(A) Nature and Meaning of Judicial Accountability

The problem of corruption and misbehavior in relation to the honourable bench has remained no more a hidden fact. More than often the incidents of misbehavior of the judges are reported in the press and the corruption is rampant. Though the Constitution of India provides safeguards to ensure, Judiciary being managed by men of ability, honesty, experience and competence, but there are credible complaints against the judges of higher judiciary too, who are regarded as God. With the change of time and declining values, ethics, integrity, morality and propriety, the judges have also fallen in line with others. Even some of the judges themselves have exposed the situation of rampant corruption in Judiciary. It also needs to be studied whether along with the amendment of the Judges Inquiry Act, 1968, Article 124 of the Constitution itself needs amendment, because it provides for a procedure like impeachment which is very difficult. In India as for as the lower Judiciary is concerned, there is a lot of disciplinary mechanism provided by the Constitution itself, and also by the special statutes. On the other hand, mechanism provided for the judges of higher courts is cumbersome and ineffective. Therefore question arises who will Judge the Judges?

Judicial Activism must imply Judicial Accountability. We have judicial review, why should there be no judicial responsibility? The

2 Ibid p. 192.
judges judge others, why should they be not judged? The chorus is continuous. Some decades back, the slogan was “Committed Judiciary”. Today, it is Judicial Accountability. Judiciary must not shy away from accountability, this will in turn benefit Judiciary itself.

The word “accountable” as defined in the Oxford Dictionary means “responsible for your own decisions or actions and expected to explain them when you are asked”. Accountability is the sine qua non of democracy. Transparency facilitates accountability. No public institution or public functionary is exempt from accountability although the manner of enforcing accountability may vary depending upon the nature of the office and the functions discharged by the office holder. The judiciary, an essential wing of the State, is also accountable. Judicial accountability, however, is not on the same plane as the accountability of the executive or the legislature or any other public institution. Indian polity is under severe strain. Faith of the people in the quality, integrity and efficiency of governmental institutions stands seriously eroded.

They turn to the judiciary as the last bastion of hope. But of late, even here things are getting increasingly disturbing and one is unfortunately no more in a position to say that all is well with the judiciary. The independence and impartiality of the judiciary is one of the hallmarks of the democratic system of the government. Only an impartial and independent judiciary can protect the rights of the individual and can provide equal justice without fear and favor. The constitution of India provides many privileges to maintain the independence of judiciary. If the Preamble to our Constitution be regarded as the reflection of the aspirations and spirit of the people, then one thing that even a layman will note is that among the various goals that the Constitution-makers
intended to secure for the citizens, “JUSTICE- Social, Economic & Political” has been mentioned before the rest.” 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, reversion and review of orders. What is the mechanism for accountability for serious judicial misconduct, for disciplining errant judges? Our Constitution provides for removal of a judge of the Supreme Court or the High Court for proved misbehaviour or proved incapacity, by what is popularly called the process of impeachment, where under two thirds of the members of each House of Parliament can vote for the removal of the judge. So far, only one impeachment proceeding has been initiated against a Supreme Court judge. It failed because Congress abstained from voting and consequently two-thirds majority was not available.

It is now generally accepted that the present impeachment process is cumbersome, time consuming and tends to get politicized. It needs to be reformed urgently.

(B) Need for Judicial Accountability

“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”. In a „democratic republic” power with accountability of the individual enjoying it, is essential to avert disaster for any democratic system. 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 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 courts; 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 recent incidents in Bihar (like killing of an under trial in the court itself and lynching a suspected thief to death) depicts that frustrated by the failure to get justice, people are slowly losing faith in judiciary and are taking law into their hands. This is highly deplorable. A need definitely is there to make judiciary accountable, as derogation of values in judiciary is far more dangerous than in any other wing of the government as judiciary has to act as the guardian of our constitution. Judicial accountability and answerability of the judges is not a new concept. Several countries in their constitutions have already provided for ensuring accountability of judiciary. This 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. “While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self restraint.”

(C) Judicial Accountability: A Theoretical Understanding

At the outset, one needs to understand and appreciate the idea of demanding judicial accountability. As stated earlier, accountability primarily entails instilling a sense of transparency, subjecting the judicial regime to a strict public scrutiny so as to prevent any judicial delinquency from infiltrating. At the same time, the long-standing debate between accountability impinging upon the independence of judiciary often becomes imperative to be addressed. An interesting observation surrounding the innate resistance between the two has been drawn from the Constitution as the Constitution makers did not expressly provide for any mechanism to make the judiciary accountable. The underlying presumption behind the same was to prevent the violation of the fundamental edifice of judicial independence, a prerequisite for a free and fair judiciary to exist. The objective sought to be achieved was to promote accountability through a mechanism of self-regulation without compromising the facet of independence. It is rather interesting to note that it has only been in recent times, that a public outcry for holding the judiciary accountable has been a matter of public debate and deliberations in all corners of the world, thereby making it a global phenomenon. As

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4. Judiciary was a subject of the Constituent Assembly Debates on July 29, 1947. While inter alia, there was debate regarding the independence of judiciary and enshrining a distinct provision for the same, one does not come across any discussion on making the judiciary accountable to its citizenry. See Constituent Assembly Debates, Vol. VIII, 218.

5. See R.S. Pathak, Administration of Justice and Public Accountability, 15 Indian Bar Review 213 (1988). It is also interesting to note that while Article 235 was included to make the subordinate judiciary accountable to the higher judiciary, no similar provisions were enacted for the higher judiciary. The underlying idea was to subject the higher judiciary to self-regulation. Former Chief Justice J.S. Verma notes that the enactment of Article 235 is per se a clinching evidence of accountability being intricately associated with the idea of judicial independence. The element of accountability thus was envisaged to co-exist with independence, ensuring the relationship to be harmonious. See J.S. Verma, CJI, please declare my assets, August 12, 2009, available at http://www.indianexpress.com/news/cji-please-declare-my-assets/501022/ (Last visited on August 21, 2009).
Justice Sir Moti Tikaram of Fiji notes, judiciary is “no longer a sacrosanct and inviolable sanctuary of its occupants.”

While the debate regarding the need for judicial accountability has gained significant momentum in the recent years with civil society and the media, assuming the role of alert watchdogs, a question to ponder upon often has been the need for judicial accountability. In its Comments on the Judges Enquiry Bill 2006, the Committee on Judicial Accountability noted that the dire need of an accountability mechanism stems from the over-assertiveness of the judiciary to the extent of declaring themselves immuned from any form of enquiry into their actions. Such a reprehensible and autocratic practice makes it all the more onerous to ensure that an accountability mechanism be operative as it is imperative to note that Judiciary is about the law and not above the law. Accountability is imperative as, inter-alia judges are appointed in most countries and thus the public at large has no control over them. Also, there are hardly any provisions disciplining the judges and this is deeply associated with what Rowat terms as “arrogance of office” leading to the arbitrary use of discretionary powers by the Judges in the form of holding someone in contempt. He also notes that since the ordinary

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8 At this juncture, perhaps it will be interesting to note the observations made by David Pannick in his celebrated book Judges. Pannick notes that unless judges are treated as fallible human beings and choose to remain above the rest of the community, isolated from them, they will be misunderstood to their mutual disadvantage. See David Pannick, Judges Ombudsman Journal 204 (1998).
10 As Prashant Bhushan notes, the “sword of contempt” has kept the Judiciary isolated and immuned from any form of public criticism. Contempt of Court in the recent years, as observed by the critics, has been used indiscriminately. See Prashant Bhushan, Judicial Accountability or Illusion: The National Judicial Council Bill, available at http://www.judicialreforms.org/files/judicial_acc_or_illusion_pb.pdf (Last visited on August 21, 2009). Recent notable case on point would be In Re: Arundhati Roy (2002) 3 SCC 343.
process of removal of a Judge by way of impeachment is rather cumbersome, an accountability framework becomes the need of the hour. We opine that the need for judicial accountability needs to be an all inclusive mechanism where not only would the judiciary be accountable to an external authority, independent of the institution but also to the public at large as Judiciary is an office of public trust. Stephen Burbank\textsuperscript{11} argues that the judicial accountability proceeds further to the representatives of the People or the law makers, having a legitimate interest in the functioning of the judiciary.

One is to also note that the rhetoric surrounding judicial accountability is confined not only to the elucidation of the idea per se but also extends to the definitional aspects of the same. In so far as accountability is concerned, in most instances of any moral turpitude, the interpretation has mostly been with respect to seeking accountability towards an external authority. The proposed Judges Enquiry Bill, 2006 which sought to create a National Judicial Council is an example of the same.\textsuperscript{12} However, the irony of such an approach is writ large as the legislation proposes that an in-house committee consisting of sitting judges be appointed to investigate into the alleged charges of misconduct, thereby guising itself in the garb of an external authority. In our opinion, such an approach largely defeats the purpose of seeking accountability as it is violative of the principles of Natural Justice which seeks to mandate that no man shall be the judge in his own cause.

\textsuperscript{11} See Stephen Burbank, Judicial Independence, Judicial Accountability and Inter branch Relations, 95 The Georgetown Law Journal 909 (2007). (Burbank argues that since it is the legislature which legislates the laws and also appropriates funds for the Judiciary, it accords them the legitimate right to be interested in the functioning of the Courts, in a due process. He further notes that there is a need of “an appropriate intra branch accountability” in order to avoid “inappropriate inter branch accountability” with respect to the Federal Courts of United States).

\textsuperscript{12} The Bill was subject to wide criticism due to its lack of investigative powers and the provisions for an in house committee for investigation. See generally Comments of the Committee on Judicial Accountability on the Judge’s Enquiry Bill, 2006, supra note 13.
Prashant Bhushan notes that not only is it highly inefficient to have the already overburdened sitting judges to investigate upon such matters, but also unnecessary and quite rightly, promotes the view of holding the judiciary accountable to no one but itself. What is needed is a regime to ensure a neutral and objective accountability as opposed to the adoption of an in-house procedure to provide a mere lip service. However at the same time, one cannot deny the importance of personal accountability as Pimentel observes that accountability to one’s self and ethics, termed as “subjective or personal accountability” is also an essential facet of judicial accountability. While it is highly impossible to approximate the level of such personal accountability, it remains extremely desirable as the triumvirate of moral accountability, public accountability and judicial independence cannot be disintegrated. In Benjamin Franklin’s words “only virtuous people are capable of freedom” and therefore, we opine that the element of personal accountability leads to an enhanced public accountability which significantly determines the element of judicial independence. Certain jurisdictions provide for a public access to the regimes of accountability of the Judges and judicial discipline. This, in turn facilitates the aspect of independence to be largely dependant on

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14 Judge Wallace takes a contrary view, in so far he suggests that “that to preserve judicial independence, these investigations should be left primarily to the judicial branch.” Otherwise, he argues, there might be a strong operative relationship between the decisions given and the extent to which a politician can influence a Judge if accountability were to be towards an external authority. See J.Clifford Wallace, Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives, 28 CAL.W.INT’L LJ 341 (1998).
16 See supra note 13, 345.
17 An example of the same would be the appointment of Ombudsman.
public perception as accountability seeks to promote increased legitimacy and furthers justification for judicial independence.18

The above analysis emphasizing the long felt need of accountability thus attempted to bring into light the theoretical underpinning behind the same. Further we would aim to revisit the theoretical concept of judicial independence. The underlying idea is to argue that judicial independence and accountability are not concepts to be looked at in isolation but are the two sides of the same coin, necessary to supplement each other.

(D) Removal of a Judge

The question of removal of a Judge before the age of retirement is an important one as it has a significant bearing on the independence of the Judiciary. If a Judge of the Supreme Court could be removed by the Executive without much formality, then it can be imagined that the Court would lose its independence and become subject to the control of the Executive.

In every Democratic Country swearing by the Rule of Law, therefore special provisions are made making removal of Judges an extremely difficult exercise. In Britain, for example, Judges hold office during good behaviour and can be removed only on an address from both Houses of Parliament.19 In the U.S.A., a Supreme Court Judge holds office for life and is removable only by the process of impeachment in case of treason, bribery or other high crimes and misdemeanours.20

20 Schwartz, American Constitutional Law, 135; Art. II(4) of the U.S. Constitution.
Provision has however been made by for voluntary retirement on full salary after ten years of service and attainment of the age of seventy.

The Constitution of India also make a provision for the removal of a Supreme Court Judge.\textsuperscript{21} He may be removed from office by the President on an address by both Houses of Parliament presented in the same session for proved misbehavior\textsuperscript{22} or incapacity. The address must be supported by a majority of the total membership in each House, and also by a majority of not less than two thirds of the members of each House present and voting.\textsuperscript{23} The word ‘proved’ in this provision indicates that the address can be presented by Parliament only after the alleged charge of misbehavior or incapacity against the Judge has been investigated, substantiated and established by an impartial tribunal. The constitutional provision does not prescribe how this investigation is to be carried on. It leaves it to Parliament to settle and lay down by law the detailed procedure according to which the address may be presented and the charge of misconduct or incapacity against the Judge investigated and proved.\textsuperscript{24}

In accordance with the above provision, Parliament has enacted the necessary law for the purpose. The Judges (Inquiry) Act, 1968, now regulates the procedure for investigation and proof of misbehaviour or incapacity of a Supreme Court Judge for presenting an address by the Houses of Parliament to the President for his removal.

The procedure for the purpose is as follows: A notice of a motion for presenting such an address may be given by 100 members of the Lok

\textsuperscript{21} Art. 124(2), proviso (b); Art. 124(4) and Art. 124(5).
\textsuperscript{22} Even if a Judge commits errors, even gross errors, it dose not amount to misbehavior on his part: C.K. Daphlary v. O.P. Gupta, AIR 1971 SC1132.
\textsuperscript{23} Art. 124(2), proviso (b) and Art. 124(4).
\textsuperscript{24} Art. 124(5).
Sabha, or 50 members of the Rajya Sabha. The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a committee consisting of a Supreme Court Judge, a Chief Justice of High Court and a distinguished jurist. If notices for the motion are given on the same day in both the Houses, the committee of Inquiry is to be constituted jointly by the Speaker and the Chairman.

The Committee of inquiry is to frame definite charge against the Judge on the basis of which the investigation is proposed to be held and give him reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the Committee may arrange for the medical examination of the Judge by a medical board appointed by the Speaker/Chairman or both as the case may be.

The report of the Committee is to be laid before the concerned House or Houses. If the Committee exonerates the Judge of the charges laid against him, then no further action is to be taken on the motion for his removal. If, however, the Committee finds the Judge to be guilty of misbehaviour, or suffering from an incapacity, the House can take up consideration of the motion. On the motion being adopted by both Houses according to Art. 124(4), noted above, an address may be presented to the President for removal of the Judge. Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

It can be seen that the constitutional provision in India for the removal of a Supreme Court Judge is modeled on the English provision, though the former is somewhat more rigid than the latter insofar as-(i) it
requires a special majority in both Houses whereas in England no special
majority is prescribed; (ii) while in India the grounds have been specified
on which an address for the removal of a Judge can be presented, there is
no such provision in England; (iii) in India, there is provision for
investigation and proof of the grounds before presenting an address, no
such provision exists in England. Therefore, it appears that the provision
in England for the removal of Judges is more flexible than that in India. It
is a considerable issue for the purpose of accountability and failure of
Art. 124 cl.(4) & (5).

The procedure outlined above for the removal of a Supreme Court
Judge was activated in 1991. For the first time since the Constitution came
into force, the above-mentioned procedure to remove a Supreme Court
Judge was put in motion in 1991. Steps were initiated to remove a
Supreme Court Judge on charges of misconduct prior to his appointment
when he was the Chief Justice of a High Court. 108 members of the Ninth
Lok Sabha gave notice to the Speaker of a motion for presenting an
address to the President for removal of Justice Ramaswami of the
Supreme Court.

The charge against him was that he committed financial
irregularities while he was the Chief Justice of Punjab and Haryana High
Court. The Speaker of the Lok Sabha admitted the motion on 12\textsuperscript{th} March,
1991, and proceeded to constitute an Enquiry Committee consisting of
Justice P.B. Sawant, a sitting Judge of the Supreme Court, Chief Justice
Desai of the Bombay High Court and Mr. Chinnappa Reddy, a retired
Supreme Court Judge as a distinguished jurist. This was done by the
Speaker in terms of S.3 (2) of the Judges (inquiry) Act, 1968. Before the
Committee could present its report, Lok Sabha was dissolved.
In *Sub-Committee of Judicial Accountability v. Union of India*, the Supreme Court was called upon to consider the question whether dissolution of Lok Sabha put an end to the motion for removal of the concerned Supreme Court Judge. The Court’s response to this question was that the motion for removal of a Judge under Art. 124 of the Constitution does not lapse with the dissolution of the House. The motion having been submitted to the Speaker, its validity would in no way be impaired by the dissolution of the House. The Court reached this conclusion as a result of interpretation of Ss. 3(1) and 6 of the Judges (Inquiry) Act. Referring to these statutory provisions, the Court observed:

“The effect of these provisions is that the motion shall be kept pending till the Committee submits its report and if the Committee finds the Judge guilty, the motion shall be taken up for consideration”.

The Court ruled that the Committee of Inquiry appointed by the Speaker was a body outside Parliament and a statutory body under the Judges (Inquiry) Act, and till it furnishes its findings to the House, the Committee maintains its own separate identity.

The Court ruled further that whether a motion has lapsed or not because of the dissolution of the House is not solely for the House to decide. In the Court’s opinion, because of the written Constitution, “the usual incidents of parliamentary sovereignty do not obtain and the concept is one of ‘limited Government’”.

Judicial review is an

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27 Ibid., at 345.
inevitable part of a written Constitution which is the fundamental law of the land. The Court ruled accordingly:<sup>28</sup>

“The interpretation of the laws is the domain of the Courts and on such interpretation of the constitutional provisions as well as the Judges (Inquiry) Act, 1968, it requires to be held that under the law such a motion dose not lapse and the courts retain jurisdiction to so declare.”

Interpreting Arts. 121 and 124, the S.C. ruled that the Constitutional process for the removal of a Judge up to the point of admission of the motion, constitution of the Committee and the recording of findings by the Committee are not, strictly speaking, proceedings of the House of Parliament. This part is covered by the enacted law. The Speaker is a statutory authority under the Judges (Inquiry) Act up to that point and the matter can not be said to remain outside the Court’s jurisdiction. Till this stage, the matter can not be discussed on the Floor of the House because of the bar placed by Art. 121.

The Speaker while admitting a motion and constituting a committee to investigate the alleged grounds of misbehaviour or incapacity does not act as part of the House. The House does not come into the picture at this stage. The Parliament comes in the picture only when a finding is reached by that machinery that the alleged misbehaviour or incapacity has been proved.

Prior proof of misconduct in accordance with the law made under Art. 124(5) is a condition precedent for the lifting of the bar under Art. 121 against discussing the conduct of a Judge in Parliament. Art. 124(4) really becomes meaningful only with a law made under Art. 124(5).

Without such a law having been made, the constitutional scheme and process for removal of a Judge remain inchoate. The Judges (Inquiry) Act, 1968 is, therefore, constitutional and *intra vires* Parliament.

When the Speaker admits the motion under S. 3 of the Judges (Inquiry) Act, the Judge concerned is not, as a matter of right, entitled to any notice or hearing. Also, there is no legal provision under which the Court has power to interdict the Judge from attending to judicial work in the Court pending inquiry against him. It may, however, be advisable to do so if so advised by the Chief Justice.

The Chief Justice is expected to find a desirable solution in such a situation to avoid embarrassment to the Judge and to the Institution in a manner which is conducive to the independence of the Judiciary. Should the Chief Justice be of the view that in the interests of the institution of Judiciary it is desirable for the Judge to abstain from Judicial work till the final outcome under Art. 124(4), he would advise the Judge accordingly. The Judge would ordinarily abide by the advice of the Chief Justice.

The Court also ruled that the petitioner, being a Committee of the Bar, has *locus standi* to move a writ petition in the Court to raise these matters concerning the removal of a Supreme Court Judge.

Soon after the Inquiry Committee started the proceedings, a Congress M.P., Shri M. Krishnaswami, filed a petition in the Supreme Court challenging the Committee’s functioning. His complaint was that Justice Ramaswami had not been given a fair hearing and also that the Judge was entitled to a copy of the report. The S.C. dismissed the petition on the ground that the petitioner had no *locus standi*. If Justice
Ramaswami wanted a copy of the report, he would have to appeal to the Court himself.  

Next, a writ petition was filed in the S.C. on behalf of Justice Ramaswami by his wife claiming a copy of the report of the Inquiry Committee before its being submitted to the Speaker so that the Judge may take recourse to Judicial Review in case he was found guilty by the Committee. In Sarojini Ramaswami v. Union of India, the S.C. considered several important questions arising out of the writ petition, viz.:

1. Whether the concerned Judge has a right of Judicial Review of the order of removal made by the President under Art. 124(4)?
2. Is the Inquiry Committee a Tribunal and thus subject to the Supreme Court’s appellate jurisdiction under Art. 136?
3. Does the concerned Judge have a right to get a copy of the report before its submission to the Speaker?

A five-Judge Bench considered the issues involved; three opinions were filed. The majority opinion (3 Judges) was written by Verma, J.; a separate but concurring opinion was filed by Kasliwal, J., and K. Ramaswami, J.; filed a dissenting opinion. The following summary is based on the three Judge-opinion given by Verma, J.

After reading the constitutional provisions and the provisions of the Judge’s (Inquiry) Act and the rules made there under, the Court pointed out that if the Inquiry Committee reaches the verdict of ‘not guilty’, either unanimously or by majority, the matter ends there and Parliament is not required to take up the motion of removal for consideration.

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30 AIR 1992 SC 2219.
This means that the Inquiry Committee is “the sole and final arbiter on the question of removal of the Judge where the findings reached by the Committee, whether unanimously or by majority, is that the Judge is ‘not guilty.’” This indicates that there can be no judicial review where the Inquiry Committee makes a finding that the Judge is ‘not guilty’ of any misbehavior. In such a situation, no question arises of furnishing a copy of the report of the Committee to the concerned Judge.

In case, the Inquiry Committee finds the Judge guilty, then the matter goes to Parliament. The Supreme Court has come to the conclusion that under Art. 124(4), “a full consideration on merits, including correctness of the finding of ‘guilty’ made by the Inquiry Committee on the basis of the materials before the Parliament is contemplated during the Parliamentary part of the process of removal of a Judge.”

This means that despite the finding of ‘guilty’ by the Committee, the Parliament may decide, after considering the matter, not to adopt the motion for removing the Judge. This leads to the conclusion that the concerned Judge should also have an opportunity to comment on the finding by the Inquiry Committee. For this purpose, therefore, the Speaker/Chairman of the House has to supply a copy of the Inquiry Committee’s report to the concerned Judge while causing it to be laid before the Parliament under S.4(3) of the Act.

As regards judicial review, the Court has ruled that if Parliament does not adopt the motion for removal of the Judge, the process ends there with no challenge available to anyone. The judicial review of the
finding of ‘guilty’ made by the Inquiry Committee may be permissible on limited grounds “pertaining only to the legality” but only after “the making of the order of removal by the President in case the Parliament adopts the motion by the requisite majority”. “Resort to judicial review by the concerned Judge between the time of conclusion of the inquiry by the Committee and making of the order of removal by the President would be premature and is unwarranted in the constitutional scheme.”

The Supreme Court has ruled that the Inquiry Committee appointed under the Judges (Inquiry) Act cannot be treated as a ‘tribunal’ for the purposes of Art. 136 because the report finding the Judge guilty of misbehaviour is “in the nature of recommendation for his removal which may or may not be acted upon by the Parliament”. Since the Committee holding that the Judge is guilty of any misbehaviour is not “final and conclusive”, it is legally not permissible to hold that the Committee is a tribunal under Art.136 of the Constitution.”

This means that an appeal cannot be filed in the Supreme Court from the Inquiry Committee under Art. 136.

This judgment has seeds of confrontation between the Supreme Court and Parliament. Ordinarily, after Parliament has taken a decision to remove the Judge, on the basis or the report of the Committee of Inquiry, the matter should come to an end. As the Court has said itself, if the Inquiry Committee report is favourable to the concerned Judge, the matter ends there and Parliament cannot take any further action in the matter. If, however, the report of the Inquiry Committee goes against the

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33 Ibid., 2244.
34 Ibid., 2248.
35 See Art. 136.
Judge, then, only Parliament can take action to remove him after giving him a hearing on the inquiry report.

Once Parliament has passed the resolution removing the Judge after following the due procedure and the President assents to the motion, the Judge stands removed and there appears to be no need for any judicial review thereafter. Otherwise, there is a chance of controversy arising between the Judiciary and Parliament. In any case, judicial review can only be on procedural grounds and not on the merits of the grounds of removal.

In the long and arduous process of removal of the Supreme Court Judge, the third stage was reached when the Inquiry Committee held the Judge guilty of willful and gross misuse of office and moral turpitude by using public funds for private ends in several ways while he was the Chief Justice of the Punjab and Haryana High Court during Nov.11, 1987 to Oct.6, 1989. The Committee reported that acts committed by the Judge were of such a nature that his “continuance in office will be prejudicial to the administration of justice and public interest”. The Committee said: “The acts constitute ‘misbehaviour’ within the meaning of Art. 124(4) of the Constitution.”

The report of the committee was tabled in Parliament on December 17, 1992. Thereafter, the motion was debated in the Lok Sabha. A lawyer was allowed to appear before the House to defend Justice Ramaswami. Ultimately, the motion was put to vote in the House but was lost as it could not receive the requisite votes in the House because of the absence of the Congress Party members from the House.

As a sequel to the above episode, a writ petition was moved in the Supreme Court seeking a declaration that the motion of impeachment moved in the Lok Shabha for the removal of the S.C. Judge ought to be regarded to have been carried by construing the expression “supported by a majority” in Art. 124(4) as meaning that a member abstaining from voting should be deemed to have supported the motion. The S.C. rejected the contention. The Court argued that the expression “not less than two-thirds of the members present and voting” in Art.124(4) emplies that motion is to be deemed carried only when the requisite number of members express their support for the motion by casting votes in its favour. Abstention from casting vote can not be construed as deemed support for the motion.37

The President can not remove a S.C. Judge except in accordance with the procedure laid down in Art. 124(4). Thus, the President can not remove a Judge unless each House of Parliament passes an address for the removal of the Judge supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting on the ground of proved misbehaviour and incapacity. Unless such an address is presented to the President in the same session by the two Houses, the President is not empowered to remove a Judge.38

The word ‘misbehaviour’ used in Art. 124(4), “is a vague and elastic word and embraces within its sweep different facets of conduct as opposed to good conduct”. Literally ‘misconduct’ means wrong conduct or improper conduct. Guarantee of tenure to a Judge, and its protection by the Constitution does not mean giving sanctuary for corruption or grave misbehaviour. But, at the same time, every action or omission by a Judge

in the performance of his duties which may not be a good conduct necessarily, may not be regarded ‘misbehaviour’ for purposes of Art 124(4) indictable by impeachment.\textsuperscript{39} Error in Judgment, however gross, can not amount to ‘misbehaviour’.\textsuperscript{40}

These issues have been described broadly further in the chapter 6.

**(E) Judging the Judges**

Recently, the judiciary has been greatly in the news, but for all the wrong reasons. A string of judicial scandals have erupted in the recent past, starting with Chief Justice Sabharwal”s case, and then going on to the Ghaziabad district court Provident fund scam, the 15 lakh cash-at-judges-door scam of Chandigarh, and the Justice Soumitra Sen case of Calcutta. Some of these have arisen due to the lack of transparency in the selection and appointment of judges. In many cases, persons of doubtful integrity come to be appointed and confirmed through a totally secretive, ad hoc, arbitrary and non-transparent process of selection and appointment through a Collegium of judges of the High Court and the Supreme Court. Unfortunately however, we are finding that these rotten eggs who come to be appointed, get confirmed, even when they are found by the Collegium to have been of doubtful integrity, and are not removed even when a judge's committee has found them guilty of criminal misappropriation and criminal breach of trust, and even after the Chief Justice of India has recommended their impeachment selection, appointment and removal of judges.

A historic non-impeachment Case

1. Case Of Justice V. Ramaswami


\textsuperscript{40} Daphtary v. Gupta, AIR 1971 SC 1132.
May 11, 1993 will be remembered as a black day for Parliament and for the judiciary in this country. For on that day, 205 Lok Sabha members belonging to the Congress (I) and its allies sabotaged the impeachment motion against Justice V. Ramaswami of the Supreme Court by abdicating their constitutional duty of voting for or against and thus defeating the motion by ensuring that it did not receive the support of an absolute majority of the total membership of the House. Each one of the 196 MPs, who voted, all belonging to the Opposition parties, voted for the removal of the judge. Thus, despite the motion for removal being passed unanimously by the members who voted, it failed, bringing to a close the more-than-two-year old proceedings for the removal of Ramaswami. The result, therefore, is that despite a high-power inquiry committee of three eminent judges having come to the conclusion that Ramaswami was guilty of several acts of gross misbehaviour which warranted his removal, the judge is still entitled to discharge judicial functions from the highest court of the land. It is another matter that after the impeachment motion failed, Ramaswami was persuaded to resign by the Congress(I) which belatedly realised that it would have to pay a heavy price for being seen to have supported a corrupt judge. The failure of the motion, especially after the tortuous course it went through, raises several grave issues for the future of the administration of justice in this country and indeed for probity in public life in general.

2. The Case Of Justice Ashok Kumar

In the case of Justice Ashok Kumar, who was appointed an additional judge in April 2003, the Collegium of three senior judges of the Supreme Court unanimously decided not to confirm him as a permanent judge in August 2005 because of adverse reports regarding his integrity. Despite
this, he was given extensions as additional judge, and finally came to be confirmed in February 2007 on the Chief Justice's recommendation, which was made without consulting other members of the Collegium of judges, in complete violation of several judgments of the Supreme Court. These had clearly laid down that in a matter of appointment of judges, the Chief Justice cannot act alone and must go along with the majority view of the Collegium of senior judges of the Supreme Court. The 9 Judge judgments also provided that an appointment made without consulting the Collegium was challengeable and could be struck down in a judicial proceeding. The memorandum of procedure lay down by the law ministry also made it abundantly clear that in such matters the Chief Justice must consult the Collegium of senior judges, as well as those other judges who have come from the same High Court in which the proposed appointment is to be made. Thus, Justice Ashok Kumar's appointment was clearly contrary to the Constitution, and the law laid down by the Supreme Court itself. Though Justice Ashok Kumar's confirmation as a permanent judge was challenged by senior advocates of the Supreme Court, unfortunately the court has upheld his confirmation on the basis of very dubious reasoning. While the Court berated the previous Chief Justices for having given extensions to Justice Ashok Kumar as additional judge for political considerations, it found nothing wrong with his confirmation, despite the fact that it was done without consulting the Collegium and after his integrity was found doubtful by the previous Collegium of judges when it had considered the matter. Moreover, nothing had changed subsequently to cast any doubt on the finding of the previous Collegium. Thus the Supreme Court, missed the opportunity to judicially correct the administrative illegality in confirming a judge whose integrity had been found to be doubtful, and that too without consulting the Collegium of
senior judges of the Court. Such judicial behaviour of the Supreme Court only confirms the growing public perception that the recent crisis of credibility and integrity of the higher courts is largely a result of improper appointments due to extraneous considerations which are facilitated by the totally nontransparent manner in which judges are selected and appointed.

3. Arundhati Roy Case

Can a citizen of India not criticise the Supreme Court’s decisions? Can she not criticise the procedures and management of the court? Is the court not supposed to be accountable? How will its accountability be enforced if it were made absolutely immune from public criticism?

Arundhati Roy’s conviction and punishment for contempt of court shows that despite its doctrinal activism on human rights, the Supreme Court of India is still way behind the times in balancing freedom of speech and contempt of court. Action against Arundhati must be seen in the context of the decision of the Supreme Court in NBA vs India in which the court permitted the concerned state governments to raise the height of the Sardar Sarovar dam up to 90 ft. That decision came in 1998 after the work on the dam had remained stayed on the court's order since 1994. It came as a great disappointment to Narmada Bachao Andolan (NBA) and its sympathisers because a rise in the height of the dam meant submersion of more villages and displacement of thousands of more people from their homes. Since even those displaced earlier had not been adequately rehabilitated, what would be the fate of such additional displaced persons? The decision was severely criticised and NBA undertook campaigns to educate the people about the harmful effects of the court's decision. Medha Patkar, the leader and Arundhati Roy, a Booker Award
winner and sympathiser of NBA, criticised the judgment. They were served a notice for contempt. The judges were doubtless offended by Roy's sarcastic references to them in her article in a news magazine but decided to drop the matter after giving an admonition. NBA organised a 'dharna' in front of the Supreme Court and in a meeting held there the decision of the court was severely criticised. A complaint was made against Medha Patkar, advocate Prashant Bhushan and Arundhati Roy by some lawyers alleging contempt of court and the court issued a notice asking why they should not be punished. All the three respondents denied that they had committed any contempt and asserted that they had a right to criticise the judiciary and its decisions in exercise of their freedom of speech guaranteed by the Constitution. When that matter was heard, it was revealed that the petitions were frivolous, they suffered from various procedural flaws, and none of the charges made against any of the three respondents could be proved. The court had to concede that had its registry carefully scrutinised the petition, perhaps even a notice might not have been issued. The three persons were therefore acquitted. But the court took suo motu notice of the contemptuous statements contained in Arundhati Roy's affidavit and issued a fresh notice of contempt.41

Arundhati appeared and defended what she said in her affidavit. She asserted that as a citizen of India she had a right to criticise the decision of the Supreme Court, this being part of her fundamental right to freedom of speech. She had absolutely no intention to commit contempt of the court and what she said did not amount to contempt. The court held her guilty of contempt and sentenced her to one day's imprisonment and a fine of Rs 2,000, failing to pay which she would have to undergo three months' imprisonment. Arundhati Roy was sent to Tihar jail. She spent a

41 S P Sathe, 'NBA Contempt of Court Case', EPW, November 24, 2001, p 4338
day there and came out after paying Rs 2,000. The ground of contempt that is known as scandalising the court has fallen in disuse in most of the advanced countries and it has not been used in England during the entire 20th century. In all democratic countries, the space of judicial review has expanded and it has acquired a political dimension. Criticism of judicial decisions and of the judicial system is necessary to reinforce its accountability to the people. What did Arundhati Roy say which infuriated the court? In her affidavit she said: On the grounds that judges of the Supreme Court are too busy, the chief justice of India refused to allow a sitting judge to head the judicial enquiry into the Tehelka scandal, even though it involves matters of national security and corruption in the highest places. Yet when it comes to an absurd, despicable, entirely unsubstantiated petition in which all the three respondents happen to be people who have publicly - though in markedly different ways - questioned the policies of the government and severely criticised a recent judgment of the Supreme Court, the court displays a disturbing willingness to issue notice. It indicates a disquieting inclination on the part of the court to silence criticism and muzzle dissent to harass and intimidate those who disagree with it. By entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility considerable harm. Arundhati had said that for "the petitioners to attempt to misuse the Contempt of Court Act and the good offices of the Supreme Court to stifle criticism and stamp out dissent, strikes at the very roots of the notion of democracy". This should make it clear that her complaint was not that the court was motivated but that the court allowed itself to be used by those motivated to stifle criticism and suppress dissent. The conclusion of the court that she had imputed motives to the court was
therefore rather hasty. She honestly believed that the decision of the Supreme Court in the NBA case had done a great harm to the displaced people. She pointed out various examples of judicial decisions which, according to her, had "materially affected, for better or for worse, the lives and livelihoods of millions of Indian citizens". She then says that: An activist judiciary, that intervenes in public matters to provide corrective to a corrupt, dysfunctional executive, surely has to be more, not less accountable. To a society that is already convulsed by political bankruptcy, economic distress and religious and cultural intolerance, any form of judicial intolerance will come as a crippling blow. If the judiciary removes itself from public scrutiny and accountability and severs its links with the society that it was set up to serve in the first place, it would mean that yet another pillar of Indian democracy will crumble. A judicial dictatorship is as fearsome a prospect as a military dictatorship or any other form of totalitarian rule.\footnote{S.P. Sathe, Accountability of the Supreme Court: Arundhati Roy Case, Economic and Political Weekly, Vol. 37, No. 15 (Apr. 13-19, 2002), p.1384}

What was contemptuous in this? Did she say that the Supreme Court was motivated with the desire to harass her and suppress her dissent? If her entire statement is read, it is clear that her statement was made in the context of the petition that had earlier been dismissed by the court for being frivolous. Did the court, though inadvertently, not allow itself to be used by the petitioners for their nefarious purpose of suppressing criticism and repressing dissent? Can a citizen of India not criticise the court's decisions? Can she not criticise the procedures and management of the court? Is the court not supposed to be accountable? How will its accountability be enforced if it were made absolutely immune from public criticism? Even what she said regarding Tehelka
was a mere criticism of the priorities of the court. How does such criticism erode the reputation of the court? Is the reputation of the court so fragile that it would be lost by mere criticism of its working? Despite criticism of several judgments in the past (the most significant being the emergency decision in A D M Jabalpore v. Shukla), the court's reputation has not been affected. People still have faith in the judiciary which is obvious from the fact that whenever any scam takes place or a mayhem occurs, people ask for an enquiry by a judge. Reputation of the Indian judiciary is certainly high in comparison with the reputation of the other organs of government. But it can remain so only if it is constantly subjected to people's ombudsmanning. If the courts adopt an attitude of being a holy cow, they will not know how they are evaluated by the people. Arundhati Roy did not say that there was judicial dictatorship. She only said that if the courts became immune from public criticism, they could usher into a dictatorship and since any dictatorship is bad, judicial dictatorship would also be bad. While surveying the previous decisions, the court distinguished Shivshankar's case in which harsh criticism of the judiciary was held not to be contemptuous. In Namboodripad's case, he had been convicted for contempt for a speech which was a pure theoretical statement on the role of the judiciary from a Marxist perspective. It appears that the fact that Shivshankar was a former judge of a high court and later a minister in the central government made his case different from that of Namboodiripad. Freedom of speech can not be greater for one who has been a judge than for one who is a citizen Arundhati Roy had no personal axe to grind. She spoke for a cause which she thought was important and needed her support. Should these things not count while trying a person for contempt? If Shivshankar's judicial belonging elicited greater tolerance of his views,
Arundhati Roy's altruistic intentions also deserved such tolerance. Moreover, the court was rather patriarchal in condescendingly referring to her as a 'woman' whom they treated leniently by giving one day's punishment. Could they not have made it more symbolic by sentencing her to imprisonment till the rising of the court while simultaneously declaring that the court had risen? By convicting her and sentencing her, the court has certainly not covered itself with glory. A more tolerant and more sensitive but not sentimental court would doubtless earn greater public admiration.\(^{43}\)

4. The Case of Justice Soumitra Sen

Justice Sen has been recommended to be removed by impeachment by the Chief Justice of India, for the offence of misappropriating funds received by him as a court receiver and thereafter for giving false explanations to the High Court. The Chief Justice made this recommendation after a report of a committee of three Judges, who after carefully examining the facts came to the conclusion that he had committed several acts of serious misconduct. Though these acts of misconduct were the subject matter of proceedings pending against him in the Calcutta High Court, yet he came to be appointed during that time, due to the lack of transparency in the matter of appointments. Though the report of the judges committee was submitted a year ago and the Chief Justice's recommendation for the removal by impeachment of Justice Sen was made five months ago, the government has not made any attempt to proceed with his impeachment. This is despite the fact that the government has proposed a bill to amend the Judges Enquiry Act by which this very procedure for initiating impeachment proceedings is

\(^{43}\) ibid
being sought to be given statutory status. The inaction of the government in Justice Sen's matter displays the complete lack of seriousness on the part of the government in enforcing judicial accountability. In these circumstances, the Campaign for Judicial Accountability and Reforms has prepared an impeachment motion against Justice Sen and is sending it to all the political parties with the request that they should have it signed by their MPs so that it could be presented to the Chairman of Rajya Sabha for proceeding with his impeachment.

5. Case Of Justice Ashwini Kumar Mata

The problems created by the lack of transparency in the appointment of judges is exemplified by the presently proposed appointment of Mr. Ashwini Kumar Mata who has recently been recommended for appointment as Judge to the Delhi High Court. Mr. Mata has recently purchased one floor of a house in Safdarjang Enclave from a builder who had an agreement with the owner of the plot that he would construct the building and hand over three floors to the owner. The remaining two floors would remain with him which he could sell only after handing over possession of the three floors to the owner. Despite the fact, that the builder had not completed the construction of the building and not handed over the possession of the floors belonging to the owner to him, Shri Mata entered into an agreement for purchasing one of the floors which was to go to the builder from him. Shri Mata thereafter used his agreement with the builder to seek mutation (getting his name recorded as owner) of that floor in his name. In his application, he attached a copy of his agreement with the builder, containing the forged signatures of the owner, Mr. Joshi. When this was discovered by Mr. Joshi, he made a complaint to the police regarding the forgery. Eventually, at the instance
of a magistrate, an FIR came to be registered and an investigation began into this forgery. The act of forgery became clearer when Mr. Mata filed a different version of the same agreement in arbitration proceedings which he had initiated. In this version of the agreement, the signatures of the owner were not there. These facts were learnt only after the recommendation for the appointment of Shri Mata had already been sent to the Law Ministry by the Collegium of the High Court. Thereafter a representation was sent to the collegiums in the High Court and the Supreme Court. Mr. Mata responded to the representation and said that the criminal investigation by the police had exonerated him. The police report had been given hurriedly after the representation, without even waiting for the forensic examination of the forged signatures, and is dishonest. Thereafter another representation was sent to the Supreme Court and the High Court collegiums detailing the misconduct of Mr. Mata and pointing out why it is not possible for the signatures of the owner to have been forged without Mr. Mata’s knowledge and consent. We have pointed out in our representation that even if it is not certain that Mr. Mata participated in the forgery of his agreement with the builder, it is better to err on the side of caution by not appointing him, instead of being faced with a situation as that with regard to Justice Soumitra Sen of the Calcutta High Court.

6. J. P.D. Dinakaran case –

One of the charges was of him having acquired more than 300 acres of land in three villages of Tamil Nadu in his name, the name of his wife, daughter, and four companies. All these were incorporated on 23 August 2001, with his wife, daughter and other close relatives as shareholders. It is also alleged that he had encroached upon another 150
acres of village common land as well as government land meant for distribution to land less dalit families. He had put all the 450+ acres of land under a common fence. It was further alleged that he had acquired a lot of other expensive immovable property, including a plot of land in the name of his wife in 2001-02, where he is alleged to have recently spent over Rs 2.5 crore for construction of a commercial complex, and another plot in Anna Nagar, Chennai, in the name of his wife in 2004-05 for over Rs. 90 lakh. There are several allegations about the ostensibly dishonest manner in which he dealt with a number of cases, in Tamil Nadu (while he was a judge there) and then as Chief Justice of Karnataka. In particular, there is an income tax case where he quashed the it department's reopening of assessment of an assessee (where the amount of tax and penalties involved were around Rs 50 crore), at the very first hearing by falsely recording a concession of the standing counsel of the it department. The it department in their appeal against Justice Dinakaran's order stated that the standing counsel had denied making any such concession and eventually the division bench reversed Justice Dinakaran's order. Then, there are a number of cases involving mining leases in Karnataka, which were being heard by the bench at Dharwad because the mining areas fell within the territorial jurisdiction of the bench. First, Justice Dinakaran withdrew these cases to himself by constituting a "green bench" over which he presided and then withdrew these cases on the basis that they involved mining in forest areas. He then proceeded to pass a series of very unusual orders, many which benefited the miners. In one case, he allowed a miner, Vinod Goel, to lift over a lakh of tonnes of iron ore on a writ petition filed by him in 2009, on the plea that he had mined the material prior to 1985 (when his lease had expired) and that he had not lifted the material for 24 years since the ore was worthless.
earlier! He passed suspicious orders in several other mining cases dealt with by his "green bench". All in all, the allegations form a formidable body of credible charges.

The Dinakaran episode underlines the need to urgently put in place a Judicial Performance (or Complaints) Commission, which could be entrusted with the inquiry of complaints against judges and empowered to take action against errant judges. This must be a full time body, independent of the government as well as of the judiciary, as opposed to an in-house Judicial Council, which is what the judiciary wants. The Dinakaran episode also underlines the need to put in place a credible institution for the selection and appointment of judges to the Supreme Court. Until we put in place a credible system of selecting judges and examining complaints against them, we will be seeing many more Dinakaran type episodes, each of which will contribute to the steady erosion of the integrity and public confidence in the judicial system.

7. Mid-Day journalists had published documentary evidences against Justice 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 their benefits. Yet no action was taken against him.

It was only after the convictions of four Mid-Day journalists for contempt, by Delhi HC, 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

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like a Damocles’ sword which hangs over the neck of the people, particularly the media.\textsuperscript{45}

8. In the Ghaziabad Provident Fund Scam case, when the vigilance judge of the Ghaziabad district court reported to the High Court about how more than 7 Crores had been siphoned out of the Ghaziabad treasury by successive District Judges of Ghaziabad with the help of an administrative officer of the court, in the guise of Provident Fund advances to class 3 and 4 employees. The administrative officer of the Ghaziabad Court, Ashutosh Asthana made confessional statement to the Court that he had done this at the behest of successive judges of the district court and that much of this money had been used for building houses of the district judges, paying for various items of furniture etc. for them judge of the Supreme Court were also present. The matter was reported to the police and soon the lawyer and his clerk were arrested. During preliminary investigation it was found that several High Court judges as well as a Supreme Court judge were indulge. Initially the Ghaziabad police investigating the case was told by the Chief Justice of India that they could not directly interrogate the High Court judges and that they must send only written questions to the judges, which must be sent through the CJI. Thereafter the Ghaziabad police expressed helplessness in investigating this case involving a Supreme Court judge, several High Court and District Court judges. On tis the investigation was transferred to the CBI. More than one year thereafter, there is no information about the progress made by the CBI in the investigation. The fact however that is while several minor employees have been charge sheeted, no judge has been charge sheeted yet. Moreover, Ashutosh

\textsuperscript{45} Prashant Bhushan (on behalf of the Committee on Judicial Accountability), ‘Committee on Judicial Accountability’, p.2 in http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf accessed on 4th July, 2011
Asthana died in jail in mysterious circumstances which his family believe to be a murder.

9. This scandal known as the “cash at judges door scandal” arose when a packet containing Rs. 15 lacs was delivered by a lawyer’s clerk to the security guard of Justice Nirmaljit Kaur. The packet was opened by the guard in the presence of the Judge in her living room where reportedly some other judges of that court and a judge of the Supreme Court was also present. The matter was reported to the police and soon the lawyer and his clerk were arrested. During preliminary investigation it transpired that the money was sent by a Delhi Hotelier called Ravinder Singh and was really meant for another judge by the name of Nirmal Yadav, but mistakenly delivered to Nirmaljit Kaur. The investigation was eventually handed over to the CBI. The case received a great deal of publicity and an in-house inquiry committee of 3 judges was also constituted by the Chief Justice of India to inquiry into the matter. This inquiry committee submitted a report on 6/12/08 and came to a clear conclusion that the money was sent by Ravinder Singh for Nirmal Yadav and was probably related to the purchase of land by her along with her relatives in Solan, Himachal Pradesh. The committee also found that she had committed various other irregularities, which were serious enough for the CJI to seek her explanation and resignation.

(F) The Relationship Between Judicial Accountability and Independence

The existence of an independent judiciary can be said to be the bulwark of governance. Needless to say, there has always existed a tussle between the legislature and the executive to assume control over the judiciary as can be traced back to the Constituent Assembly Debates in
India. Deciding on the independence of the judiciary was thus a key concern that the Members of the Constituent Assembly thereby sought to address. At this juncture, one needs to take note of the fact that the facet of independence was sought to be achieved by enactment of various constitutional provisions, most importantly the appointment of the Judges. Appointment of Judges in England by the Lord Chancellor and in America by the Senate was felt to be an unsupervised and politicized process and was a sentiment shared by many in the Constituent Assembly.\footnote{See generally Constituent Assembly Debates, Vol. VIII, 258. The provisions of appointment of the Judges to SC and High Courts (Article 124 (2) and Article 217 (1)) and insulation of the conduct of the Judges by the enactment of Articles 121 and 211, which provides that the discharge if the duties by a SC or a High Court judge cannot be discussed in the Parliament or State Legislature crystallize the concept of judicial independence by making the judiciary insulated from the political processes of the outside.}

A contextualized understanding of judicial independence in India therefore entails a plethora of rulings pronounced by the Hon’ble Supreme Court (hereinafter SC), emphasizing the need for an independent judiciary time and again. In State of Bihar v. Balmukund Shah,\footnote{AIR 2000 SC 1296, ¶ 294.} independence of judiciary was elevated to the status of being a constituent of the Basic Structure of the Constitution, the seeds of which were borne in the locus classicus Keshavananda Bharati v. State of Kerala.\footnote{AIR 1973 SC 1461. (Sikri C.J. had mentioned the separation of powers between the Legislature, Executive and the Judiciary to be one of components of the basic and foundation structure of the Constitution).} In a host of other rulings, the need for an independent judiciary free from the interference of unwarranted political processes has been advocated as the sine qua non of a democratic society.\footnote{See generally S.P. Gupta v. Union of India, AIR 1982 SC 149, where it was stated that independence of judiciary constitutes the foundation over which the edifice of the Indian democratic polity rests. See also Union of India v. Sankal Chand Himmattal Seth AIR 1977 SC 2328.} Thus, the need for judicial independence cannot be over emphasized. However, literature...
has shown that in spite of being an appealing concept per se,\(^{50}\) judicial independence is often caught in the conundrum of structuring itself, thereby obfuscating its very existence. While it has been identified as a ‘means to an end’, what the end is sought to be achieved has often been obscured, leaving numerous loose ends.\(^{51}\) While there are several dimensions to explore the concept of judicial independence, in the present piece, we will restrict ourselves to specifically the relationship between judicial accountability and independence.

The idea of judicial independence shares an inextricable relationship with judicial ethics, of which accountability is one of the dimensions. It is often thought that the two are antithetical to each other and hence, one cannot exist in the presence of the other. This has often been a favorite area for the legal scholars to deliberate upon\(^{52}\) and thus has been subject to extensive scrutiny. However, there seems to have been a unanimous opinion about the same as most authors have noted that there exists an accountability-independence continuum and weighing one in the complete absence of the other is fatal to the existence of the other.\(^{53}\)

We further suggest that judicial independence cannot be viewed to have a separate existence because it is only in an accountable judiciary that the faith of the citizenry can be reposed. The element of accountability is a necessary concomitant to establish the supremacy of

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\(^{50}\) See supra note 12, 9.

\(^{51}\) While some scholars have recognized fairness and impartiality to be the ends sought to be achieved by the means of judicial independence (See Shirley Abrahamson, Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence, 64 Ohio State Law Journal 3 (2003)), some others have argued that ends are often politicized, i.e., politics does not remain outside the confines of judiciary but well within it, often shaping the ends it seeks to achieve.(See Stephen Burbank, What Do We Mean by “Judicial Independence”? , 64 Ohio State Law Journal 323 (2003)).

\(^{52}\) For example, Stephen Burbank argues that judicial independence is not a monolith and inquires as to whether there is a long felt need of making different mechanisms of accountability and independence operative on the consideration of the different functions performed by the Courts. See Burbank, supra note 31, 323.

\(^{53}\) Id., 325.
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the institution. This in turn, seeks to promote the element of independence and thus forms a vicious cycle and one runs the risk of not appreciating the delicate relationship between corruption and independence. The central argument that we are contending through this piece is that the tension between judicial independence and judicial accountability is an artificial one since judicial independence is largely dependent on the public acceptance of the judiciary to be a fair institution, executing its responsibilities in accordance with the law of the land. It is to ensure this element of fairness that it is patently wrong to argue that accountability is in conflict with independence. It seems that the dichotomy between the two is rather superimposed and dispelling the myth surrounding the same is the need of the hour. The demand of accountability, according to us, is the first step towards eradicating the occurrence of any event of misfeasance as a dishonest Judge should not be serving the Bench. Thus, as Prashant Bhushan stated in a recent interview, the fact that a greater demand of accountability, if at all, compromises with the need for independence, is welcome as a step to eradicate any disastrous consequences of letting a dishonest adjudicator decide on the fate of the people.54 It is rather ironical that despite being one of the few nations in the world where a Right to Information legislation functions effectively, the judiciary seeks insulation from public view defending its independence. The fact of the matter however remains that the need for integrity is a means of achieving the cherished goal of judicial independence and therefore, shying away from making oneself accountable is sheer naivety on the part of judicial institutions.

54 V. Venkatesan, Of Accountability to the People, Frontline, September 2009, 33.
With the above said theoretical understanding, the thesis now attempts to view the position of Indian judiciary in the accountability-independence debate.

**G) ‘Right’ To Disclosure of Assets: Evaluating the Supreme Court Judge’s Assets Case**

The Supreme Court Judge’s Assets case throws upon a plethora of questions with regards to the immunity sought by the CJI from the applicability of the RTI legislation. However, what applicant Subhash Agrawal essentially sought by means of the RTI application filed was not to seek the actual asset disclosures. On the contrary, the demand was whether High Court and Supreme Court judges were complying with the Code of Conduct adopted by the Chief Justice’s Conference, 1997 and whether judges of the Supreme Court were disclosing their assets to the Chief Justice under a code of conduct framed in 1999 by the judges themselves. The public information officer of the Hon’ble Supreme Court (endorsed by the Chief Justice) responded by saying that the information did not exist in the Supreme court registry. The matter was then referred to the Central Information Commission (hereinafter CIC), wherein it was found out that the Hon’ble Supreme Court had been making a distinction between the information held by the Chief Justice’s office and the information held by the Supreme Court. This distinction was outright rejected by the CIC and it directed the information officer to obtain the information from the CJI’s office and make it available to the RTI applicant. The Hon’ble Supreme Court then filed a petition with the Hon’ble Delhi High Court against this order of the CIC. While the CIC merely ordered the release of information as to whether judges were disclosing their assets or not, the Supreme Court argued that this would
open the gates to people seeking actual disclosure of assets under the RTI. It claimed exemption from asset disclosure under the RTI Act as it was under a “fiduciary relationship” that the judges disclosed this information to the CJI and it was “personal information having no relationship to public interest and would cause an unwarranted invasion of privacy” of judges. It further claimed that the CJI was not a ‘public authority’ under the RTI Act; hence it was not amenable to entertain RTI petitions. The Hon’ble Supreme Court still maintains this stance despite the declaration of assets on the Court’s website.

The judgment was delivered after the Hon’ble Court made it clear that there would not be any withdrawal of its writ petition despite the judges’ decision to put their asset declarations on the web site. Hon’ble Justice Bhat strongly rejected the claim that the CJI was not a public authority and that CJI’s office is not amenable to the RTI Act. It further held that the CJI decidedly held information about whether judges had made asset declarations and he had to disclose the same to the applicant. The judge opined that since the Code of Conduct was adopted by the judges themselves, there cannot be any claim of fiduciary relationship. He further held that the information was personal information of judges entitled for protection under clause 8(1)(j) of the exemptions in the RTI Act, unless the information officer or the CIC came to the conclusion that the public interest in disclosure of this information outweighs the interest of privacy of the judge. The applicant in the present case did not ask for the actual asset disclosures but only whether there was any compliance, and hence the question whether the public interest in disclosure of judges’ assets outweighs the public interest in protecting the privacy of judges was left undecided.
He also rejected the submission that the 1997 Supreme Court resolution imposed a confidentiality obligation on the CJI to ensure non-disclosure of the asset declarations by the judges by noting that “the mere marking of a document as ‘confidential’ does not undermine the overbearing nature of S. 22.”

The Delhi High Court reserved its verdict on an appeal filed by the Supreme Court challenging its order after two days of arguments. It contended that the central information officer cannot be an appellant in the case representing the Supreme Court and asked either the Registrar General or Secretary General to represent the Court. Further, the CIC could not be a party to the case as it was a constitutional body and only the RTI applicant could be included as a party.

In its appeal before the Delhi High Court seeking to set aside the single-judge order, the Supreme Court registry contended that Justice Bhat failed to appreciate that information on “voluntary” declaration of assets by the judges to the CJI could not be sought under the RTI Act. The Supreme Court Registry contended that there was no law providing for declaration of assets to the CJI. Information could be sought under S. 2(j) of the Act only if it was held by or was under the control of any public authority under the provision of any statute or any law. It is noteworthy that the judgment of the Hon’ble Delhi High Court brought judges under the purview of public authority. The registry claimed that Justice Bhat erred in holding that “all” information received by the CJI was within the purview of the Act and had interpreted the provisions of the Act too broadly which was “unnecessary” and “illogical”. It further

55 S.22 (Protection of action taken in good faith): The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
claimed that the judgment failed to consider that there was a plethora of information which was available with the judiciary but could not be made public.\textsuperscript{56}

This controversy has been a hotbed of many firsts that will go down in history. It is for the first time that the SC has become a litigant in an issue before a High Court, a High Court judge has spoken up against the established view of the SC judges – not in his judicial capacity as it is impermissible but on a public issue instead which has diverse ethical dimensions and former judges have entered the field in an effort to keep intact the institutional integrity of the SC. Scathed with criticisms and a fair share of accolades, the ruling is surely a benchmark in the Indian jurisprudence.

The Court on January 12, 2010, delivered its reserved verdict from November 12, 2009. It ruled that a move towards ensuring accountability will preserve the independence of judiciary. The Court observed that “well-defined and publicly-known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant.”\textsuperscript{57} Affirming the observations of Justice Bhat, it further ruled that the CJI’s office is a public office for the purposes of RTI as it is created by or under the Constitution of India. Consequentially, the phrases ‘held by’ or ‘under the control of’ under S. 2(j) of the RTI Act not only includes information obtained by a public authority but also all of the information that is received or used or consciously retained by the public authority in the course of its functions and official capacity. Any other interpretation would render the right to

\textsuperscript{56} Delhi High court website, available at, http://lobis.nic.in/dhc/ (Last visited on January 16, 2010).
information ineffective. The declarations furnished to the CJI are not done in a private capacity or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life, and are in larger public interest. Thus, the Court reinforcing the greater need of ensuring accountability, stated that the asset information shared with the CJI by the SC judges are not held by him in fiduciary capacity and revelation of the same would not result in breach of any duty.

What is interesting to note with respect to the judgment is the emphasis of the Court on considering the right to information not merely as a paper tiger but according it the status of a constitutional right by stating that the office of the CJI was not exempt from the transparency framework. The overreaching purpose of having a right to information is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. By holding that every public authority is liable to provide information, the Court has broadened the scope of the act to a large extent. The judgment has been of a conclusive nature in so far the Court has held that notes, jottings and draft judgments would not come under information as these are tentative and can be changed. This in turn has settled the confusion regarding the scope of information, inclusion of draft judgments would hinder the decision making process and lead to frivolous charges, thus compromising its independence. At the same time, concerns have been raised regarding the consequences of including judiciary as a ‘public authority’. Questions have been raised as to the existence of a right to obtain the notes made by the CJI and the collegium of judges in the appointment of the Judges to Supreme Court and the High Courts in
accordance with the law laid down in the Second Judges Appointment case.\textsuperscript{58} In the event of such notes being made public, there are greater concerns if a candid opinion on the merit of individual judges will be expressed by the Collegium. We believe that the task of the legislature should therefore be addressing these critical points in the proposed legislation so as to overcome the conundrum.

Above all such concerns, what is rather endearing is the fact that the Delhi High Court reiterated the accountability-independence continuum by observing that “the greatest strength of the judiciary is the faith people repose in it.”\textsuperscript{59} In our opinion, the appreciation of the need for accountability as a method to strengthen the independence is an essential concomitant to ensure the working of an effective judiciary. Hence, in the light of the proposed Bill on asset declaration, the decision seems to be a new ray of hope in the murky waters of combating corruption as judicial corruption now has become a living reality. Instances of widespread judicial delinquency\textsuperscript{60} in the recent past thus necessitate the enactment of a legislation so as to ensure that effective measures are taken to prevent the same.

With the appeal now lying with the Apex Court, greater questions seem to be looming large. Can the court adjudicate upon a matter in

\textsuperscript{58} S.C.A.O.R v. Union of India, AIR 1994 SC 269.

\textsuperscript{59} Supra note 34 See ¶ 73 of the judgment.

\textsuperscript{60} We have briefly tried to highlight some of the recent instances of judicial corruption. Former Chief Justice Y. K. Sabharwal was accused of being guilty of serious offenses under the Prevention of Corruption Act. See Investigate Justice Sabharwal, available at http:/ www. petitiononline.com/ CJIProbe/ petition.html (Last visited on January 13, 2010). The Ghaziabad PF Scam followed soon after which involved more than 30 judges including 10 from the higher courts. (See Avinash Dutt, My Lords, There”s a Case Against You, available at http://www.tehelka.com/ story_main24.asp? filename=Ne123006My_lords.asp (Last visited on January 13, 2010). Justice Jagdish Bhalla of the Lucknow Bench of Allahabad High court acquired several illegal properties in the name of his wife and other close relatives. Shanti Bhushan along with other noted lawyers, founders of the Committee on Judicial Accountability demanded that impeachment proceedings to be initiated against him, though no steps were taken. Chief Justice of Punjab & Haryana High Court, Justice Jain, was charged of violating the code of conduct for judges by deciding in favour of someone with whom he has ‘family relations’. The complaint was pending before the former CJI Y K Sabharwal, who dismissed it saying he found no merit in it.
which it is an interested party? In the light of the allegations advanced against several members of the Bench, it seems imperative to us that clear guidelines concerning the constitution of the Bench to hear the matter should be framed. As the Government moves ahead with its agenda of enacting the proposed legislation, such policy questions should be given a deeper thought so as to make the legislation more comprehensive in its substance and form.

The recent spate of controversy surrounding Justice P.D. Dinakaran’s elevation to the Supreme Court has once again reiterated the need for an accountability framework to be in place. On August 28, 2009, Justice Dinakaran, who is presently the Chief Justice of Karnataka High Court, was recommended by the Collegium for elevation to SC. Subsequently, Forum for Judicial Accountability, a Chennai based organisation made a representation to the CJI, contending that in the light of the corrupt practices and abuse of office practiced by Justice Dinakaran, his appointment to the Apex Court should be reconsidered. In its fourteen page long representation, the Forum highlighted several instances of Justice Dinakaran amassing wealth and misappropriating public property, pronouncing certain inappropriate judicial orders as well as abusing office to the extent of having a number plate on his car, contrary to the mandates of the Motor Vehicles’ Act.61 It is indeed a matter of great concern that the Collegium appointed to recommend Judges for elevation to the Apex Court missed out on such crucial information of one of its recommended appointees.62 While Justice

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62 Leading journalist V. Venkatesan observes that the Collegium while recommending Justice Dinakaran also narrowly interpreted the law laid down in the Second Judges case by not consulting the two senior most judges of the Madras High Court where Justice Dinakaran has spent his tenure. He further argues that the Collegium should subject the recommended appointees to public scrutiny so as to shed light on such controversial backgrounds which legally renders them misfit. See V. Venkatesan,
Dinakaran vehemently denies any such allegations, but scholars have opined that the choice made by the higher judiciary to be closely guarded behind the veils of secrecy, immunizing themselves from any public scrutiny, has led to a situation such as Justice Dinakaran’s where he stands deprived of his right to a fair hearing.

In our opinion, the appointment of Justice Dinakaran seems to be a real opener in the times of the accountability-independence debate as most jurists, emphasising on the greater need of preserving the sanctity of the judiciary, have opined that a questionable integrity should be a necessary and sufficient condition to render an appointment void, without meeting the standard rigors of evidence. Justice Dinakaran’s nomination would not have created such a controversy had there been an existing framework for declaration of assets.

(H) Present Scenario

Voluntary disclosure of assets or the Delhi High Court’s decision does not in any way preclude the need for a parliamentary legislation for a declaration of assets, which would enable the judiciary to preserve its independence while ensuring judicial accountability. The fact that there is


63 Vinay Sitapati, in an editorial, beautifully argues the downsides of a “secret hearing” before the Inquiry Committee as mandated by § 3(4) of the Judges (Inquiry) Act, 1968. In his opinion, it robs the accused in question from refuting the allegations in a public forum thereby substantially depriving the right to defend oneself. Contrasting the same with the U.S position, where judges nominated by the President are subjected to an interrogation by the Senate, Sitapati concludes that the Indian judiciary has become its own victim of shrouding itself in veils of secrecy and has rendered its members defenseless to combat any allegations. He sums up stating, “when you are not answerable to anyone, you find yourself unable to answer back.” See Vinay Sitapati, Hear him out, The Indian Express, December 19, 2009, 6.


65 Prashant Bhushan, Judicial Accountability: Asset Disclosures and Beyond, Economic & Political Weekly, September 12, 2009, 8.
some measure of a check and balance system in the executive and legislature ensures accountability, which is entirely absent in the institution of judiciary. The strict application of the doctrine of contempt of court has ensured that judges are not even held accountable to public opinion. Despite the resolution, judges can refuse to declare asset details on the SC’s website. Voluntary disclosure of assets without any regulatory mechanism, as is the case now, might lead to possible harassment from unscrupulous litigants, which are the primary concern of all judges, or even result in easy forum-shopping. Safeguards must be erected in addition to the contempt powers of the court and the common remedy for civil and criminal defamation.\textsuperscript{66}

In a Compendium of Instructions,\textsuperscript{67} the Election Commission made it mandatory for all candidates to submit a statement of expenses relating to their electoral campaigns during the campaign period. These figures are displayed by them on the notice boards of the returning officers. Upon winning an election, every Member of Parliament and State Legislator is required to submit an annual statement of assets owned by him/her and his/her dependents to the presiding officer of the house.\textsuperscript{68} These documents are not made public ordinarily. Access to such records has not been granted under the RTI Act either. Several states have passed


\textsuperscript{68} See The Members of the Lok Sabha Declaration of Assets Rules (MLSDAR) 2004 at http://164.100.47.133/ls/templates/Rules_L_A_2004_E.pdf (Last visited on January 13, 2010) and The Members of the Rajya Sabha Declaration of Assets Rules, (MRSDAR) 2004 at http://www.rajyasabha.nic.in/rsnew/general_information/GI_Declaration_Assets.pdf (Last visited on January 13, 2010). According to Rule 4(4) of MLSDAR and MRSDAR, the information on assets and liabilities is entered into a register and treated as confidential. Access is denied unless the presiding officer gives written permission for disclosure. Similar regulations exist in the legislatures of all of India’s 28 states and two Union Territories, which are directly administered by the Central Government.}
subordinate legislation granting a right of access to the records and
documents of Panchayat and municipal bodies to (a) the elected
representatives, and (b) all adults eligible to vote in the elections to these
bodies. For example, S. 9 of the Punjab Panchayati Raj Act 1994 requires
the officers of the panchayats at the village level to proactively disclose a
statement of income and expenditure at the annual meetings of the village
body.

The Apex Court judges agreed on August 26, 2009 at a full court
meeting of its judges, under the chairpersonship Chief Justice K.G.
Balakrishnan, to make their assets public. They passed a resolution that
the details of their assets, which are already available with the office of
the CJI in varying formats, would be tabulated in a uniform format and
placed on the court website at the earliest. Following their lead, several
other High Courts have also made it mandatory for the judges to make
their assets public. On August 28, 2009, a full court bench of the Delhi
High Court judges unanimously decided to declare their assets to the
Chief Justice of Delhi and place the data on the website, in terms of the
May 7, 1997, resolution. However, the modality and manner of
declaration are being finalised. Judges of the Kerala High Court,
including the Chief Justice, have declared their assets and put the
information on the website of the high court for scrutiny. Judges of other
high courts including the Madras High Court have also declared their

assets, which is available on the website.\textsuperscript{71} The details furnished by them would be hosted on the High Court website. The decision was unanimously taken by a Full Court meeting; however, at present there is no fixed format for presenting the details. The Bombay High Court judges passed a unanimous resolution at a special full-court meeting on September 2, 2009, declaring that all of them will publicly declare their assets. Himachal Pradesh High Court and Punjab and Haryana High Court have also placed the judges’ assets in the public domain.\textsuperscript{72} However, finer details, for instance, declaring the market value of the assets remain a grey area.

The 98th Amendment Bill introduced in 2003, sought to establish a National Judicial Commission (hereinafter NJC) and amend Articles 124, 217, 224 and 231 of the Constitution relating to the appointment of judges and acting judges, and the creation of common High Courts for two or more states. The Bill lapsed because of the dissolution of Lok Sabha. The Law Commission presented a report on the draft version of the Bill in its 195th report.\textsuperscript{73} The Judges (Inquiry) Bill 2006 has incorporated almost all of the Law Commission’s recommendations. This Bill seeks to replace the 1968 Act and establish a National Judicial Council. All complaints by everyone against High Court and Supreme Court judges, as well as a motion for removal of a judge moved in Parliament, shall be investigated by this body. The NJC comprises of the

\textsuperscript{71} High Court of Madras, Assets of the Honourable Judges, available at http://www.hcmadras.tn.nic.in/assetsofjudges.htm (Last visited on February 5, 2010).


Chief Justice of India, two Supreme Court judges and two High Court Chief Justices to investigate High Court judges; or the Chief Justice of India and four Supreme Court judges to investigate Supreme Court judges. If the allegations are proven, the NJC may impose minor measures or recommend the removal of the Judge; however removal of a judge shall be through impeachment by Parliament. Judges may appeal to the Supreme Court against impeachment or any other measures taken by the NJC. Among the many glaring issues therein, the fact that the Council consists exclusively of members of the judiciary, may be problematic when investigating members from the same community. The provision of appeal to the Supreme Court goes straight against the Constitutional provision of Presidential Order not being open to challenge. This Bill was referred to the Parliamentary Standing Committee in August 2007 but nothing has happened ever since.74

A Judicial Bureau of Investigation under an independent Judicial Complaints Commission needs be set up to investigate complaints and taking action against judges. There should be a National Judicial Complaints Commission which would be independent of both government and judiciary, comprising of five members and investigating machinery under it. However the law laid down in K. Veeraswami v. Union of India75 expressly restrains criminal investigation of judges without the prior written permission of the CJI. This has tied the hands of investigating agencies from investigating judges of the higher judiciary.

In our opinion, voluntary public disclosure of assets by judges is not solution to the problem of judicial accountability. The need of the hour is a body which is independent of the government and the judiciary

which is the forum for admitting all complains against judges, sitting and retired, and conduct investigation and take action. This must comprise of people from all fields and not just legal personalities as it would eliminate all possibilities of bias and conflict of interest.\textsuperscript{76} Candidates should be selected on the basis of eligibility only after extensive discussion and a thorough scrutiny of his past record. This would ensure accountability keeping the independence of the judiciary intact and uncompromised. The South African Constitution establishes the office of the Public Protector,\textsuperscript{77} which is nearly identical to the institution of Ombudsman.\textsuperscript{78} The word ombudsman has its origin in Old Swedish where it literally means representative. The first modern usage of this office began in Sweden in 1809 and later on several other countries followed suit.\textsuperscript{79} In Sweden, the Ombudsman has constitutional status and can even admit complaints against court decisions.\textsuperscript{80} As of 2004, there are around 120 countries in the world where the office of the ombudsman is fully functional.\textsuperscript{81}

\textbf{(I) NJAC Act, 2014}\textsuperscript{82}

The goal sought to be achieved by emphasizing on a greater need for accountability and transparency is elimination of corruption. This will secure and maintain public confidence in the judiciary which is essential as the judiciary is a cornerstone of the Indian democracy. As stated


\textsuperscript{77} See S. Afr. CONST. § 182 & § 183: Public Protector

\textsuperscript{78} Advocate Thulisile Madonsela became South Africa’s third Public Protector in October 2009. See also, the Public Protector South Africa’s website, available at http://www.publicprotector.org/ (Last visited on February 5, 2010).


\textsuperscript{80} See Swed. CONST. ch. XII Article 6.

\textsuperscript{81} Supra note 55.

\textsuperscript{82} For full description see ch. 6.
earlier, the element of accountability in judiciary needs to be secured steadfastly so as to be able to ensure independence of the same. Accountability therefore needs to be seen as a supplement of independence and not a hindrance. While most countries, following common law traditions, don’t have requirements for asset declaration or interest disclosures of any kind for the members of judiciary, many countries are now contemplating the same as there is a general move towards disclosure of assets by public servants. Regulations regarding declaration of assets help in preventing conflicts of interest in public office holders. It also goes a long way in ensuring the transparency of decision making process, thus laying down the foundations for accountability of the judges. However, we are of the opinion that this disclosure will have little or no impact without open public access or oversight. While the judgment of the Delhi High Court is indeed a ray of hope in the murky waters of lesser accountability, one needs to ensure that the proposed legislation for asset disclosure realizes the same in letter and spirit.

The mechanism for declaration of assets should be fair, objective and transparent. The recommended appointment of Justice P.D. Dinakaran to the Supreme Court by the Collegium is an example of the situation where a lack of a clear and definite disclosure mechanism might result in unforeseen circumstances, bringing in disrepute to the institution of judiciary. The need of the hour therefore, in our opinion, is a clear set of guidelines with respect to asset disclosure. Who will monitor the declarations and how will the information be kept and communicated are crucial question looming large. The introduction of the Bill is indeed a welcome change but as has been stated earlier, in the absence of a proper mechanism to regulate the process of disclosure, the legislation will have
no teeth. At the same time, applicability of RTI Act in the present context of ensuring accountability too has to be considered carefully, drawing from the lines of the Delhi High Court judgment. While the civil society waits for the Apex Court to pronounce the final verdict, one hopes that the executive and the legislature ensure that any new legislation to ensure accountability enhances the integrity and capacity of the institution of judiciary as a whole.

In the chapter to follow, it is proposed to examine in detail the constitutional challenges and issues regarding appointment and accountability of higher judiciary in India.