or hospitality except from his family close relations and friends.

K. A Judge shall not hear and decide a matter in which a company in which he holds shares in concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.\textsuperscript{89}

L. A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).\textsuperscript{90}

M. A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{88} \textit{Id at} 210-211.
\item \textsuperscript{89} \textit{Ibid}
\item \textsuperscript{90} \textit{Ibid}
\item \textsuperscript{91} \textit{Ibid.}
\end{itemize}
These are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but illustrative of what is expected of a Judge.92

(ii) The National Judicial Commission (NJC)

Growing dissatisfaction with the failure of in-house mechanism, it has been rightly felt that an independent mechanism like the National Judicial Commission (NJC) would help in achieving the much needed accountability. The suggestion for a National Judicial Commission has been made by the 80th Report of Law Commission of India and 121st Report of Law Commission of India.93 This body will consist of five members94:-

A. One member nominated by collegiums of all the Judges of Supreme Court.

B. One member nominated by collegiums of all the Chief Justices of High Court.

C. One member nominated by a Collegium of the Speaker, Leader of the opposition in the Lok Sabha and the Leader of opposition in the Rajya Sabha.

D. One member nominated or selected of Chief Vigilance Commissioner of the Central Vigilance Commission (CVC), Comptroller and Auditor General (CAG) and the Chairperson of the National Human Rights Commission (NHRC).

Therefore once selected, the members of the National Judicial Commission would enjoy a fixed tenure of five years so that they would not be under the control of any authority. This Commission would have investigative machinery under their control through which they could get charges against Judges investigated.95 Thereafter, if they find evidence of misconduct, they would set up a three-member

92 Id at 212.
93 Id at 83.
94 Supra n. 65 at 16
95 Ibid.
Committee to hold a trial of the judge. If they find him guilty, the National Judicial Commission (NJC) could recommend appropriate action against him which would then be mandatory. The matter need not go to Parliament. Whatever the details of this body, the time has certainly come to put in place a totally independent body which can investigate and punish judges for judicial misconduct.\textsuperscript{96}

The Judicial Commission could also be used to select judges for appointment to the High Courts and the Supreme Court. They could also be empowered to transfer judges between the High Courts. This power of appointment and transfer was appropriated by the Supreme Court by an inventive interpretation of the words \textit{"in consultation with the Chief Justice of India"}. They said that in order to preserve the independence of the judiciary, the primacy in the matter of judicial appointments must remain with the judiciary.\textsuperscript{97} The National Judicial Commission, being a full time body, could devote the requisite time to select the best candidate by following a fair and transparent system which methodically examines the merits of possible candidates on some laid down criteria. That would also free the appointment system from the control of the government and the nepotistic influence of the judiciary.\textsuperscript{98}

(iii) The Judicial Standards and Accountability Bill, 2010

The deepening crisis and public debate catalysed the need for judicial accountability through the \textit{Judicial Standards and Accountability Bill, 2010}, emphasizing the need of preserving the sacrosanct judiciary in the epoch of weakening credibility. This Bill is the legislature's third attempt in making the judiciary transparent.\textsuperscript{99} This Bill replace the previous \textit{The Judges Inquiry Act, 1968}. It lays down judicial standards of conduct and provides for the accountability of judges by establishing mechanisms for investigating even individual

\begin{flushright}
\textsuperscript{96} Supra n. 1 at 85 \textsuperscript{97} Supra n. 65 at 16-17. \textsuperscript{98} Ibid. \textsuperscript{99} Supra n.37 at 84.
\end{flushright}
complaints. The Bill seeks to establish the **National Oversight Committee (NOC), Judicial Scrutiny Panel (JSP) and an Investigation Committee (IC)**.\(^{100}\) Also it makes annual declaration of assets of the judges mandatory. To protect the judge from defamation, the Bill exempts documents and records of the proceedings pertaining to the complaint from the preview of the **Right to Information Act, 2005 (RTI)** while making the report public. It prohibits the participants from revealing any information regarding the investigation.\(^{101}\)

The National Oversight Committee will be headed by a former Chief Justice of India, where the public can lodge complaints against erring judge, including the Chief Justice of India and the Chief Justices of the High Courts. The five-member Committee will be appointed by the President. The Committee has the power to issue advisories or warnings to judges and can also recommend the judge’s removal to the President.\(^{102}\) Here the President is bound to accept PM’s recommendation. Now if this recommendation is done by a three member Committee two from government and one recommended by the Leader of the opposition, then the minority dissent will also be addressed. On receiving a complaint, the Committee will forward it to a system of scrutiny panels, which will have the powers of a civil court. If the charges are serious, the Committee can request the judge concerned to resign. If the judge does not do so, the Oversight Committee will forward the case to the President with an advisory for his removal. The Bill mandates that the judges should not have any close association with the individual member of the Bar. All the details concerning the investigations will be put up in the Supreme Court and High Court websites.

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\(^{100}\) Ibid.

\(^{101}\) Ibid

\(^{102}\) Id at 85.
(iv) Judicial Restraint against Activism

The Indian legal system in tune with constitutional philosophy has to protect human liberty, social equality and social justice. Therefore, the need for the caution is the greater when judiciary becomes active while interpreting the Constitution for the purpose of implementing the fundamental rights. Like many catch words judicial activism has acquired so many different meanings as to obscure more than it reveals. However, there is no explicit statutory definition. Technically speaking judicial activism connotes that function of the judiciary which represents its active role in promoting justice. Judicial activism may also be construed as the active process of implementation of the rule of law, essential for the preservation of a functional democracy.

According to Justice P.N. Bhagwati judicial activism is:-

"The Indian judiciary has adopted an activist goal oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental right, and the process rewritten some part of the Constitution through a variety of techniques of judicial activism. The Supreme Court of India has undergone a radical change in the last few years and it is now increasingly identified by the justice as well as people the last resort for the purpose bewildered".

According to Webster’s dictionary judicial activism means:

"The practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent or in opposition to supposed constitutional or legislation intent".

103 Supra n.1 at 178.
104 Id at 179.
According to Black's dictionary judicial activism is:-

"a philosophy of judicial decisions where by judges allow their personal views about policy among other factors, to guide their decisions with suggestions that adherent of this philosophy tend to find violations and they are willing to ignoble precedent".

The judicial restraint against activism is not justified as the courts should be concerned with the rule of law only. It raises accountability question since they are not directly elected by the people, neither they are answerable to the executive or legislature. Furthermore, on what grounds are the bench that decides a case selected is also not clear? We can learn from the USA judicial courts where there is a private meeting of nine judges deciding on a petition, if four (4) Justices vote to grant the petition, the case proceeds, otherwise it ends. Similar clear cut methods are also desired in our country. This surely calls for the curtailment for activism after all one cannot just start doing others function, which is against the principle of separation of powers. It may be argued by the courts that because of incapacity of the other two organs, they are indulging in activism and this is being proved by the growing number of cases filed in the PIL, however this explanation does not justify in what the judiciary is doing. There should be suo-motu cognizance but preferably after some delay and it should be followed by recommending an arrays of alternatives. Its role should be more of advisory, accepting or rejecting it would on the other hand depend on the two organs. What is therefore required is judicial restraint i.e., limitation on judicial decision making, other than those explicitly imposed by the Constitution or Statutes.

(v) Amendment of the Contempt of Court Act

It is high time that the Contempt of Court Act be amended. The purpose of the Contempt of Court Act is to protect the independence of the judiciary and not the dignity of judges. If a person commits a
contempt of court then he commits a wrong against the court or the position which a judge holds, not against the judge himself. Therefore, a contempt of court may be committed even by a judge. For example if the judge of a subordinate court disobey the order of direction of the High Court then the subordinate court judge has committed a contempt of court and may be prosecuted for the same therefore, the contempt of court has become a big obstruction in making the judges accountable for their acts and this can be solved by amending the Contempt of Court Act, 1971 and thereby making it more precise and clear.

The Contempt of Courts (Amendment) Act, 2006 made an important addition to the Contempt of Courts Act, 1971 to provide for truth as a valid defence in contempt proceedings. But the Contempt of Courts (Amendment) Act, 2006 is only a half-hearted attempt to ensure judicial accountability, and realise the objectives of the Contempt of Court Act. For proper accountability some more alterations are must. Parliament Standing Committee (PSC) on Home Affairs made the following suggestions of amendment in the Contempt of Courts (Amendment) Bill, 2003.

Accused should be given reasonable opportunity to depend himself according to law.

A. Cases of contempt should not be tried by courts but an independent commission of concerned district.

B. The Act should be amended to remove word, ‘scandalizing the court or lowering the authority of the court’ from the definition of criminal contempt.

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107 Ibid.

108 Id at 151-152.
(vi) **Role of Media and NGOs**

Media forms the fourth estate in democracy, which has embraced rule of law for its governance. The legislature, the executive and the judiciary work in tandem by way of allocation of power to each.\(^{109}\) About 20 years back, the media was not paying much attention to the court proceedings though the decisions given by the courts had far reaching effect on the life, liberty and rights of the people. The role of the Media, as regards, courts proceedings had radically changed and it greatly helped the common man to understand the nature and contents of our judicial proceedings.\(^{110}\)

The need of the hour is that relationship between the media and the judiciary are to be carefully managed by both the institutions. While the media strives to provide access to information to the public it needs to ensure that it does not hamper upon the rights of various parties involved in a particular case or unduly influence the judiciary. Though the freedom of expression is essential to democratic society, it is not a sole aim of society. Freedom of expression is guaranteed by Article 19 (1) (a) of the Constitution, it has been held by Supreme Court\(^{111}\) that freedom of the *press* is included in that wider guarantee, it is necessary to plead for the freedom of the press in the country.

Earlier Media has always been silent because of the threat of the Contempt of Court Act but with the amendment of this Act, it seems that that the freedom of expression will not be infringed. It is true that the Media has its own negative sides but one cannot fail to give credit to its positive aspect, for instance in the investigating role it played in the *Jessica Lal Case*. The way it brought the truth out was indeed incredible. So what is required is that a kind of balance is to be drawn between the working of Media i.e. its positive and negative

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\(^{109}\) *Supra* n. 45 at 33


\(^{111}\) *Express Newspaper v. Union of India*, AIR 1958 SC 578 at 614.
aspects and for that there is a need for an independent autonomous public institution like the Media Council, a constitution at need which will evolve a code of conduct or of ethics for the media with regard to honesty and fairness.

A credible, predictable and transparent legal framework and an independent and capable judiciary are the foundation of the rule of law and underpin the development of democracy, market economy and social justice. Shortcoming of law-making process is documented by various donors, World Bank and NGOs. Some of the judicial reform issues which are discussed by NGOs are.

A. Weak governance and corruption in the Judiciary.
B. Lack of laws to govern Magistrate.
C. Lack of judges and lawyers.
D. Low salary of judges and prosecutors.

(vii) **Law Commission Report No. 230, August 2009**

The Constituent Assembly in 1947-49, the Joint Committee of 1966, the NCRWC Report of 2002 and the Law Commission in 2006, amongst many others, have steadfastly underlined the importance of judicial independence. The Supreme Court has repeatedly held that judicial independence is a part of the "basic structure" of the Constitution. However, the frequent use of transfer of judge's power, contained in Article 222 of the Constitution, has been exercised by the executive to undermine judicial independence. The 230th Report of the Law Commission has come up with certain recommendations. Some of which are discussed below:-

A. **Increase in number of working days**

Considering the huge number of pendency of suits in the courts it becomes necessary to increase the number of working days. This must be done at all levels of judicial hierarchy and it must begin from the apex court.
B. **Speedy Justice**

Speedy justice is a right of every litigant and this has been guaranteed in Article 21 of the Constitution. In fact, it has been rightly said that *justice delayed is justice denied*. Therefore, effective steps have to be taken; an attempt has been made by Gujarat State and Delhi to have evening courts.

C. **Alternative Dispute Resolution (ADR)**

This is recognised as an effective method whereby parties who are involved in a dispute, upon an agreed set of rules and regulations, share the expenses of the dispute, try to reach a settlement. With new demands emerging, sometimes the existing ones fail, the ADR has emerged out of this version. A qualified arbitrator who is licensed professional and expert in that area is hired to solve the issue. The parties involved also decide that after the completion of the resolution it may further not be appealed. In India, arbitration involving commercial disputes is being recognised as an effective method. Equitable solutions are reached more quickly than litigation, at less costs and it allows parties to adopt whatever procedures they choose for the resolution of the disputes. The court in India have offered full support and encouragement for arbitration; they do not review the merits of an award in arbitration, unless requested by any party and only under restricted grounds of challenge laid down in the *Arbitration Act*. Provisions have been made in the *Legal Services Authorities Act* for setting cases through Lok Adalats. These are voluntary mediating agencies where by lawyers, retired judges and social activities can take up pending cases in the lower courts and secure a settlement.

D. **Technology**

Modern technologies help to collect a lot of information and also build judicial database, which enables us to assess the performance of judiciary as an institution.
(viii) Idea of Extra-Institution

In countries having Written Constitution an impeachment was thought the only method by the formers of the constitutions to hold judges of higher judiciary accountable for any kind of judicial misconduct. But with the passage of time because of political decision in impeachment proceedings, this punishment seems to be less effective to hold the judges liable for their acts and omission. Therefore, to help solve this serious constitutional problem a thinking process emerged in democratic systems to have an extra-institution to accomplish this task. Hence many countries have established the extra-institutions though they differ in nomenclature.

The first country which has taken lead in the process is Sweden. There the Constitution of 1809 provides for a Parliamentary Ombudsman. The extra-institution of Ombudsman was established in 1816 in Sweden. This institution has power to hear complaint of the policemen, prosecutors, judges and jailors. These all courts are within the purview of the Ombudsmen. About the functioning and attitude of the judges towards the Ombudsmen an eminent author, Welter Sellhorn said that most of the Swedish judges are enthusiastic about the Ombudsman. He further opined that not even a single judge with whom he came cross while conducting a survey to elicit opinion about the institution of the Ombudsman have said anything against the institution. All the judges were happy with the system of Ombudsman.

In the Chief Justice Conference of 1990 the idea to establish the institution of Ombudsman in India was mooted by Justice P.D. Desai, the then Chief Justice of Calcutta High Court. He was of the opinion that a Judicial Ombudsman or Nyaya Ayukta under the Chief Justice of India with powers to hear and investigate into the complaints against judges of higher judiciary is to be established in India. This body must be empowered with the power of contempt to deal the cases of frivolous and motivated complaints. The idea initiated by Justice P.D. Desai has not been taken seriously so far.
Hence to maintain a balance between the independence and accountability of judges this idea requires serious thinking in Indian perspective.

A. Special Court of Complaints

The other country which has experimented the extra-institution for disciplining judges is the Denmark. In Denmark an extra-institution in the name of Special Court of Complaints has been established in 1939. This court has been empowered to hear complaints against judges. The relevant provision of the Code of Civil Procedure provides that:

"Anyone who considers himself injured by improper or unseemly conduct on the part of a judge in the exercise of his official duties can within 14 days file a complaint with the Chief Public Prosecutor for presentation to the Special Court of Complaint."

In 1959, the jurisdiction of this court was expanded to include official acts outside the court room and to include all Professional judicial personal. Since then the court is working effectively and these were cases when judges were removed from their offices on the basis of findings of this court. At the same time the court has also imposed fines on the judges. Thus, whether such kind of court is feasible in India requires consideration. However, this idea has not been given by anyone so far as the case of India is concerned.

B. Commission on Judicial Performance

The third country which has taken lead to establish extra-institution, though somewhat different in nature, for disciplining judges is California. California has a Commission called the Commission on Judicial Performance. The Commission has two main functions.

112 It comprises of nine members, including five judges appointed by the State Supreme Court attorney by the State Bar, and two lay persons appointed by the Governor and confirmed by majority vote of the State Senate. The members serve four year renewable terms. Two of the five judges come from the Courts of Appeal, two from the Superior Courts, and one from the Municipal Courts.
First, getting rid of unfit judges and secondly, controlling the behaviour of judges who are still qualified for their position. The Commission receives complaints against the judges and examine their judicial performance. There are instances when judges either tendered their resignations or sought retirement after complaints were lodged against them with the Commission. The balance sheet of the Commission is the evidence of the fact that the Commission through its corrective measures has contributed to maintain a higher standard of judicial conduct in California. Perhaps keeping in view the functioning of the California Commission Judicial Performance, Justice V.R. Krishna Iyer has strongly recommended having such kind of a commission for India. However, like other extra-institutions the idea of having Judicial Performance, Commission has not been seriously considered in India. Thus the ideas initiated by Krishna Iyer require serious thinking because it can be helpful to improve the functioning of the judiciary which in turn will restore the confidence of the people in the judiciary.

In United State of America the institution of Ombudsman have been established so far as the judges of State Courts are concerned. But for discipline and punishing the judges of the Federal Court the impeachment is the only way-out. Since 1936 not even a single judge has been impeached in United States. Thus, they are thinking on the lines of having some other alternate punishment though lesser in gravity than that of impeachment. In India, we are also going through the same process. So, there is an urgent need to evolve some other mechanism in the name of the extra-institution functioning in many countries. This will help to make judges accountable for their judicial misconduct and improper behaviour. This is a necessity for India in the present context for imposing judicial discipline.

(X) Sum-Up

One must realise that in countries like India the judiciary is relied upon by the citizenry to solve many to their difficulties and
therefore consistent standards of accountability that give the Indian judiciary this strength are of utmost importance. The moment judicial accountability wavers it creates a vacuum where, both the political class and vested interests would take advantage of the conundrum to further reduce the credibility of the judiciary whereas, an accountable judicial institution can only lead to a stable political atmosphere as well as a far more efficient system of governance.\textsuperscript{113}

However, it is also acknowledged that judicial accountability if stretched too far can seriously hamper judicial independence and thus it is essential that we strike the right balance between the two. The accountability of any public institution is very important for the survival of democracy itself. The absolute and unlimited power to any high public institution without accountability is harmful to the society at larger. Our Constitution contains certain provisions for fixing the responsibility of an individual judge. The provisions of office make judges accountable to their conscience. The lower judiciary is under the complete control of higher judiciary in their respective states.

Transparency is facilitated through the process of accountability. It is best achieved when one is accountable to law. Moreover the judges need to understand that although the people of India through the Constitution provide then with immunities and powers to work independently but with greater toward the people to whom the judges are appointed to serve.\textsuperscript{114}

The judiciary is a key institution which shoulders the onerous responsibility of restricting the other organs of the state of work within their bounds. To discharge this heavy duty, the Constitution of India grants independence to it. But it is bounder duty on it, to exercise this independence for the welfare of the people at large. It must exercise judicial activism where the rights of common man are trampled by the executive and the legislature. At the same time, it should also exercise

\textsuperscript{113} Supra n. 104 at 159
\textsuperscript{114} Ibid
and the legislatures make any socio-economic policy, which gives maximum benefit to maximum number of people with minimum friction. Thus it is rightly said that the judicial activism is desirable but over judicial activism is dangerous. Therefore, in certain areas the judiciary has to work with judicial self-restraint. It can help of win the faith and confidence of the people.