APPOINTMENT AND ACCOUNTABILITY OF HIGHER JUDICIARY: CONSTITUTIONAL CHALLENGES AND ISSUES

(A) Lack of judicial Accountability in India

The framers of the Indian Constitution would not have imagined that within 60 years of the framing of the Constitution, the Indian Judiciary would emerge as the most powerful institution of the State. The Constitution established the High Courts and the Supreme Court as watchdog institutions, independent of the executive and the legislature, to not merely dispense justice, but also to ensure that the executive and the legislature did not exceed the authority conferred upon them by the Constitution. Thus, the Judiciary was given the powers to interpret the laws and the Constitution and also to strike down executive action which violated any law or the fundamental rights of citizens. It was also the authority to examine whether laws framed by Parliament conformed to the Constitution and declare them void if they violated it. By a creative interpretation of the provision authorizing the Parliament to amend the Constitution, the Supreme Court in 1973 also acquired the power to strike down even constitutional amendments which were held by the Court to violate the basic structure of the Constitution. Many laws and some constitutional amendments have been struck down by the Courts during this period.

Through all this, the superior courts in India have emerged as perhaps the most powerful courts in the world, exercising virtually Imperial & unchecked powers. While executive action and even legislation could often be struck down by the courts, the directions of the
courts, sometimes issued without even notice to the affected parties, were beyond question, and had to be obeyed by all executive officers on pain of contempt of court. Of course, often these powers were wisely exercised to correct gross executive inaction.

While the Court was acquiring these powers, by an even more inventive (called purposive) interpretation of the provision regarding appointment of judges by the government, it took over the power of appointment of judges. Thus judges of the High Court and Supreme Court are now appointed by a collegium of senior judges of the Supreme Court. The judiciary has thus become like a self-perpetrating oligarchy. There is no system followed in the selection of judges and there is no transparency in the system. In particular, no regard is given to examining the record or credentials of judges in their ideological adherence to the constitutional ideals of a secular, socialist democratic republic or their understanding of or sensitivity towards the common people of the country who are poor, marginalized and unable to fight for their rights in the courts.

Thus, the courts in India enjoy virtually absolute and unchecked power unrivalled by any Court in the world. In these circumstances, it is absolutely vital that judges of the superior judiciary be accountable for their performance and their conduct – whether it be for corruption or for disregard of constitutional values and the rights of citizens. Unfortunately, neither the Constitution, nor any other law has created any institution or system to examine the performance of judges or examine complaints against them. The Constitution provides that High Court and Supreme Court judges cannot be removed except by impeachment. That process requires signatures of 100 MPs of the House of People or 50 MPs of the Council of States for its initiation. If a motion containing charges
of serious misconduct with the requisite signatures is submitted, and admitted by the Speaker of the House of People or the Chairperson of the Council of States, an Inquiry Committee of 3 judges is constituted to hold a trial of the judge.

Only if he is found guilty, the motion is placed before each House of Parliament where it has to be passed by a 2/3 majority of each House. Our experience has shown that it is practically impossible to remove a Judge through impeachment even if one is somehow able to get documentary evidence of serious misconduct. This is because MPs and political parties to which they belong are very reluctant to take on a sitting Judge because virtually all of them have pending cases in courts. The judges often behave like a trade union and do not take kindly to brethren being accused of misconduct. It is, therefore, virtually impossible to get an impeachment off the ground unless the matter has become a big public scandal. Only in those cases, is it possible to get enough MPs to sign an impeachment motion. The only impeachment of a Judge to have gone far was that of Justice V. Ramaswami in the early 90’s. After the motion was presented, a Judges Inquiry Committee found him guilty of several charges of misconduct when the matter went up for voting to Parliament.

The ruling Congress Party directed all their MPs to abstain from voting. Thus, though the motion was unanimously passed in the Lok Sabha, it did not get the support of the majority of the total membership of the House and, therefore, failed. The Judge remained in office till he retired, but was not assigned any judicial work by the then Chief Justice. Only last month, we have seen a second motion against a Judge of the Calcutta High Court signed and submitted to the Chairman of the Council
of States. Allegations and charges against a Judge even when supported by documentary evidence, rarely get any coverage in the media because of the widespread fear of contempt of court. The contempt law in India allows any judge of the High Court and Supreme Court to charge any one with criminal contempt and send him to jail, on the ground that he/she has “scandalized the Court or lowered the authority of the Court”. What “scandalizes or lowers” the authority of a Court is also the subjective judgment of each Judge. In Arundhati Roy's (the well-known writer) case, a bench of 2 judges of the Supreme Court charged her with contempt and sent her to jail merely because she criticized the Court in her affidavit.

Earlier, the Supreme Court has declared that a person charged with “scandalizing the Court” will not be permitted to prove the truth of his allegation against a Judge. Though Parliament has recently amended the Contempt of Courts Act to expressly allow truth as a defense, nothing has been done to prevent judges against whom allegations are made from charging the person with contempt and hauling him to jail. The criminal contempt jurisdiction of the Court and the cavalier manner in which it is exercised, is another example of the enormous and unchecked power of the superior courts in India. Our campaign for Judicial Accountability has since long been demanding that the courts’ power to punish for “scandalizing and lowering the authority of the Court” must be taken away by legislation. Of course, this demand has been stoutly resisted by the courts who claim that deleting this provision would greatly encourage baseless allegations and abuse of judges by disgruntled litigants and would thereby erode public confidence in the courts.

But then, there is the law of civil and criminal defamation to protect judges against vilification. Moreover, public confidence in the
courts as in any person or institution is generated or eroded by the actions of the courts and not by any baseless allegations by disgruntled litigants. However, with such fierce opposition by the courts, the legislature has not had the courage to delete this provision from the Contempt of Courts Act. In 1991, the Supreme Court by another ingenious judgment, involving Justice Veeraswami (the father-in-law of Ramaswami), who was Chief Justice of the Tamil Nadu High Court who was caught with assets, vastly disproportionate to his income, laid down that no judge of a superior court could be subjected to a criminal investigation without the written permission of the Chief Justice of India.

This judgment has been use to prevent the investigation and prosecution of many judges against whom there was documentary evidence of corruption, fraud, misappropriation, etc. This has also increased the impunity of judges who have now got used to the feeling that they can get away with any kind of misconduct or even criminal conduct, without any fear of any criminal action or action for removal. Armed additionally with the power of contempt, they also have little fear of public exposure. All this makes for an alarming picture of lack of accountability of the higher judiciary in India. You cannot practically take any disciplinary or criminal action against misconduct or crimes committed by judges.

If you expose them publicly, you run the risk of contempt. This lack of accountability coupled with the enormous unchecked powers that the courts have acquired and are exercising make the judiciary a very dangerous institution and indeed a serious threat to Indian democracy. This lack of accountability has led to considerable corruption of the higher judiciary which is evident from the recent spate of judicial
scandals which have erupted in India. The recent report of TI on corruption perception index shows that the judiciary is perceived to be the second most corrupt institution in India after the Police.

(B) Control Mechanism for Judges in India

In 2002 in his address to bar, the then Chief Justice of India Mr. Justice S.P. Bharucha stated that “more than 80% of the judges in country were honest and smaller percentage was bringing the entire Judiciary into disrepute.”

Recently a senior judge of the Apex court Mr. Justice Altameh Kabir has affirmed the above view when he said that only 80 percent judge are noble. Another Chief Justice of the India, Mr. Justice J.S. Verma after his retirement also admitted that “there is no point in saying that there is no corruption in the judiciary. No one is going to say it, much less accept it”.

A very alive, correct and informing situation has been depicted by Mr. Justice Verma, when he remarks;

There was a time when judges had sense of propriety, dignity, and self-respect, but time is over such propriety having become rare. Today however, if after making a reasonable inquiry you find that there is something wrong and you tell the judge concerned, he will say “who are you to ask me to resign…I have taken the oath”. That is the attitude.

Likewise, a few years ago Mr. Justice Markandey Katju also added in the above views of the honorable judges when he said that something

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1 Das Crus, Judges and Judicial Accountability, 2005. at p. 45.
rotten in Allahabad High Court. He also said that “Do not tell all these things I and my family have more than hundred year of association with Allahabad High Court. People know who is corrupt and who is honest. There are some judges in Allahabad High Court whose nobility is always questionable”

(a) Contempt Proceedings

In India as for as the power judiciary is concerned, there is a lot of disciplinary mechanism provided by the Constitution itself, and also by the special statutes. The High Courts can exercise not only judicial power but have also administrative control over the judges of lower judiciary. The laws of contempt of courts are also applicable to the judges of lower judiciary. On the other hand, in a series of judicial pronouncements courts have repeatedly taken the view that the term ‘Judge’ used under section 16 of the Contempt of Courts Act, 1971 gives statutory recognition in respect of contempt committed only by those judges who presided over subordinate courts.

Actually, the plain, grammatical, literal and natural meaning of the expression ‘Judge’ goes in the favour of including all judges from bottom to the top. Judiciary has put artificial limitation on the scope of section 16 of Contempt of Courts Act, and thereby arriving at conclusion that the judges of the courts of record could not be held liable for the contempt of court. Such restricted interpretation is not very much convincing and conducive to the confidence in administration of justice by reposing unequalled faith in and respect for the superior court judges merely with

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4 See, Times of India, dated, 10/12/2010 at p. 1.
6 See, Indian Penal Code, 1860.
7 Harishchandra Mishra v. the Honorable Mr. Justice S. Ali Ahmed AIR 1968 Pat. 65.
the help of unwritten norms of English tradition prevailing at the time of the commencement of the Constitution or statutory provision of the Contempt of Courts Act.

It is interesting to note that, the Parliament by enacting the said Act does not make any clear distinction between judges of the inferior courts and the judges of superior courts. Section 16 of the Act uses simply the term ‘judges and magistrate’, and it may be taken into its literal or simple meaning, as judges means all the judges.

Hence, it is a good case proving tendency towards the need of inclusion of superior court judges too in the definition of ‘Judge’ under the Act.

It has been interesting to note how the conduct of the honorable Judge of Patna High Court during the proceeding of the court in Harishchandra Mishra v. the Honorable Mr. Justice S. Ali Ahmed, could be justified or appreciated, where the learned judge had not only threatened advocate Mr. Sadanand Jha to get him arrested but on his expressing a word of sorrow his reaction was against the propriety of judges. In the instant case an incident took place as advocate Sadanand Jha insisted upon hearing of revision on admission matter on merits. Thereupon, Mr. Justice S. Ali Ahmad remarked to advocate Jha “You are present in court physically but mentally you are elsewhere and therefore, you missed my observation”. Advocate Jha then replied “My Lord, it is really uncharitable that your Lordship says that I was present, in the court physically but was mentally somewhere else. I was both physically and mentally present in the court”.

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8 A.I.R. 1986 Pat. 65.
Learned Judge, became very angry upon this and he stated that it has become your habits to insult the court. He said Peshkar call the constable, I will have him arrested. He spoke for about ten minutes in which he used the following terms and expressions towards Advocate Jha:

“You are a small fry and I would not even like to harm you because you are such a small fry. You have no knowledge and no understanding. With your habit you are doomed. I will not harm you but you will suffer from within and be doomed. I can tolerate a lot but there is limit to it and once the limit is reached. I am a very hard nut and remember that I tell you that you will suffer internally and be doomed. Now a day it has become the fashion of the Bar to insult the judges. I tell you, you will weep” Advocate Jha said I am sorry.

Then reaction of the judge was: “You should be sorry and you would be sorry. You will suffer and you are doomed. Do not think with the attitude you will flourish or prosper”.

The honorable majority (N.P. Singh, S.K. Chaudhari, Uday Sinha and P.S. Sahay JJ.) adopted the same view and held that the judges of the Supreme Court and High Court are not subject to contempt of court.

It is humbly submitted that majority’s view did not appear to be legally convincing by giving restricted meaning to Sections 9 and 16 of the Contempt of Courts Act by several reasons, Firstly, the Supreme Court and High Courts were said to be immune from contempt proceedings under Art. 129 and 215 of the Constitution merely on the ground that courts of record and in England had never been subject to contempt of court. We should think that we have written Constitution and
statutory provisions in relation to the contempt of courts and we should not adopt foreign view against our Constitution. Secondly, the superior courts judges’ immunity from contempt of court was said to be justified only because of absolute freedom and independence of such judges is necessary for the administration of justice. If it is so it is requested with due respect that the absolute freedom and independence of subordinate court also ought to be ensured. Thirdly, it is also not very much convincing because of the specific provision using the term ‘Judge’ and not expressly granting immunity to superior courts’ judges. Finally, the reasoning of the majority that such things had happened in the court room in the past as well but they had been buried in the spirit of forget and forgive also does not prove to be of any avail, as bad precedent could not be treated as good precedent.

However, Mr. Justice Birendra Prasad Sinha did not agree with the majority’s proposition. He observed:

“With greatest of respect to my learned Brethren it is not possible for me to agree with the proposition that the judges of the High Courts and Supreme Court are not immune from contempt of courts proceedings, nor do I agree that an application filed without the consent in writing of the Advocate General is not maintainable”. 9

Though, for the above mentioned minority decision of Mr. Justice Birendra Prasad Sinha, it is true no reason has been given by him, but it is humbly submitted that, the minority view of Justice Sinha is more convincing. Accordance with the call of the time and carries more weight than many majority decisions of the Supreme Court.

9 Ibid. at. P.69.
No doubt, this question has not been authoritatively settled till now, but preponderance of judicial opinions appears to favour the complete exclusion of superior court’s judges from liabilities under the Contempt of Courts Act, 1971. There is a series of cases in which courts have repetitively said that superior court’s judges are immune from the contempt proceedings. The highest court of the land otherwise did not allow a petition against the former Chief Justice of India, E.S. Venkataramiah without expressing any view on the issue whether contempt proceeding could lie against the superior court justices or not.

In the instant case issue had arisen out of an interview given by the learned former Chief Justice exposing the reason for deterioration of standards due to the role of lavish party and whiskey bottle in judicial appointments. He had exposed that in every High Court there were at least four to five judges who had practically been out every evening, winning and dining either at a lawyers’ house or a foreign embassy. The honorable court silenced the issue by reminding Chinese proverb “as long as you are upright do not care if your shadowed is crooked”.10

The Apex Court also avoided contempt proceedings against Mr. Justice V. Ramaswami in Sub-Committee of Judicial Accountability V. Justice V. Ramaswami11 for having written a letter to members of the inquiry committee setup under Judges (Inquiry) Act, 1968 making reckless allegation against the judiciary as a whole. The same judicial attitude continued in State of Rajasthan v. Prakash Chand12 where Justice Sethna approved the above decisions by saying that no contempt petition lie against the superior court judges.

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10 See, Outlook, March, 2009, at 18.
11 A.I.R. 1992 S.C. 320, see also Krishaswami v. Union of India (1999) 4 S.C.C.605, In the instant case the functioning of the committee was challenged, but Supreme Court held that petitioner had no locus standi.
The Apex Court again choose to sail on the same boat in *Tarak Singh V. Joyti Basu*\(^{13}\), which represented unholy nexus between duty and interest of a High Court judge, wherein the judge concerned had stayed allotment in Salt Lake City but had got a corner plot allotted to himself out of Chief Minister’s discretionary quota. The Supreme Court noted that, the learned judge had misused his divine judicial duty as liveries to accomplish to his personal ends. He had betrayed the trust reposed in him by the people. But the court did not think it proper to proceed under the Act in spite of false affidavit submitted by the learned judge.

The silence of the court in successive cases is bound to create a background in which the court will break its silence and bring the contemptuous conduct of superior court’s judges within the preview of the Contempt of Courts Act. The court is likely to do it in view of no specific exemption granted either under the Constitution or under the Statutes. The rule of interpretation evolved in *Superintendent and Remembrancer of Legal Affairs, W.B. v. Corporation of Calcutta*\(^{14}\), wherein while dealing with the issue whether state is bound by its own statute the Supreme Court had said that it is bound unless it is excluded expressly or by necessary implication may serve as torch bearer.

Therefore, in view of the requirement of transparency in every walk of life it is not appealing why the honorable judges of the superior courts should enjoy immunity from contempt proceedings. So, there are two options, Firstly the Supreme Court should give natural meaning to the expression ‘Judge’ used under the Contempt of Courts Act and include the judges of the superior courts within its preview, or secondly the

\(^{13}\) (2005) 1 SCC 1.

\(^{14}\) A.I.R. 1972 SC 505.
Parliament should amend the Contempt of Courts Act making it clear by using the expression Judges including the Justice of the High Courts and the Supreme Court.

(b) Impeachment Process

With regard to the judges of higher judiciary the Constitution of India provides only for impeachment procedure under Art. 124. The procedure prescribed under clause (4) of Art. 124 speaks in negative tone and thereby emphasizes the mandatory requirement to be fulfilled. It reads:

“A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that house and by a majority of not less than two thirds of the membership of that house present and voting has been presented to the President in the same session for such removal on ground of proved misbehaviour or incapacity”.

The above constitutional provisions make it clear that judges of High Court and the Supreme Court are to be removed only on the ground of proved incapacity. The word “proved” used in the Art. 124 makes the procedure so ticklish and “implies that the allegations have crystallized into conclusive proof pointing to the misbehaviour of incapacity. The word ‘proved’ also 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.

15 It is equally applicable with respect to the removal of High Courts’ judges under Art. 217(1) (b) of Indian Constitution.
Likewise, the constitutional provision does not prescribe how this investigation is to be carried on against a particular judge. 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 charges of misconduct or incapacity against the judge are investigated and proved. It is to be done according to the provisions of Judges (Inquiry) Act, 1968, which is very cumbersome.

We should remember that at present there are some visible signs of decline in judicial prestige which requires renovation of existing law. In March 2003, Mr. Justice Shamit Mukherjee of the Delhi High Court was arrested by the Central Bureau of Investigation under the Anti-Corruption Act, 1988 and Criminal Procedure Code, 1973 for Criminal conspiracy and allegedly involving in serious graft charges including womanizing and involvement in the multi-crore Delhi Development Authority Corruption and ultimately he was suspended in charge of taking money for favorable decision.

Recent incidence of impropriety committed by Mr. Justice Saumitra Sen of Calcutta High Court and consequent communication of Chief Justice of India to Prime Minister of India to initiate impeachment process after his refusal to resign has added fuel to the fire of judicial credibility. In 2009 very acute controversy arose as to the elevation of the Chief Justice Dinakaran of the Karnataka High Court to the Supreme Court bench in view of allegation of graving governments’ land in Karnataka. The controversy took a new twist and removal process has

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17 Art. 124 (5), Constitutional of India.
18 The Parliament in pursuance of constitutional mandate enacted the Judges (Inquiry) Act, 1968, which regulates the procedure for investigation and proof of misbehavior or incapacity of Judge for presenting an address by the Houses of Parliament to the President for his removal.
been initiated against him on the basis of a motion admitted by the chairman council of the State who has appointed a three member panel headed by Justice V.S. Sirpurkar of the Supreme Court of the India. The investigation is in progress. In Chandigarh there was also considerable furor over three judges of the Punjab and Haryana High Court accepting membership from the golf course club, namely, the Forest Hill Club.

However, it is interesting to note that since the adoption of Indian Constitution this procedure has been put in motion on only one occasion.\(^{19}\) Even that was impeded, and it did not reach its logical end. The obvious result is that in nearly six decade functioning of our constitution, not a single judge has been removed under the Art. 124 of the Constitution. It does not mean that the judges are extremely honest and capable but it only means that procedure prescribed under Art. 124 read with Judges (Inquiry) Act, 1968 is cumbersome, flawed, dilatory and political.\(^{20}\)

Thus, due to dissatisfactory conditions of control mechanism envisaged under the Constitution and failure of removal process a different procedure was evolved to discipline the errant judges. It necessitated the evaluation of ‘in-house’ procedure by the court itself.

(c) **In-house procedure**

The adoption of in-house procedure has an interesting history. In 1995, the members of the Bar in Bombay High Court resorted to the extra-ordinary steps for disciplining the Chief Justice of the same High Court. The basis of the action of the Bombay Bar Association was financial irregularities alleged to have been reflected in the

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\(^{19}\) See the matter of Justice Ramaswami.

\(^{20}\) As happened in the matter of Justice Ramaswami.
disproportionate amount of royalty received by Chief Justice Bhattacharjee from a foreign publisher\textsuperscript{21}. The Bombay Bar Association resorted to strike and passing a resolution against him to resign.

While Justice Bhattacharjee resigned following an uproar, the Supreme Court emphasized the need to evolve a method of self regulation by the judiciary in such cases of alleged misconduct. The Judiciary chose to evolve a via media to satisfy both. It opined that:

It is true that freedom of speech and expression guaranteed by Art. 19(1) (a) of the Constitution is one of the most precious liberties in any democracy. But equally important is the maintenance of respect for judicial independence which alone would protect the life, liberty and reputation of the citizen. So the nation’s interest requires that criticism of the judiciary must be measured, strictly rational, sober and proceed from the highest motives without being coloured by partisan spirit or pressure tactics or intimidatory attitude. Keeping this object in mind the judiciary has evolved in-house procedure to deal with errant judges which is self regulatory mechanism.

In the aforementioned case evolving a domestic mechanism the Supreme Court said that instead of taking matter to press, staging ‘Bundh’ and boycotting the court, advocate3 should bring the matter before the Chief Justice of High Court, in the case of complaint against any judge of the High Court and in the case of complaint against Chief Justice of the High Court they should bring the matter before the Chief Justice of India.

Thus, yawning gap between proved misbehavior and bad conduct inconsistent with the high office on the part of a non-cooperating judges/Chief Justice of a High Court could be disciplined by self-regulation through in-house procedure. This domestic procedure would fill in the constitutional gap and would yield salutary effect.

Under this proceeding, if the Chief Justice of the High Court is of the opinion that the allegation against a judge of the High Court needs a deeper probe, he shall forward to the Chief Justice of India the complaint and the response of the judge concerned along with his comments. The procedure stipulates that after considering these, if the Chief Justice of India thinks that a deeper probe is required, he shall constitute a three-member inquiry committee of two Chief Justice of High Courts other than the High Court to which the judge facing the allegation belongs and one High Court Judge. The judge concerned would be entitled to appear before the committee and have his say. Under the procedure adopted by the Supreme Court, it would not be a formal judicial inquiry involving the examination and cross-examination of witness and representation by advocates.

Likewise in the case of a complaint against a Supreme Court judge, if the Chief Justice of India, in the light of the response of judge concerned, feels that it need a deeper probe, he would constitute an inquiry committee of three Supreme Court judges. The Chief Justice of India shall take further action based on the findings of the committee. Under this procedure, the committee may conclude and report to the Chief Justice of India that:

(i) There is no substance in the allegations contained in the complaint, or
(ii) There is sufficient substance in the allegations and the misconduct disclosed is so serious that it calls for initiation of proceedings for removal of the judges, or

(iii) There is substance in the allegations contained in the complaint but the misconduct disclosed is not of such a serious nature as to call for initiation of proceedings for removal of judges.

After receiving the findings of the committee, Chief Justice of India shall advise the judge concerned to resign or seek voluntary retirement. In case the judge refuses to do so, the Chief Justice of India shall advise the chief Justice of the High Court concerned not to allocate any judicial work to him, and intimate the President and the Prime Minister.

The scheme of in-house procedure was spelt out by the bench in the Bhattacharjee case\textsuperscript{22} and it has been experimented on four occasions, i.e. the Punjab & Haryana, High Court scandal first\textsuperscript{23} and second,\textsuperscript{24} and Rajasthan High Court scandal\textsuperscript{25} Karnataka High Court scandal.\textsuperscript{26} However, the ultimate result of the above scandals compels to remark that the in house procedure may not be able to check the deviant behavior of judges.

In public service commission case Chief Justice V.N. Kirpal recommended transfer of one of the tainted judges, Justice Amarbir Singh Gill, to the Guwahati High Court, However, said judge was never transferred because of opposition to the proposal from Guwahati Bar, which felt that the Guwahati High Court was being considered a dumping

\textsuperscript{23} Properly known as Public Service Commission case, 2002.
\textsuperscript{24} See, Justice Nirmal Yadav case.
\textsuperscript{25} See Justice Arun Madan case.
\textsuperscript{26} Sex Scandle case of Karnataka High Court’s Judges.
ground for tainted judges. With regard to other two judges, the in-house committee appointed by Chief Justice Pattanaik (who came in office in due time) had concluded that, judges misconduct did not warrant their removal. The committee exonerated Justice M.L. Singhal, while holding Justice Mehtab Singh Gill and Amarbir Singh Gill guilty.

It is noteworthy that, Justice Amarbir Singh Gill wrote to Justice Pattanaik that he would be taking leave, from December 16, 2002, until his retirement in May 2003. As Mehtab Singh Gill did not respond back to Justice Pattanaik on what he intended to do, Justice Pattanaik passed an order deprecating his misconduct. In his order he warned Mehtab Singh Gill to be careful in future, though, no further action was taken against all the three judges.

The “in-house procedure” was tried again in the matter of Justice Arun Madan, a judge of the Rajasthan High Court. A three judge Committee setup in the case confirmed the involvement of Justice Madan in a proposition to a woman doctor to have sex with him in exchange for a judicial favour. Though, no disciplinary action was taken against Mr. Justice Arun Madan, but it is worth mentioning that the Justice B.K. Roy committee report resulted into the resignation of Justice Arun Madan.

The in-house procedure was tried again in case of a group of judges of the Karnataka High Court, however in the matter a three judge Committee headed by the Chief Justice of the Bombay High Court. Justice C.K. Thakkar was set up to examine the alleged sexual misconduct of the judges. But the in-house procedure failed once again in that case and no damage was done to the judges of Karnataka High Court.

It depicts from the above discussion that in order to maintain accountability of the Higher Court’s judges, our judiciary always thought
to have a domestic mechanism, as in-house procedure. Although, under this procedure one thing may be appreciable that here alternative were given to the errant judges, either to quietly to resign or to face impeachment proceedings, but this approach, however, is time taking, limited reach and same has not been working so well in every cases.

The failure of in-house procedure fourth time in the matter of allegation against Justice Nirmal Yadav of the Punjab & Haryana High Court is clear proof of the ineffectiveness of the procedure even if the in-house inquiry finds the actionable wrong committed by comes judges of the superior courts. To refresh our memory in allegation of 15 lakhs intended to be given to Justice Nirmal Yadav the Central Bureau Investigation investigated the matter and made out a case for precutting Justice Nirmal Yadav under the Prevention of Corruption Act. In meanwhile a three Judge in-house committee headed by justice H.L. Gokhley, Chief Justice of Allahabad High Court and found substance in allegation and recommended initiation of proceedings to remove from office. But due to otherwise advice of Attorney Genral Milon Banerjee, the proceeding was thwarted.

The ultimate result of the cases dealt under in-house procedure reveals that, this procedure may not be able to check the deviant behavior of judges. Of late there has been a series of transfers of the High Court judges to another High Court.

It is humbly submitted that instead of dealing with the corruption, the judge concerned must not be transferred to another High Court. Continuing a judge found to be guilty of deviant behavior by transferring him to another High Court is extremely unethical and highly objectionable, because of merely transfer in extreme cases is no
punishment at all. Though, the Supreme Court of India also adapted to Restatement of Values of Judicial Life, 1997, as ‘in-house mechanism, but till now there has not been even a single case in which a judges has been removed from his office.

The main reason of failure of in-house mechanism is in fact is purely product of the judiciary and it does not have any Constitutional or statutory basis. That is reason why there is an ultimate and urgent need of a statutory based mechanism for disciplining the judges of Higher Courts, as in United State of America, South Africa and other countries. The unsatisfactory results of the impeachment process as well as the non-statutory nature of in-house procedure, the impropriety and misconduct of the judges seem to have ignited a public debate. There is growing acceptance that in India, there is a need to Judge the Judges.

However, there exist various schools to though, as to means committed to the similar end of judicial accountability. A very charitable view was shared by former Chief Justice of India, Mr. Justice Venkatachaliah, when he said “my own feeling is that judges do not need a code of conduct in the strict sense. Rather, it is a restatement of those principles of judicial life and conduct which might come in handy for us, whenever we are in dilemma. The need for the code of conduct may imply that there is something wrong with the system and mechanism which dealt with the misbehaviour of judges. That may be well so because a system cannot be higher than the quality of the times in which it functions”.

On the other hand, Chief Justice J.S. Verma expressed a quite opposite view. In his opinion “when moral sanction does not work, then
legal sanction is required”. Fears have been expressed that accusation of misconduct, before they have been established as credible—would affect the independence of the judiciary.27

In this regard it will be relevant to quote Mr. Justice Katju that “something rotten in Allahabad High Court. He also added that he is from the same High Court and people know who is honest and who is corrupt.”28

It goes without saying that judiciary like other institutions in a democratic set-up, must be open to receive a critical analysis and should be answerable. A former Chief Justice of Delhi High court rightly wrote in his article that “the necessity of Council is based on the undisputed fact that the judges do not come from another planet. They come from the same stock as the rest society and subject to the same frailties. It is no secret that the antics of some of them do bring shame to judiciary. No protection is sought for them.”29

Therefore, the question arises, who will judge the judges? The general dissatisfaction with the available mechanism resulted into a voice of demand to establish a strong efficient and adequate mechanism for maintaining accountability of judges.

(C) Recent Attempt towards Judicial Accountability-

Recently, in India, mainly two proposals have come out. Firstly, the formation of a National Judicial Commission, and secondly, a new bill in place of existing Judges (Inquiry) Act, 1968. Though, the proposal for appointment of a National Judicial Commission was in fact first

27 Supra note, 3.
28 Supra note, 4.
mooted by Mr. Justice P.N. Bhagwati\textsuperscript{30}, but authoritively it has been made by the Law Commission of India in its 80\textsuperscript{th} report in the year of 1990. A Constitutional Amendment Bill, 1990 was also formulated in this regard by the Minister of Law and Justice, but the Bill lapsed on the dissolution of the 9\textsuperscript{th} Lok Sabha.\textsuperscript{31}

Thereafter, the formation of National Judicial Commission was recommended by the National Commission to Review the working of the Constitution.\textsuperscript{32} It was proposed that, the commission will draw up a code of ethics for judges besides ordering transfer, postings and promotion of judges. It will also take disciplinary action against Judges indulging in Malpractice. Regarding the removal of judges and remedies for deviant behavior, the Commission suggested\textsuperscript{33} as under:

“A Committee comprising the Chief Justice of India and two senior-most judges of the Supreme Court shall be exclusively empowered to examine complaints of deviant behavior of all kinds and complaints of misbehavior and incapacity against judges of the Supreme Court and the High Courts. Their scrutiny at this stage would be confined to ascertain whether:

(a) There is substance at all in the complaint;

(b) There is a \emph{prima facie} case calling for a fuller investigation and inquiry; or

(c) It would be sufficient to administer an appropriate advice/warning to the erring Judge or give other directions to the concerned Chief


\textsuperscript{31} 67\textsuperscript{th} (Amendment) Bill, 1990.

\textsuperscript{32} Recommendation dated, March 31, 2002.

\textsuperscript{33} \textit{Id.}, para 7.3.8.
Justice regarding allotment of work to such judge or to transfer to him to some other court”.

If, however, the committee finds that the matter is serious enough to call for a fuller investigation or inquiry, it shall refer the matter for a full inquiry to the committee constituted under the Judges (Inquiry) Act, 1968.

It is important to note that the Commission recommended also, certain changes in the Judges (Inquiry) Act, 1968, to make the system of accountability more effective\(^{34}\) by saying that the Committee constituted under the judges (Inquiry) Act, 1968 shall be a permanent committee with a fixed tenure with composition indicated in the said Act and not one constituted ad-hoc for a particular case or from case to case, as is the present position under Section 3(2) of the Act. The tenure of the inquiry committee shall be a period of four years and to be re-constituted every four years.

The inquiry committee shall be constituted by the President in consultation with the Chief Justice of India. The inquiry committee shall inquire into and report on the allegation against the judge in accordance with the procedure prescribed by the said Act and submit their report to the Chief Justice of India, who shall place it before a committee of seven senior-most judges of the Supreme Court. The Committee of seven judges shall take a decision as to whether:

(a) Findings of the inquiry committee are proper, and
(b) any charge or charges are established against the judges and if so, whether the charges held proved are so serious as to call for his removal

\(^{34}\) Id., para 77.9.
or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court. If the decision of the said committee of judges recommends the removal of the judge, it shall be a convention that the judge promptly demits office himself. If the fails to do so, the matter will be processed for being placed before Parliament in accordance with article 124(4) and 217(1) proviso (b).

This procedure shall equally apply in case judges of the Supreme Court and High Courts except that in the case of a Supreme Court Judge against whom complaint is received or inquiry is ordered shall not participate in any proceeding affecting him. The matter of judges’ conduct inviting cation was again taken up in 2003 and a suggestion to set up a National Judicial Commission came under the Constitution (98th) Amendment Bill, 2003 but could not be passed.

The next step was Judges (Inquiry) Bill, 2006. The perusal of the provision of this bill reveals that it has made sufficient improvement upon the Judges (Inquiry) Act, 1968.

The proposed bill also shows improvement upon the earlier Judges (Inquiry) Act, 1968. Firstly, on the line of advocates Act, 1961, requiring the disciplinary action purely by the advocates themselves, it provides for the establishment of National Judicial Council consisting of all the members of the judiciary itself. It has dropped the membership of a ‘distinguish jurist’ and has also increased the number of members in the Council. Now the proposed National a Judicial Council will consist of five members i.e. Chief Justice of India as Chairman, two senior most judges of the Supreme Court and two Chief Justices of the High Court as
members. Chief Justice will have the dominant role as he will be Chairman and will nominate the other four members. **Secondly,** it has taken full care of maintaining judicial independence without leaving any chance of prosecution through Media, as inquiry is to, be conducted *in camera* by the Chairperson and the members of the Council seating jointly. **Thirdly,** the proposed bill tries to safeguard the interest of the complainant by keeping identity confidential from all persons in general and also the judge against whom the complaint is made in particular along with such protections as the counsel deems fit. **Fourthly,** the proposed bill also disqualifies, the removed judge from getting any further employment to any office of profit under the Government of India, or Government of States, any diplomatic assignments or other appointment required to be made by the President, acting as an arbitrator in any Arbitration proceedings and pursuing chamber practice. **Fifthly,** with a view to minimize or avoid complaints false, which are frivolous, vexatious, not in good faith or with an instant to hares the judge against whom such complaint is filed, are made punishable. **Sixthly,** the proposed bill also recognizes right to appeal and provides that an aggrieved judge may prefer an appeal to the Supreme Court against an order of removal by the President, or a final order passed by the council imposing one or other ‘minor measure’ on the basis of the complaint. **Seventhly,** with a view to keep the stream of justice pure the proposed bill aims at issuing of code of conduct containing guidelines for the conduct and behavior of judges and **lastly,** the proposal regarding inclusion of the intimation of assets and liabilities by the superior court judges to their respective Chief Justice may have good effect with a view to attract the public confidence in the judges.
(a) Judicial Standard and Accountability Bill, 2012

The Preamble says, it is a bill to lay down judicial standards and provides for accountability of judges and establish credible expedient mechanism for investigating into individual complaints for misbehavior or incapacity of a judge of the Supreme Court and of a High Court.

S. 10 establishes a “Complaints Scrutiny Panel” to scrutinize the complaints against a judge. S. 12 provides that if Scrutiny Panel is satisfied that there are sufficient grounds for proceeding against the judge, it shall, after recording the reasons therefore, submit a report on its findings to the National Judicial Oversight Committee for making inquiry against the judge.

(i) Key Features-

The 2010 Bill replaces the Judges (Inquiry) Act, 1968. It seeks to: (a) create enforceable standards for the conduct of judges of High Courts and the Supreme Court, (b) change the existing mechanism for investigation into allegations of misbehaviour or incapacity of judges of High Courts and the Supreme Court, (c) change the process of removal of judges, (d) enable minor disciplinary measures to be taken against judges, and (e) require the declaration of assets of judges.

(ii) Judicial Standards-

- The Bill requires judges to follow certain standards of conduct. Complaints against judges can be made on grounds of non-compliance with these standards or certain activities such as
corruption, willful abuse of power or persistent failure to perform duties.

- Some activities prohibited under the Bill are: (a) close association with individual members of the Bar who practice in the same court, (b) allowing family members who are members of the Bar to use the judge’s residence for professional work, (c) hearing or deciding matters in which a member of the judge’s family or relative or friend is concerned, (d) entering into public debate on political matters or matters which the judge is likely to decide, and (e) engaging in trade or business and speculation in securities.

(iii) Investigation Authorities -

The Bill establishes three bodies to investigate complaints against judges: the National Judicial Oversight Committee, the Complaints Scrutiny Panel and allows for the constitution of an investigation committee.

- National Judicial Oversight Committee will consist of a retired Chief Justice of India as the Chairperson, a judge of the Supreme Court, a Chief Justice of the High Court, the Attorney General for India, and an eminent person appointed by the President. The Oversight Committee shall have supervisory powers regarding investigation into complaints against judges, and also the power to impose minor measures.

- Scrutiny Panel will be constituted in the Supreme Court and every High Court. It shall consist of a former Chief Justice and two sitting judges of that court. The Panel shall conduct an initial investigation into the merits of a complaint made against a judge.
It shall also have the power to report frivolous or vexatious complaints. Persons making frivolous or vexatious complaints can be penalised by rigorous imprisonment of up to five years and fine of up to five lakh rupees.

- Investigation Committee will be set up by Oversight Committee to enquire into complaints. The investigation committee will be set up if the Scrutiny Panel recommends that an inquiry should be carried out to investigate a complaint. The Bill does not specify the qualifications of members of the investigation committee, but leaves this to the discretion of the Oversight Committee.

In a note sent to the Union Law Ministry, Law Commission Chairman Justice A P Shah covered all the important clauses of the Bill, which was passed by the Lok Sabha in March 2012, and raised issues of constitutionality of the proposed law.

In the note, Justice Shah termed the definition of misbehavior in clause 2(j) of the Bill as “over-inclusive and under-inclusive at the same time”. Elaborating, he said that the definition was over-inclusive because even a “minor infraction” would constitute misconduct, an act for which impeachment has been given as available remedy.

It was also under-inclusive, the note adds, since the definition was very expansive. “Though it has a residuary clause ‘conduct which brings dishonour or disrepute to the judiciary’, this definition is so vague so as to be redundant,” he said.

The former Delhi High Court chief justice also takes exception to the Bill aiming to lay down statutory judicial standards. “The statutory laying down of judicial standards, thereby making the non-observance of
such standards justiciable, opens a Pandora’s box of litigation. For example, Clause 3(f) provides that no judge shall ‘enter into public debate or express his views in public on political matters’. This is a widely worded restriction and considerable litigation can be expected to ensue, including several cases of vendetta by losing litigants, on the connotation of ‘views expressed’, ‘political matters’, etc,” his note says.

It is respectfully submitted also that in a democracy all institutions including the judiciary must be transparent and accountable and therefore, even the higher judiciary should not be above the law. It is not advisable that judiciary should adopt the attitude of ‘TOUCH ME NOT’ in all cases. The persons who are more learned and law knowing should be required to be more responsible. That will be a better way to ensure the system of justice pure and clean.

(D) The Recommendations of Law Commission of India

There are several reports of Law Commission of India regarding judicial reform. The Researcher would like to highlight only those LCI reports which are directly related to the present research topic those are discussed as below-

3. 214th report on proposal for reconsideration of Judges Case I, II, III. It was stated in this report that in the three judges cases, I, II & III – S.P. Gupta Vs UOI reported in AIR 1982 Supreme Court 149, Supreme Court Advocates on Record Association Vs UOI reported in 1993(4) SCC 441 and Special Reference 1 of 1998 reported in 1998(7) SCC 739, the
Supreme Court has virtually re-written Articles 124(2) and Articles 217 which pertain to appointment of Supreme Court and High Court Judges respectively. The word “collegium” is no where present in the constitution. It was first used by Bhagwati J in the majority judgement of S.P. Gutpa vs. UOI (4:3) In Para 29 “There must be a collegium to make recommendations etc.” …… (already extracted in Para 2 of Part-1) Again in the Presidential reference the expression “collegium” and 43“collegium of judges” has been freely used (Paras 15 and 22 to cite a few instances) It is submitted that any addition of words in the constitution would not be permissible under the interpretive jurisdiction of the Supreme Court. The Supreme Court has to interpret the constitution as it is. The advisory opinion in the guise of clarifying doubts raised regarding the norms laid down in the Judges II case has virtually reviewed its earlier decision. It is respectfully submitted that the opinion expressed in an advisory opinion is contrary to the plain language of article 124(2). What the article says is that the President shall consult the Chief Justice of India and such of the judges of the Supreme Court or the high court as he deems necessary. The article does not place any ceiling or limitation on the number of judges other than the Chief Justice of India to be consulted. The President should always act on the aid and advice of the Council of Ministers (article 74). However, contrary to what was said in the Constitution, both the Judges II and Judges III cases have laid down that consultation with the Chief Justice of India means a collegium consisting of the Chief Justice of India and two or four judges as the case may be. Further, in both the cases it was stated that it is the Chief Justice of India who should consult with collegium of judges, whereas Constitution says that the President should consult the Chief Justice of India and such judges as he deems necessary.
The Eighty Fifth Report on Law’s Delays: Arrears in Courts has expressed the same view. The same is extracted here below: “The Committee is aware that for this state of affairs the Union Law Ministry is not blameworthy, as the entire process of initiation of proposal for appointment of new judges is no longer the responsibility of the Executive as a result of a decision of the Supreme Court. Though it was not contemplated in the Constitution, responsibility for judicial appointments now rests in the domain of the judiciary. The Union Law Minister is accountable to Parliament for the delay in filling up of the vacancies of judges but he has functionally no contribution to make. The Supreme Court read into the Constitution a power to appoint judges that was not conferred upon it by the text or the context. The underlying purpose of securing judicial independence was salutary but the method of acquiring for the Court the exclusive power to appoint judges by the process of judicial interpretation is open to question. Against this backdrop the Committee recalls a recent discussion in the Rajya Sabha in which the Government was asked regarding alternate arrangements to fill up the vacancies and whether there was any scope for having a fresh review of the Supreme Court’s judgment.

The position as it exists in different countries may be noticed at this stage. On a scrutiny of several constitutions of other countries it may be seen that in all other Constitutions either the executive is the sole authority to appoint judges or the executive appoints in consultation with the Chief Justice of the country. The Indian Constitution has followed the latter method.

However, the 2nd judges case Advocates on Record Association vs. U.O.I. (1993(4) SCC 441), as we have seen in the discussion above,
has completely eliminated and excluded the executive and the opinion of the Hon’ble Supreme Court in the Presidential reference (Special Reference 1 of 1998) has reaffirmed this view with slight modifications.

In America the State judges are elected. When they are not elected their appointment is subject to legislative concurrence. In the Supreme Court it is the President who nominates the Judges but the nomination has to be confirmed by the Senate. In Australia it is the executive that appoints judges. In Canada the Governor General makes the appointment of judges. In New Zealand the Chief Justice is appointed on the recommendations of the Prime Minister by the President. The Prime Minister in turn consults the Attorney General; the A.G. informally consults the President of Court of Appeal and other judges. As for High Court Judges, Chief Justice recommends after consulting other Judges and gives the list to the AG for scrutiny. AG scrutinizes the list, consults New Zealand Law Society and then candidate’s consent is sought. Thereafter the Cabinet finally recommends the names to the Governor General who issues the appointment letter. Recently, the judges from the Apex Court and the High Court of Kenya came to the Supreme Court and they addressed the Supreme Court Bar. They confirmed that they have a National Judicial Commission which undertakes the selection process. In this National Judicial Commission there is the Attorney General and the Chief Justice, two senior most judges of the Apex Court and an expert. Thus it may be seen that in all the Constitutions, the executive has a role to play and in some countries a major and exclusive role. The Indian Constitution provides a beautiful system of checks and balances under Articles 124(2) and 217(1) for the appointment of Judges of the Supreme Court and High Courts where both the executive and judiciary have been given a balanced role. As already stated this delicate balance has been
upset by the 2nd Judges case (Advocate on Record Association Vs Union of India 1993(4) SCC 4412 and the opinion of the Supreme Court in the Presidential Reference (Special Reference No.1 of 1998). It is time the original balance of power is restored. The views of the Parliamentary Standing Committee on Law & Justice recommended the scrapping of the present procedure for appointments and transfers by Supreme Court and High Court Judges are of great relevance in this context. As reported in the Hindustan Times of 20.10.2008 “the Law Ministry has agreed to review the 15-year-old system after the Parliamentary Standing Committee on Law & Justice recommended doing away with the committee of judges (collegium). Presently, the collegium decides the appointments and transfer of judges. Interestingly, the recommendations come close on the heels of recent cases of corruption against judges of the top courts in the country. Law Minister H.R. Bhardwaj told Hindustan Times that the House Committee’s recommendation had been accepted, and an action-taken report prepared by the Ministry would now be placed before Parliament. “Collegium system has failed. Its decisions on appointments and transfers lack transparency and we feel courts are not getting judges on merit. (…….) The government cannot be a silent spectator on such a serious issue”, Bhardwaj said. The House Committee had said: “Through a Supreme Court judgment in 1993, the judiciary wrested the control of judges appointments and transfers. The collegium system has been a disaster and needs to be done away with”. H.R. Bhardwaj, Minister for Law & Justice, said “It is the right time to review this important matter”. “There was no problem till 1993 when the judiciary tried to re-write the Article of the Constitution dealing with appointments. They created a new law of collegium which was wrong. In a democracy, the primacy of Parliament cannot be challenged”, he said.
The Chairman of the Departmental Related Parliament Standing Committee of Personnel, Public Grievances Law and Justice in its 28th Report presented to the Hon’ble Chairman of Rajya Sabha on August 2008 has stated thus: “I would like to conclude by saying that the Government should expeditiously see to it that appointment of Judges in High Courts and Supreme Court are done in a transparent way. We have recommended in two ways: One is, we have to see to it that the collegium system has to be done away with, since appointments will be delayed, we have said that from the very beginning of identifying the eligible persons, the various places of recommendations, be it at the level of the High Courts, or, at the Governor’s level or at the level of the Departments, and finally be the Supreme Court, should be transparent, and this should be put up in the web site then and there so that the person, who is going to occupy the Constitutional place, is known to the public, and their background should be allowed to be discussed by the public and, finally, it has to go through the process of issuing warrant by the President of India. But, what is happening presently is that from the day one of identifying the person till the issuance of the warrant, nothing is known to anybody except to the persons who are involved in it. Even the persons, who are identified and who are going to be made as judges of the High Court or of the Supreme Court, may not know about it. This type of secrecy is not good for democracy”.

It may be noted in this context that in every High Court the Chief Justice is from outside the State as per the policy of the Government. The senior most Judges who form the collegium are also from outside the State. The resultant position is that the judges constituting the collegium are not conversant with the names and antecedents of the candidates and
more often than not, appointments suffer from lack of adequate information.

In conclusion, two alternatives are available to the Government of the day. One is to seek a reconsideration of the three judgments aforesaid before the Hon’ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of the executive to make the appointments.

4. Report No. 230 on reforms in the judiciary- some suggestions. In this report it was stated:
   (i) Sometimes it appears that this high office is patronized. A person, whose near relation or well-wisher is or had been a judge in the higher courts or is a senior advocate or is a political high-up, stands a better chance of elevation. It is not necessary that such a person must be competent because sometimes even less competent persons are inducted.
   (ii) The post of Chief Justice should not be transferable. If the Chief Justice is from the same High Court, he will be in a better position to not only control the lower judiciary but also to assess the persons both from the bench and the bar for elevation to the High Court. This will also curtail the unnecessary delay in filling up the vacancies in the High Courts.
   (iii) The constitutional promise of securing to all its citizens justice, social, economic and political, as promised in the Preamble of the Constitution cannot be realized unless the three organs of the State i.e. legislature, executive and judiciary join together to find ways and means for providing to the Indian poor equal access to its justice system.
   (iv) The Indian Constitution provides a beautiful system of checks and balances under articles 124(2) and 217(1) for appointment of Judges of
the Supreme Court and High Courts where both the executive and the judiciary have been given a balanced role. This delicate balance has been upset by the 2nd Judges’ case (Supreme Court Advocates-on-Record Association v. Union of India)2 and the Opinion of the Supreme Court in the Presidential Reference (Special Reference No.1 of 1998)3. It is time the original balance of power is restored. The Law Commission has in its 214th Report (2008) recommended accordingly.

Justice J. S. Verma, a former Chief Justice of India, who had written the lead judgment in the 2nd Judges’ case, expressed in an interview to the Frontline Magazine published in its issue of October 10, 2008. When asked: “You said in one of your speeches that judicial appointments have become judicial disappointments. Do you now regret your 1993 judgment?” Justice Verma responded: “My 1993 judgment, which holds the field, was very much misunderstood and misused… My judgment says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it. Broadly, there are two distinct areas. One is the area of legal acumen of the candidates to adjudge their suitability and the other is their antecedents… Therefore, my judgment said that in the area of legal acumen the judiciary’s opinion should be dominant and in the area of antecedents the executive’s opinion should be dominant. Together, the two should function to find out the most suitable (candidates) available for appointment.”

(E) Report of Venkatchaliah Commission

In February 2000 the NDA government set up the National Commission to Review the working of the Constitution consisting of the former CJI Justice Venkatchliah, Justice Jeevan Reddy and Justice
Sarkaria. Again the paramount concern was “the necessity of preserving and promoting the concept of judicial independence and the all pervading fact that independence of the judiciary is a basic feature of the Constitution”\textsuperscript{35}. It went on to elaborate, “if tomorrow a National Judicial Commission is created and it is so constituted that the Executive dominates it, it would equally be violated of the basic structure of independence of the judiciary of our Constitution”.\textsuperscript{36} And further elucidated their position “it is equally essential that the commission be presided over by the Chief Justice of India and by none else.”\textsuperscript{37} The Commission proposed the National Judicial Commission was as follows

(a) The Chief Justice of India: Chairman
(b) The two senior most judges of the Supreme Court: member
(c) The Union Minister for Law and Justice: member
(d) One eminent person nominated by the President after consulting the Chief Justice of India: member.

It is interesting to note that the Commission’s report expressly provided “the recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary”.\textsuperscript{38}

The report of the Venkatchaliah Commission (2002) transmuted into the Constitution (98\textsuperscript{th} Amendment) Bill number 41 of 2003. The Bill came to be introduced by the then NDA government in the 13\textsuperscript{th} Lok Sabha. The Bill could not be passed because of the dissolution of the Lok Sabha in March 2004 when the government called for fresh elections.

\textsuperscript{35} National Commission to Review the working of the Constitution, Volume 2 of the Report of Venkatchaliah Commission ch. 7 para 7.3.7- 7.3.11.
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
The Law Commission headed by DR. A.R. Lakshmanan as Chairman *suo moto* submitted its 214th Report. Strangely it made no reference to the Venkatchaliah Commission Report naught of the Constitution (98th Amendment) Bill, 2003. It came with the bizarre conclusion, that there were two alternatives available to the Government. One was to seek reconsideration of the three judgments before the Supreme Court to restore the original balance of power. The other option was “to pass a law to restore the primacy of the Chief Justice of India and the power of the Executive to make appointments”.

(F) The Madras Bar Association Decision

*The Madras Bar Association v. Union of India* 39 this decision assumes significance because certain aspects of the independence of Judiciary came to be tested in this particular case. One of the telling ratio of the judgment was the view taken by Khehar J. that the government could not “participate in the selection process whereby the Chairperson and member of the adjudicatory body are selected.” 40 It also significantly ruled, “the manner of their appointment and removal including their transfer, and tenure of their employment, should have adequate protection so as to be shorn of Legislative and Executive interference.” 41

(G) UPA’S Attempt at NJAC

The UPA government introduced the Constitution (120th Amendment) Bill No. LX 2013. It sought to establish a ‘broad-based Judicial Appointment Commission’ in order to ‘provide a meaningful role to the Executive and Judiciary to present their view points and make the

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participants accountable while introducing transparency in the selection process’. Therefore the Constitution (120th Amendment) Bill, 2013 inserted a new Art. 124 A that constituted a Judicial Appointments Commission. The bill was passed through the Rajya Sabha in September 2013. The dissolution of the 15th Lok Sabha in May 2014 and the calling of general elections resulted in the bill not going through the Lok Sabha.

(H) NDA’S NJAC Bill 2014 and the Constitution 121st Amendment Bill 2014

In the general elections of April-May 2014, the Bharatiya Janata Party led alliance came into power with an absolute majority. The new government did not waste much time and introduced the Constitution (121st Amendment) Bill in the Lok Sabha. The Bill resembled its precursor introduced by the UPA II government. The Bill was passed with a rapidity and unanimity unheard of in recent times. During August 13 and 14 of 2014 the Constitution Bill as well as the NJAC Bill was passed by both Houses of Parliament. By December 2014, more than one half of the states had passed resolutions ratifying the Constitution (121st Amendment) Bill 2014 and was presented to the President of India who gave his assent on 31 December 2014. The notification of the two Acts came in much later.

(I) The Purpose And Scheme of This Anthology

The starting point of the debates is the two bills which were originally introduced by the UPA-II government and thereafter modified and introduced and passed by the NDA government. The Judiciary is a unique institution in a democracy which curtails transgressions of constitutionally assigned powers by the Executive and the Legislature.
while simultaneously administering the laws validly made. Its role necessitates independence in very real terms. Modern democracies are still struggling to achieve independence of the judiciary simultaneously while ensuring it remains accountable. There are no clear cut solutions, but there are well documented constitutional experiences. The current anthology debates the Constitution (99th Amendment) Act and also the NJAC act 2014 which, to many seriously erodes judicial independence and that it is not ‘basic structure compliant’. The goal posts in different ages have been different: the mechanics of appointments was paramount during the Constituent Assembly Debates, the threat to judicial independence and deciding voice in the appointments process dominated in S.P. Gupta and evolving a mechanism to ensure the best talent is recruited dominated in the Supreme Court Advocates on Record case (SCAORA I and II). The post 2014 debate has been centering around the shortcomings of the Collegium system of appointment and the dissatisfaction expressed by the bar, and also the general public. Independence is the *sine qua non* of a judiciary from ancient times to modern democracies. The concerns of accountability, transparency, selection from a wider pool of talent are all relevant aspects of the debate. But what cannot be lost sight of is that the system in order to facilitate those objects cannot compromise on the independence of the judiciary which for a nascent democracy an essential feature to bind the nation.

More than sixty years after the Constitution came into force, India is still struggling to appoint judges in a way that is consonant with both its foundational legal document and its democratic ideals. The current system – long criticized as unconstitutional and undemocratic has done little to ensure the independence of the judiciary or a sensible balance of power. In the wake of the country’s recent regime change, and public
controversies over the selection of Supreme Court and High Court justices, some critics, including the senior lawyers Rajeev Dhawan and Prashant Bhushan, have warned that the problematic status quo may soon give way to a situation in which the executive branch of government uses every means at its disposal to influence appointments to the country’s top courts.

As they hammered out the Constitution between December 1946 and November 1949, the document’s eminent chronicler Granville Austin wrote, India’s constituent Assembly members grappled at greatest length with the question of how to ensure an independent judiciary. Judges had to be insulated from political influence, but subject to a system of checks and balances that would preserve the country’s democratic principles and prevent the judiciary from wielding untrammeled power. To that end, it was almost unanimously agreed that the process of appointing judges to the Supreme Court and the High Courts would be a consultative one: the president, representing the Indian people, would elevate candidates only after conferring with the Chief Justice of India and other senior judges.

But ever since the Indira Gandhi-led government launched a withering attack on the judiciary in the 1970s, India has been appointing judges to its higher courts through a process that, in one way or another, has undermined the consultative principle. This, in turn, has been part of a larger, longer-running battle over who should ultimately control the Constitution – Parliament or the Supreme Court. In the current system, in place since the early 1990s, a changing group of five judges headed by the chief justice of India, and known as the collegiums, effectively controls appointments, having usurped that power almost entirely from the executive through a series of questionable rulings. The process is
notoriously secretive, leaving no room for public scrutiny of individual nominees. As a result, the Indian public knows very little about the 25 men and one woman who currently serve on the Supreme Court, or about their recent predecessors. Nor is there space for a larger democratic debate about the criteria on which judges ought to be selected.

Now, there are signs that the balance of power in judicial appointments may soon shift – although not necessarily for the better. The recently botched elevation to the Supreme Court of Gopal Subramaniam, a senior lawyer and former solicitor general of India, was a bellwether of this change. Subramaniam, who is 56, was nominated by the collegiums this May; its members apparently felt that the court would be well served by this lawyer of *hitherto* unimpeachable integrity. But in a stunning reversal, given Subramaniam’s reputation, in June the government sought to overturn his nomination by sending it back to the collegiums.

The ostensible reason for this step was leaked to the public via unsubstantiated media reports: the Central Bureau of Investigation (although it had previously engaged him as counsel on numerous occasions) and the Intelligence Bureau (although it had earlier cleared his name) apparently raised questions about Subramaniam’s character. The government made no formal comment. It was well known, however, that Subramaniam, as *amicus curiae* in the *Sohrabuddin* fake encounter case (in which senior members of the ruling Bharatiya Janata Party, including its new president Amit Shah have been implicated), played an important role in attempting to check alleged authoritarian excesses by the Gujarat government during the period it was headed by Narendra Modi.
Ultimately, many commentators believed, it was this willingness to challenge the government that led to Subramaniam’s rejection.

India’s is not a straightforwardly majoritarian democracy. The judiciary is meant to ensure that all Indians are accorded the same fundamental rights and are treated with quality before the law – even if doing so conflicted with the will of the political or cultural majority at the time, as expressed through the other branches of government. Fostering a judiciary with the strength of character to fulfil this role, and the intellectual capacity to engage with the complexities of jurisprudence, ought to be an essential concern of the appointments process. Under current law, it is the executive’s prerogative to ask the collegiums to reconsider nominations, as is in keeping with the general principle of checks and balances. But spurning the nomination of a well-regarded lawyer without offering any official comment subverts both this principle and the counter-majoritarian purpose of the courts. By borking Subramaniam, the government seems to signal its willingness to compromise the independence of the judiciary, and an intention to back control over appointments. As Subramaniam put it in a letter to the Supreme Court’s chief justice, RM Lodha, “The events of the past few weeks have raised serious doubts in my mind about the ability of the Executive Government to appreciate and respect the independence, integrity and glory of the judiciary. I do not expect this attitude to improve with time.”

In this unsettling milieu, Abhinav Chandrachud’s new book, The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India, is both timely and illuminating. Using qualitative and quantitative analysis, Chandrachud, a doctoral student at Stanford
University law school, unearths a distinction between “Indian constitutional law on the books and Indian constitutional law in action.” Beneath the veil of secrecy shrouding judicial appointments, he discovers a set of defined but informal yardsticks that the collegiums relies on to make its nominations. Chandrachud doesn’t address the important questions of whether these criteria promote or hamper judicial independence, or if the collegiums system is in keeping with a robust separation of powers; but his study allows us to engage with such questions in a concrete way for the first time. His book reveals that the Supreme Court, in its dogged commitment to the collegiums and its standards, may threaten the very independence it has long sought.

The Basic Theory of a tripartite separation of powers – between the legislature, executive and judiciary was first put forward in the eighteenth century by the French philosopher Montesquieu. It asserts that the autonomy of the courts is the greatest protection against the tyranny of the majority, and against those who would treat rights as fungible rather than unassailable. In keeping with this view, the framers of India’s Constitution saw the judiciary as the primary guardian of the sort of equality–political and civil, as well as social – that they hoped Independence would usher in. To this end, the Constituent Assembly vested in the Supreme Court and the various High Courts the power of judicial review, which allowed the judiciary to strike down laws enacted by Parliament.

History tells us there is no way to create a perfect separation of powers, or a perfect antidote to majoritarianism. In the United States, the twentieth-century legal scholar Alexander Bickel asked how unelected judicial members could exercise almost unimpeded authority in
overruling decisions arrived at by a democratically elected government. Checks and balances are meant to come in through a selection process whereby the president nominates judges who are then subject to confirmation by a legislative body. In practice, the government in power often elevates judges closely aligned to the ideology of the ruling party. (How justices rule once on the bench is another question.) Moreover, judges tend to interpret the law in ways that are broadly sympathetic to the worldviews of the legislature and executive; as the American political scientist Robert Dahl wrote in 1957, it is “somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”

Similar concerns troubled India’s Constituent Assembly. One member, Shibban Lal Saksena, suggested that judicial appointments be confirmed by a two-thirds majority of both houses of Parliament. Another, B Pocker Sahib, suggested that a judge of the Supreme Court ought to be appointed only after securing the concurrence of the chief justice of India. Both of these suggestions were rejected. Involving the legislature in the appointment process, the assembly thought, would be cumbersome, and would undermine the dignity of the judiciary; to accord the chief justice veto power over appointments was thought to be plainly anti-democratic. Instead, in BR Ambedkar’s words, the Constitution was designed to tread a “middle course.”

This middle course is reflected in Art. 124 and 217, which state that judges of the Supreme Court and the High Courts shall be appointed by the President, after consultation with certain authorities, including the
Chief Justice of India (and the Chief Justice of a High Court, when appointing a judge to that court).

At first blush, these provisions may appear unambiguous. But, as the legal scholar H M Seervai observed, they fail to define the nature of the necessary consultations, or transparent criteria to be used in making nominations. As a result, there is little possibility of achieving the sort of public accountability that explicit constitutional standards would provide. Because of their elisions, Arts. 124 and 217 have become two of the most important sites in the government’s contest with the judiciary over control of the Constitution.

The decision in the second judges case which was affirmed in 1998 has since been widely denounced by critics. As Krishna Iyer later noted, under the collegium system, “There is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made a sort of anarchy prevails.” That this system has failed India was most apparent when, in 2009, the collegiums nominated for elevation to the Supreme Court PD Dinakaran, who was then besieged by a string of corruption allegations. (he saved the court from protracted embarrassment by resigning from his post as chief justice of the Sikkim High Court.)

In addition to being extra-constitutional, Chandrachud’s research reveals that the collegiums has also proliferated a set of informal criteria that determine which judges make it to the Supreme Court. Since the system came into force, no person below the age of 55 has been appointed as a justice. According to Chandrachud, it has now become an “informal norm that judges will be considered eligible for appointment to the Supreme Court only after they turn 55.” In fact, since 2009, a substantial number of appointees have been above the age of 60. This is
significant because judges of the court are constitutionally required to retire at 65. The professed purpose for the collegium’s informal rule is a belief that judges ought to be “mature” enough to hold high office; but a shorter tenure, Chandrachud notes, is likely to impose “an inherent limit on judicial activism. It may take a year or so for a Supreme Court judge to settle in, and several more years to rise to a position of seniority in order to become the presiding judge in a bench on the Court.”

In addition, in order to be considered for elevation to the Supreme Court, a person must almost always be the chief justice of a High Court. The collegiums deviates from this principle very rarely, and often only in the interest of securing a certain kind of diversity. Chandrachud’s research suggests that geographical variety is favoured over other factors, including caste, gender and religion. No more than two or three judges from the same High Court serve together on the Supreme Court at any given time. Questions of an individual candidate’s overall suitability, or of the character and intelligence of eligible jurists who don’t meet the collegium’s informal criteria, seem to be ignored. What this system has meant, Chandrachud writes. Is that the court is “diverse only in one sense the politically correct sense.”

Perhaps the collegium’s informal criteria for appointments, combined with a lack of public scrutiny, has degraded rather than bolstered the court’s independence. Today, we once again have a party that enjoys a majority in the Lok Sabha, is not pressured by the demands of coalition politics, and is keen as the Gopal Subramaniam episode showed to make its imprint on the judiciary. There is little evidence to suggest that, in the face of such a government, the court will act as a counter-majoritarian institution. The new regime is presently in the process of reworking a bill on constitutional amendments, which will
establish a National Judicial Commission and a new process of appointing judges. To what extent this will impinge upon judicial independence remains to be seen. That said, if the judiciary continues to appoint judges using the collegiums system it has carved out for itself, there might be little reason for the government to question the process: after all, there is little to guarantee that judges appointed by the collegiums will be equipped to serve as guardians of the constitution.

*The object of placing the power of judicial appointments in an independent body is to remove patronage from the system and ensure that judges are appointed only on the basis of their qualifications.*

The present system of judicial appointments in the constitutional courts exemplifies the misalignment between the core value of judicial independence and accountability. The process by which a judge is appointed to the High Court or the Supreme Court has been described by Justice Ruma Pal, a former judge of the Supreme Court, as “one of the best kept secrets in this country.”

Suffice it to say, that in the last of the famous trinity of the *Judges Cases*, the Supreme Court changed the character of “consultation” to “concurrence”. As Anil Divan pithily points out, the *Judges cases* have not really broken the mystique behind the “Sacred Ritual” of appointments – they have only changed the circle of “High Priests.” Now, instead of the executive, primacy is given to the Chief Justice of India and the Collegium of Judges. The way in which judges are appointed embodies a set value about democracy. Choosing judges based on undisclosed criterion in largely unknown circumstances reflects an increasing democratic deficit.
The recent case of the impeachment motion of Soumitra Sen, former judge of the Calcutta High Court, once again highlighted the need to have a relook at the process of appointment. The unanimous voice of Parliament, while considering the impeachment motion of Sen, was that there was now a greater need for a National Judicial Commission than ever before. The legislators were, in fact, only echoing the view that has time again being stressed upon by various legal luminaries and jurists.

(J) The Rational

The rationale for the establishment of a commission must be that it will guarantee the independence of the system from inappropriate politicization, strengthen the quality of appointments, enhance the fairness of the selection process, promote, diversity in the composition of the judiciary and therefore rebuild public confidence in the system. By placing the power of judicial appointments in an independent body, the object is to remove patronage from the system and ensure that the judges are appointed on the basis of their qualifications for the job rather than anything else.

It is here that we can learn from systems elsewhere which have managed to provide for a transparent process of appointment, while maintaining judicial independence. International consensus seems to favour appointments to the higher judiciary through an independent commission.

(H) Form of the Commission

A key question is whether the new body should be appointing (The Israel Judicial Commission is the only appointing Commission) or

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42 Justice Soumitra Sen was Judge in independent India to be impeached on 18 August 2011. He resigned on 1 September 2011 ahead of the impeachment motion against him in the Lok Sabha on the 5 and 6 September 2011.
recommending commission. The former in which the commission takes over the full responsibility for making appointments, removes the danger of inappropriate influence by politicians but also weakens democratic accountability and lacks a potential check on abuse, corruption or incompetence on the part of the commission. These advantages and disadvantages are reversed under a recommending commission. Therefore, there is need to adopt a hybrid model where the Commission makes a recommendation, which should be ordinarily binding. The recommendation may be rejected only in cases where the candidate is disqualified or in cases where the procedure adopted by the Commission is legally flawed. The reasons for such rejection must also be recorded in each case.

(I) Composition

The example of the UK may be taken where the Constitutional Reforms Act, 2005 has established a Judicial Appointments Commission (JAC) with one Chairperson and 14 other Commissioners, including five judicial members, one barrister, one solicitor, five lay members, one tribunal chairman and one lay judge. The Chairperson and 12 Commissioners are appointed through open competition, while the other three are selected by the Judge’s Council.

In South Africa, the establishment of the Judicial Service Commission (JSC) has attracted much attention for the way it has made the appointments process more independent. Its 23 members are drawn from the judiciary, the two branches of the legal profession, the national and regional legislatures, the executive, civil society and academia. The entire process of appointment is geared towards securing maximum transparency.
The nine-member Commission that selects judges for all levels of courts in Israel consists of the President of the Supreme Court, two other Supreme Court judges, the Minister of Justice (Attorney General), another Cabinet Minister, two members of the Legislature (one of whom has traditionally been selected from the opposite ranks) and two representatives of the Israeli Bar.

In India, it would be more prudent to follow the UK model where politicians are kept out of the Judicial Appointment Commission. The Judicial Commission should not be a very large body, containing not more than 7 or 9 members. The Commission should consist of representation from the Judiciary, the Bar, eminent members of civil society (who should be appointed by a high powered body, for example presided over by the Vice President, the Prime Minister, the Chief Justice of India, the Law Minister and the Leader of the Opposition).

An equally important feature of public accountability is institutional and procedural openness. The requirement of openness is particularly important in the judicial appointment process, because a recurring criticism of the old system was the high level of secrecy within the selection process functioned. The extent to which the Commission operates transparent procedures is therefore a critical test of its legitimacy.

**(J) Transparency and Openness**

To give an example, the Commission in South Africa has made efforts to ensure that the process by which candidates are selected for interview is as open as possible. The statutory provisions provide that when a vacancy arises, the Commission must advertise the post and seek
nomination from a wide variety of sources. The names of candidates short-listed for interview by a screening subcommittee are made public and the view of relevant institutions (among them, the Law Society of South Africa, the General Council of the Bar and the Department of Justice) on their suitability are canvassed by the Commission.

On the other hand, the system of public interviews are opposed by pointing towards the example of the United States Senate Judiciary Committee confirmation hearing as demonstrating the danger which public interviews posed since the same could degenerate into personalised attacks on the candidates, and such demonstrations, far from increasing legitimacy, would undermine public confidence. The system was further opposed by stating that leading members of the Bar would be discouraged from coming forward if the meeting were made public.

However, public interviews may not be a plausible model for a country like India and therefore should not be introduced here. We should follow the UK model and should publish the Annual Judicial report and the names of the selected candidates should be posted on the website.

(K) Merit and Diversity

There is no gainsaying that there is a need to preserve and of course, if possible, to improve the professional and personal quality of our judiciary and therefore, merit should be given great primacy. Yet, it is equally important to consider the importance of social diversification in public institutions and the need to include hitherto under-represented groups for a more holistic advancement of all sections of society. A wider range of social backgrounds should mean not just representation from the backward classes and the minorities but also women. This underlying
policy aim is perfectly respectable, namely that the public may well have more confidence in its judges if they are more reflective of the make-up of the community at large.

(L) **Fresh Approaches**

Tackling this lack of diversity in the judiciary will require fresh approaches and a major re-engineering of the process of appointment. Diversity is likely to be achieved only if equal opportunities are placed at the heart of the judicial appointments process and are promoted through sustained and proactive initiatives. One such example comes from Ontario, where one of the first actions of the newly established Judicial Appointments Advisory Committee in 1990 was to ask the Attorney-General to write a personal letter to 1,200 senior women lawyers in the province asking them to apply for judicial office. This conscious and innovative attempt to expand the number of workmen in the recruitment pool produced such a marked increase in the number of applications from well qualified women that between 1990 and 1992, 41 per cent of the judges appointed by the Judicial Appointments Advisory Committee were women.

The outcome of the reforms would depend on the way in which the commission is set up and the model adopted. The detail of the commission must be thought through with great care. Issues such as the division of responsibility between the commission and the appointing Minister, composition of the membership and the process for selecting the commissioners themselves are key factors in determining the success of the new system.
(M) **National Judicial Appointment Commission Act, 2014**

The National Judicial Appointment Commission Bill 2014 was introduced in Lok Sabha on August 11, 2014 by the Minister of Law and Justice, Ravi Shankar Prasad the Bill was introduced in conjunction with the Constitutional 121st Amendment Bill 2014, which establishes the National Judicial Appointment Commission (NJAC). The Lok Sabha passed the Bill on 13 August 2014 and the by Rajya Sabha on 14 August 2014. The National Judicial Appointment Commission will replace the collegiums system for the appointment of Judges as mandated in existing pre-amended Constitution by a new system. National Judicial Appointment Commission Bill and Constitutional Amendment Bill, was ratified by 16 of the state legislatures in India, and subsequently accented by the President of India on 31st December 2014.

National Judicial Appointment Commission Act, 2014 has come into force on April 13, 2015 and the Constitution (Ninety-ninth Amendment) Act, 2014 has come in to force on same day.

Section 2 of the Constitution (Ninety-ninth Amendment) Act, 2014 says that under clause 2 of Article 124 of the Constitution, for the words “after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose”, the words, figures and letter “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. The first proviso, which said that “in the case of appointment of a Judge other than the chief justice, the chief Justice of India shall always be consulted”, is omitted.

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43 Notification No. So 1001(E) [F. NO-K-11016/17/2015-US (11)].
The Constitution (Ninety-ninth Amendment) Act, 2014 has inserted three new Article in the constitution of India viz. Art.124A, 124B, and 124C after the Art. 124.45

Art. 124A prescribed that-

(1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:

(a) The Chief Justice of India, Chairperson, ex officio;
(b) Two other senior Judges of the Supreme Court next to the Chief Justice of India – Members, ex officio;
(c) The Union Minister in charge of Law and Justice – Member, ex officio;
(d) Two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People – Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

However there has not been mention about whether such person is to be eminent in the field of law or otherwise.\textsuperscript{46} Hence there is possibility that, two persons handpicked by the government, coming from a background of anything else but law, who can make politically influenced recommendations exactly in line with the wishes of the Executive – a perfect instance of trespassing boundaries that lay down the separation of powers between the three organs.

The judicial members of the commission have been placed on an equal platform with the other three members, giving the judiciary on equal and not a majority say, despite the obvious inferences that regarding appointment of members of the judiciary must attach with it higher significance than that of non members.\textsuperscript{47}

Section 3 of the NJAC Act, 2014 says that the Headquarter of the commission shall be at Delhi. The Central Government shall, within a period of thirty days from the date of coming into force of this Act, intimate the vacancies existing in the posts of Judges in the Supreme Court and in a High Court to the Commission for making its recommendations to fill up such vacancies.\textsuperscript{48} If any vacancy occur by reason of the term of a Judge of the Supreme Court or the High Court then prior to the date of occurrence of the vacancy the Central Government shall makes a reference to the Commission for making its recommendation to fill up such vacancy.\textsuperscript{49} In the case of occurrence of vacancy by reason of death or resignation of a judge of the Supreme Court or a High Court the central Government shall, within a period of

\textsuperscript{46} Infra
\textsuperscript{48} The National Judicial Appointment Commission Act, 2014 (No.40 of 2014), S.4(1)
\textsuperscript{49} The National Judicial Appointment Commission Act, 2014 (No.40 of 2014), S.4(2)
thirty days from the date of occurrence of such vacancy make a reference to the Commission for making its recommendation.

*Function of the commission* – The new inserted Art. 124B in the Constitution by the Constitution (Ninety-ninth Amendment) Act, 2014 describe about the function of commission. This article runs as follows:-

“It shall be the duty of the National Judicial Appointment Commission to –

(a) Recommended persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

(b) Recommended transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

(c) Ensure that the person recommended is of ability and integrity.

Thus according to Art. 124B it is clear that the commission shall recommend person for appointing as chief justice of India and High Court and judges of the High Court and Supreme court. The transfer of the Chief Justice and other Judges of High Court from one High Court any other High Court will be only on recommendation of commission.

Art. 124C says about power of Parliament to make rules. It says that –Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it”.

(a) Procedure for selection of judge of Supreme Court

The Constitution (Ninety-ninth Amendment) Act, 2014 prescribe that the commission shall recommend for appointment the senior most Judges of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office. The provisions runs as follows:-

(1) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office:
Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.

(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligibility to be appointed as such under clause(3) of article 124 of the Constitution:
Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:
Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.

(3) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary.

After the recommendation of the commission the President shall appoint the Chief Justice of India or Judge of the Supreme Court, as the
case may be on the basis of said recommendation. Under the Act the President has power that it can return the said recommendation for reconsideration to commission, if president, find it necessary. But the President will be bound to appoint the Chief justice or Judge of the Supreme of Court, as the case may be, if the commission makes the recommendation, after reconsideration.

(b) Procedure for selection of High Court Judge

Section 6 of the National Judicial Appointment Commission Act, 2014 lays down the provisions for the appointment of High Court Judges. Which runes as follows:

Section 6-

(1) The Commission shall recommend for appointment a Judge of a High Court to be the Chief Justice of a High court on the basis of inter se seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by regulations.

(2) The commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge of that High Court.

(3) The commission shall also on the basis of ability, merit and other criteria of suitability as may be specified by regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of article 217 of the Constitution and forward such names to the chief Justice of the concerned High Court for its views.

52 Supra S. 7 proviso.
(4) Before making any nomination under sub-section (2) or giving its views under sub-section(3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that high Court as may be specified by regulations.

(5) After receiving views and nomination under sub-sections (2) and (3), the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.

(6) The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.

(7) The Commission shall elicit in writing the views of the Governor and the chief Minister of the State concerned before making such recommendation in such manner as may be specified by regulations.

(8) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court a Judge of a High Court as it may consider necessary.

After the recommendation of the commission the President shall also appoint Chief Justice of High Court or Judges of High Court, as the case may be. In this matter also the President has power to return the recommendation for reconsideration but after reconsideration if matter is again send to the President will be bound to appoint them.

(N) Constitutional Validity of the Act

The National Judicial Appointments Commission (NJAC) Act, 2014 which ends the two decade old collegiums system of judges
themselves selecting and appointing judges for higher judiciary was challenged in the Supreme Court. The separate petitions filed by Supreme Court Advocates on Record Association (SCAORA) and senior advocate Bhim Singh. Supreme Court Advocates on Record Association has opposed the NJAC Act and the Constitution 121st Amendment Bill on Various ground including that the new legislation violated the basic structure of the Constitution and was therefore invalid, void and unconstitutional. The Association’s petition settled by eminent jurist and senior advocate Fali S. Nariman.

The petitions (writ petition no. 13 of 2015) are filed on by senior advocates Fali S. Nariman, the Supreme Court Advocate-on-Record Association, NGO change India, Centre for Public Interest Litigation (CPIL), Bar Association of India and others. A Clutch of these petitions were heard before a five-judge bench led by Justice J.S. Khehar and other judges viz., J. Chelameswar, Madan B.Lokur, Kurian Joseph and Adarsh K. Goel. The following are grounds raised before the bench-

1. The NJAC Act is illegal since it was passed without first amending the Constitution. The Parliament had passed both the amendment and the Act simultaneously and the petitions said this amounted to invalidating the entire parliamentary process,

2. It would tackle with the independence of the judiciary and the collective opinion of the three judges in the NJAC could anytime be vetoed out by any two other members under the proposed law.

3. This law undermines the independence of the judiciary, and the basic structure of the Constitution because “consultation with the judges” under Art. 124 is substituted with “on the recommendation of the NJAC”
under new Article 124A which is inserted in the Constitution providing for setting up of the six-member NJAC.

It is interesting to know that the NJAC route of appointment, the Supreme Court Bar Association had come out in the favour of the new system. Adv. Prashant Bhushan, counsel for CPIL, said he would not seek a stay on the two Acts at otherwise making NJAC operational is going to be a cumbersome process. Rules will have to be framed, jurists will have to be selected and then the NJAC will come to existence as a body. Therefore, it will not be proper to pressing for a stay its operation. Bhusan expressed his hope that the Supreme Court will decide the matter expeditiously once it starts hearing. While senior advocate Bishwajeet Bhattacharya, who is one of the petitioners in the case expressed that there is need to stay the operation of the notification. It is in the interest of both the parties that the notification is stayed till the time the court rules on its validity. If the court ratifies the government’s move after hearing both the parties, the notification can always be revived but if the NJAC is held to be bad in law, the notification is automatically doomed forever.

It was ultimately considered that after enactment of NJAC Act, 2014 there will be the paradigm shift in the manner that judges of the Higher Judiciary have been appointed during last 22 years. However, in this context it will be not wrong to highlight the important deliberations which had been done regarding independence of judiciary, its accountability before the Supreme Court Constitutional Bench of five Judge-

➢ The collegium system of appointing judges is “illegal” and no court has the power to stay the proposed notification on the National Judicial Appointments Commission (NJAC) that seeks to scrap this practice,
the government told Supreme Court through the Attorney General Mukul Rohatgi.  

➤ Government brought into force a controversial law to appoint members to the higher judiciary, two days before a Constitution Bench of the Supreme Court hears a clutch of petitions challenging the National Judicial Appointments Commission Act.

➤ Justice Anil R. Dave, recued himself from hearing case after an objection was raised that the judge was now an ex-officio member.

➤ Questions over conflict of interest and doctrine of bias yet again stalled hearing by a Constitution Bench of the Supreme Court on validity of the constitutional amendment and setting up of the National Judicial Appointments Commission (NJAC) after scrapping the collegiums system.

➤ The government will not make any new appointment of judges without permission of the Supreme Court even as it has resolved tp make the National Judicial Appointments Commission (NJAC) functional by May 11, 2015.

➤ Attorney General questions basis of case against NJAC, says 5-judge bench can’t take call on 1993 order on collegiums.

➤ The Supreme Court said that the new National Judicial Appointments Commission (NJAC) must be tested for its ability to keep the

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independence of judiciary intact and its compliance with the basic structure of the Constitution.  

Asserting that the collegiums system had “limited but sufficient transparency”, the Supreme Court on asked the government to list how many persons with “doubtful integrity” have been appointed as judges in the apex court and high courts by the collegiums.

Calling it a “dangerous proposition”, the Supreme Court questioned the demanding a “reconsideration of its two-decade-old judgments, which had established collegiums as the system for appointing judges and gave “primacy” to the Chief justice of India. “When the 1993 judgment came and later in the Presidential Reference (in 1998), the first thing that you (government) said was that you accept the judicial primacy. The Union accepted the interpretation given by this court as final and binding. You cannot change your position every day.” but the researcher viewed that if a system is failed, it should be changed.

With the collegium system under attack from the government, the Supreme Court said that the new National Judicial Appointments Commission (NJAC) can also make mistakes in selection of judges and that the President had not been given better status under the nascent law.

A five-judge bench led by Justice J.S. Khehar said they would continue hearing the case on merits. The Supreme court on declined to constitute

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61 NJAC hearing: Tell us when we pushed wrong name, Supreme Court to government http://indianexpress.com/article/india/india-others/njac-hearing dated May 1, 2015.
63 NJAC no better than collegiums, it can also make mistakes: SC http://indianexpress.com/article/india/india-others/njac-hearing dated May 9, 2015.
a larger bench of 11 judges to examine the validity of the new National Judicial Appointments Commission (NJAC).  

➢ The government told Supreme Court that the role of the President in appointing judges to the higher judiciary is merely “ceremonial” and “formal” in nature – in reality, it is the council of Ministers headed by the Prime Minister that makes such appointments. Thus the appointment of judges was an “executive function” prescribed under the Constitution to be done by the Cabinet. The President’s role was confined to issuing warrants for appointments only.

➢ The Bench said the government has a “constitutional obligation” to ensure people with integrity and competence are made judges and this responsibility could not be abdicated. The Supreme Court said that letting the National Judicial Appointments Commission (NJAC) take off on a “leave-it-to-God” basis may lead to “disastrous” consequences even as the government admitted that it had only in a “very few” cases objected to the Collegium’s recommendations for appointing judges.

Underlining Rohatgi’s argument that an important objective of the NJAC was to stop “bad appointments”, the Bench called for instances where the executive tried to stop appointments but the Collegium nudged. In around five of every 100 cases, the government had objected to the appointment of judges whose names had been recommended by the Collegium since 1993. He stated there had been cases where the Intelligence Bureau gave two different reports about the same individual whose name had been recommended by the Collegium. Besides, there has

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64 Supreme Court declines government’s referral of NJAC to a larger bench http://indianexpress.com/article/india/india-others/njac-hearing dated May 13, 2015.
65 In posting of judges, President’s role only ceremonial, Govt. tells SC http://indianexpress.com/article/india/india-others/njac-hearing dated June 9, 2015.
been only on instance in the last 22 years when the government resisted but the Collegium “insisted” and sent back the name for confirmation.\(^{66}\)

- The Attorney General Mukul Rohatgi while hit out at the Collegium system handed over a list containing nearly 20 instances of proposed appointments, of which only one appointment could go through despite objections by the government.\(^{67}\)

- The Collegium system failed to ensure adequate representation to women on the Bench. The new system of appointing judges would open a window of opportunity for women to be appointed as judges in the Supreme Court and High Courts. The Collegium system, failed to ensure adequate representation to women on the bench. Defending the composition of the six-member NJAC wherein one of the two eminent persons will be either a woman or from a socially backward class, Rohatgi said the government was committed to accord due representation to them.\(^{68}\)

The bench then asked why the NJAC Act does not prescribe a certain number of women, SC/STs, OBCs and minorities in the selection, to which Rohatgi responded: “Let the NJAC start functioning and all this would be structured”.

- The Constitution Bench led by Justice J.S. Khehar asked Solicitor General Ranjit Kumar: “What if we hold the Constitution could not have been amended since this violated its basic structure? The effect of quashing is that it is deemed to have never existed on the statute book. Will quashing it not revive the previous position…as if the

\(^{66}\) Can’t leave3 it to God, show that NJAC is good, says Supreme Court http://indianexpress.com/article/india/india-others/njac-hearing dated June 10, 2015.


\(^{68}\) NJAC will ensure more women judges in higher judiciary: Centre to Supreme Court http://indianexpress.com/article/india/india-others/njac-hearing dated June 12, 2015.
amendment never happened?” Kumar replied in the negative and said that if the Supreme Court ruled that quashing the National Judicial Appointments Commission (NJAC) would revive the Collegium system for the appointment of judges, Parliament may declare the ruling as “void”, the government informed the apex court. 69

The Supreme Court sought to know from the Centre the exact number of state assemblies that conducted debates before ratifying the Constitutional amendment to set up the National Judicial Appointments Commission (NJAC). The Centre has told the court that as many as 20 states have approved the Constitutional amendment to replace the Collegium system with the NJAC. 70

Thus those were the important deliberations which had been done before the Supreme Courts 5 judges Bench. However, the researcher would like to emphasize that in these deliberations both Supreme Court and the government failed to realize that the ‘Collegium System’ envisaged by the Supreme Court was meant to assure independence of the judiciary in the contemporary context of circumstance and experience gained by the judiciary during period of 1980 to 1990s decades. But, by doing so Judiciary failed to realized inherent danger involved in it viz., in the name of ‘Collegium System’ the Supreme Court succeeded to retained all powers to itself regarding appointment of judges at Higher Judiciary by violating constitutional mandate under Art. 124. However, it has taken 22 years to realize that the ‘Collegium System’ was not a creative

69 Govt. to Supreme Court: Order Collegium’s revival, Parliament will declare it void http://indianexpress.com/article/india/india-others/njac-hearing dated June 16, 2015.

70 The Centre has told the court that as many as 20 states have approved the Constitutional amendment to replace the Collegium system with the NJAC http://indianexpress.com/article/india/india-others/njac-hearing dated June 17, 2015.
interpretation of the Constitution rather it was clearly judicial overreach. Therefore, today there are serious attempts started to repair the damage done to the Constitution through the new mechanism viz., NJAC Act, 2014. At last this five judges Supreme Court Bench headed by Justice J.S. Khehar on 16th Oct. 2015 by a majority of 4:1 struck down the Constitution 99th Amendment and National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional on the groups- Firstly, the participation of the Union Law and Justice Minister as NJAC member as contemplated under Art. 124A(1) in the matter of appointment of judges to the Higher Judiciary, would Breach the concepts of “separation of powers” and the “independence of the judiciary”, which are both indubitably components of the “basic structure” of the Constitution. Secondly, the organic development of civil society (in the context of imminent persons to be appointed in the NJAC) has not as yet sufficiently evolved therefore civil society should not have a final say in the appointment of judges to the Higher Judiciary. Thirdly, an expectation from the judiciary, to safeguard the rights of the absolutely insulated and independent, from the other organs of governance.

However, in his descending judgment Justice J. Chelameswar disagreed with the majority and upheld the validity of the 99th Amendment, on the ground that the assumption that primacy of the judiciary in the appointment of judges is a basic feature of the Constitution is empirically flawed. He said proceedings of the collegiums were absolutely “opaque and inaccessible” to the people at large and “transparency is a vital factor in constitutional governance”. Therefore, it is pertinent to note that the Bench admitted that all is not well even with the ‘Collegium System’ of “judges appointing judges”, and that the time is ripe to improve the 22-year-old system of judicial appointments.
Therefore, it has sought suggestions from the Centre and interested persons to improve the working of the ‘Collegium System’. However, it rejected the central government’s plea to refer for reconsideration of the Second and Third Judges cases of 1993 and 1998, respectively, to a larger bench. An agitated government said the verdict firstly, “ignored the unanimous will of Parliament” and called it a “flawed” one, setting the stage for an unusual fight for balance of power between the Legislature and the Judiciary and Secondly, it is trying to preserve non-transparent ‘Collegium System’ besides this, many legal luminaries disagreed with the judgment while some of them opined that this decision of the Supreme Court would act as a catalyst to bring about important reforms in the appointment and transfer of judges of Higher Judiciary in India. Thus by this decision Supreme Court restored the over-two-decade-old ‘Collegium System’ as it existed before the NJAC, for appointment of judges to the Higher Judiciary. The entire bulk of the series of judgments and orders given by five judges run about 1,042 pages.

However, the researcher likes to emphasize that in these deliberations both Supreme Court and the government failed to realize that the ‘Collegium System’ envisaged by the Supreme Court was meant to assure independence of the judiciary. But, by doing so Judiciary failed to realize inherent danger involved in it viz., in the name of ‘Collegium System’ the Supreme Court succeeded to retain all powers to itself regarding appointment of judges at Higher Judiciary by violating constitutional mandate under Art. 124. However, it has taken 22 years to realize that the ‘Collegium System’ was not a creative interpretation of the Constitution rather it was clearly judicial overreach. Therefore, it is pertinent to note that the Bench admitted that all is not well even with the ‘Collegium System’ of “judges appointing judges”, and that the time is
ripe to improve the 22-year-old system of judicial appointments. Therefore, on 16th December 2015 S.C. has sought suggestions from the Centre and interested persons to improve the working of the ‘Collegium System’. So department of Justice, Ministry of Law and Justice had requested through a public notice to send valuable suggestions in the following four categories: Transparency, A Secretariat for the Collegium, Minimum eligibility criteria and dealing with the complaints against the prospective appointments. After S.C. quashed the NJAC Act, left it to the Centre to consult the CJI for drafting the MOP (Memorandum of Procedure) for appointments to the higher judiciary. The Centre seeks to introduce Performance Appraisal as a standard for appointment.

(O) The Judiciary and the Right to Information Act

In the present contextual understanding, it is also imperative to appreciate the need of a regulatory framework in the form of the proposed legislation as opposed to a code of conduct to be adhered to which is formulated on the lines of a self-regulatory mechanism. As former CJI Hon’ble Justice J. S. Verma puts it, “I believe most of us prefer voluntary correct behaviour instead of outside imposition. That, in my humble view, is the dignified course for judges of the higher judiciary, which appears to have been the view also of the framers of the Constitution.”

This led to adoption of a self-regulation mechanism by the Supreme

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71 Justice Verma in one of his later writings however emphasized the need for a legislative framework. See J.S. Verma, In a Higher Court, September 11, 2009, available at http://www.indianexpress.com/story-print/515773/ (Last visited on September 29, 2009). Arun Thiruvenkadang opines this change in Justice Verma’s stance to be a reflection of the current perception of the judiciary and the judicial environment which mandates the need for a legal sanction to curb the malady of corruption. He notes about the recent move of the Madras High Court to declare the assets of judges without insisting any immediate safeguarding against the potential harassment to the judges which has been a concern voiced by many in the judiciary. Thiruvenkadang seeks to evaluate if it is advisable to enact a regulatory framework based on the immediate judicial delinquency in the society as is suggested by Justice Verma. See Arun Thiruvengadam, Justice Verma on Justice Bhat’s judgment and judge’s asset controversy, September 11, 2009, available at http://lawandotherthings.blogspot.com/2009/09/justice-verma-on-justice-bhats-judgment.html (Last visited on September 29, 2009).
Court on May 7, 1997. The later Chief Justice’s Conference of 1999 endorsed the same, followed by the Bangalore Principles of 2002. Since there were no mechanisms to verify the suitability or compliance of what was declared, thus there has never been any verification. There have not been any instances of action taken against any judge for lack of or wrong disclosure, though many judges have come forward and openly expressed their views in newspapers, blogs etc..., and even taken a stance opposed to that of the CJI.72

Amidst the controversies surrounding the issue of asset disclosure and the proposed legislation, September 2, 2009 welcomed a bold decision by the ‘activist’ Delhi High Court in the CPIO, Supreme Court of India v. Subhash Chandra Agarwal73 (hereinafter Supreme Court Judges Assets case), wherein Justice S. Ravindra Bhat inter alia ruled that CJI could not claim immunity from applicability of the Right to Information Act, 2005. Without questioning the propriety of the ruling, in our humble opinion, it is still a watershed given that it realizes the importance of a transparency measure in governance, which in other words also endorses the right of the citizens to know the acts of public authorities. And this act of demanding information about governance is a necessary concomitant of the RTI legislation. Hence, the attempt in this would be to contextualize the same in light of the asset disclosure controversy and the judgment of the Delhi High Court.

Before we commence on the analysis of the judgment, it would be crucial to note the importance accorded to ‘right to know’ in light of

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72 D.V. Shylendra Kumar, Reluctance to disclose assets create impression that judge has something to hide... majority of judges are definitely not reluctant, available at http://www.indianexpress.com/news/reluctance-to-disclose-assets-create-impression-that-judge-has-something-to-hide-majority-of-judges-are-definitely-not-reluctant/505436/7 (Last visited on January 17, 2010).
judicial interpretations as the irony of the situation hinges upon the same with the impervious judiciary seeking an immunity from the dissemination of information of its own players. While the enactment of a formal legislation on right to information has been fairly recent, the seeds of it were sown by the Supreme Court in State of U.P. v. Raj Narain\(^7\) emphasizing on the importance of right to information with regards to the acts performed by public authorities. It held that:

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.”

(Emphasis supplied).

A similar approach was taken by the Apex Court in Union of India v. Association for Democratic Reforms and People’s Union for Civil

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\(^7\) AIR 1975 SC 865, ¶ 74.
Liberties v. Union of India,⁷⁵ which concerned the candidature for elections. The Court held:

“There is no question of knowing personal affairs of MPs or MLAs. The limited information is whether the person who is contesting election is involved in any criminal case and if involved what is the result? Further there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruptions by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not miscomputed himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed.”

(Emphasis supplied).

This being the context of the Indian judiciary of having accorded a very high status to right to know about the acts of public authorities, it would now be our endeavour to evaluate the Supreme Court Judges Asset case in the light of the same. The attempt would be to examine the judicial ruling in the perspective of mandating a ‘right’ of the common man seeking disclosure of assets of the members of judiciary.

(P) Bangalore Principles of Judicial Conduct, 2002

In this seminar, several principles were laid down regarding challenges of appointment and accountability. It was stated that:

⁷⁵ AIR 2002 SC 2112.
1. **WHEREAS** the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge,

2. **WHEREAS** the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law,

3. **WHEREAS** the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions,

4. **WHEREAS** the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice,

5. **WHEREAS** a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law,

6. **WHEREAS** public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society,
7. WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system,

8. WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country,

9. AND WHEREAS the Basic Principles on the Independence of the Judiciary9 are designed to secure and promote the independence of the judiciary and are addressed primarily to States,

The following principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

(a) Value 1 Independence

**Principle**

Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
Application

1. A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. 2. A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judge has to adjudicate. 3. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom. 4. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions that the judge is obliged to make independently. 5. A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary. 6. A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.

(b) Value 2 Impartiality

Principle

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application

1. A judge shall perform his or her judicial duties without favour, bias or prejudice. 2. A judge shall ensure that his or her conduct, both in and out
of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary. 3. A judge shall, as far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases. 4. A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue. 5. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where: (a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings; (b) The judge previously served as a lawyer or was a material witness in the matter in controversy; or (c) The judge, or a member of the judge’s family, has an economic interest in the outcome of the matter in controversy; provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

(c) Value 3 Integrity

**Principle**

Integrity is essential to the proper discharge of the judicial office.
Application

1. A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer. 2. The behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

(d) Value 4 Propriety

Principle

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application

1. A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities. 2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office. 3. A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge’s court, avoid situations that might reasonably give rise to the suspicion or appearance of favouritism or partiality. 4. A judge shall not participate in the determination of a case in which any member of the judge’s family represents a litigant or is associated in any manner with the case. 5. A judge shall not allow the use of the judge’s residence by a member of the legal profession to receive clients or other members of the legal profession. 6. A judge, like any other citizen, is entitled to freedom of expression, belief, association and
assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. 7. A judge shall inform himself or herself about the judge’s personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge’s family. 8. A judge shall not allow the judge’s family, social or other relationships improperly to influence the judge’s judicial conduct and judgment as a judge. 9. A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge’s family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties. 10. Confidential information acquired by a judge in the judge’s judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge’s judicial duties. 11. Subject to the proper performance of judicial duties, a judge may: (a) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters; (b) Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters; (c) Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or (d) Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties. 12. A judge shall not practice law while the holder of judicial office. 13. A judge may form or join associations of judges or participate in other
organizations representing the interests of judges. 14. A judge and members of the judge’s family shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties. 15. A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or authority to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions. 16. Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

(e) Value 5 Equality

Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application

1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”). 2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. 3. A judge shall carry out judicial
duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties. 4. A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground. 5. A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

(f) Value 6 Competence and diligence

Principle

Competence and diligence are prerequisites to the due performance of judicial office.

Application

1. The judicial duties of a judge take precedence over all other activities. 2. A judge shall devote the judge’s professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court’s operations. 3. A judge shall take reasonable steps to maintain and enhance the judge’s knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for that purpose of the training and other facilities that should be made available, under judicial control, to judges. 4. A judge shall keep himself or herself informed about relevant developments of international law, including international conventions
and other instruments establishing human rights norms. 5. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness. 6. A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge’s influence, direction or control. 7. A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

Implementation

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

(Q) Code of Conduct for Judges

Hon’ble Mr. Justice S.H. Kapadia, Chief Justice of India said: “When we talk of ethics, the judges normally comment upon ethics among politicians, students and professors and others. But I would say that for a judge too, ethics, not only constitutional morality but even ethical morality, should be the base…”

The well-known legal luminaries including Former Chief Justice of India S. Venkataramaiah and Former Judge of the Supreme Court D.A. Desai and another Former Judge of the Supreme Court Chennappa Reddy have expressed the view that if all the sections of the society are accountable for their actions, there is no reason why the Judges should not be so. Former Chief Justice, Verma recognized the validity of this
plea when he remarked on one occasion, “These days we (Judges) are telling everyone what they should do but who is to tell us? We have task of enforcing the rule of law, but does not exempt and even exonerate us from following it”. For proper implementation of this concept of judicial accountability, it is necessary that the Judges should follow a code of conduct which may be broadly called as ethics for Judges.

1. Judicial decision to be honest:- It is absolutely essential that in order that the Judge's life is full of public confidence in their role in the society, the judicial decision is to be honest and fair. No judicial decision is honest unless it is decided in response to an honest opinion formed in the matrix of the judges proficient of law and fact. However, the perception of an individual judge may be wrong. But a wrong decision honestly made does not make that decision dishonest. A decision becomes dishonest if not decided on judicial conviction of fairness, honesty and neutrality.

2. No man can be a judge in his own cause:- The basic code of ethics is the principle that no man can be judge in his own cause. The principle confines not merely to the cause where the Judge is an actual party to a case, but also applies to a case in which he has interest. A Judge should not adjudicate in a case if he has got interest therein. Judge do require a degree of detachment and objectivity in judicial dispensation. They being duty bound by the oath of office taken by them in adjudicating the disputes brought before the court in accordance therewith, Judges must remain impartial, should be known by all people to be impartial. This is made clear by the Supreme Court.
3. Administer justice:- Judges must not fear to administer justice. “Fiat justitia, ruat caelum” that is “let justice be done though the heavens fall” should be followed as a motto by a Judge.

4. Equal opportunity:- Parties to the dispute be treated equally and in accordance with the principles of law and equity. A judge does not belong to any person or section or division or group. He is the judge of all people. In the courts of law there cannot be double standard-one for the highly and another for the rest. A Judge should not have any concern with personalities who are parties to the case but only with merits. He must treat the parties to the dispute equally, giving them an equal opportunity during the trial. The Rt. Hon. Lord Hewart of Bury, Lord Chief Justice of England, said that it is “essential to the proper administration of justice that every party should have an opportunity of being heard, so that he may put forward his own views and support them by argument and answer the views put forward by his opponents”. The Supreme Court said in the celebrated case “No man's right should be affected without an opportunity to ventilate his views”. In classical language of metaphor, the God of Justice sits on a golden throne, but at his feet sit two lions—“law and equity”. A Judge will fail to discharge his duty if he disregards their presence and participation.

5. Maintenance of distance from relatives:- Since judging is not a profession but a way of life, the judge must distance himself from the parties to the dispute and their lawyers during the conduct of the trial. One can notice now a days the growth of a new caste in legal profession who thrive not by intellectual or professional capabilities but by utilizing their close connection with the judges. The growth of this suspicious trend can be checked if practicing lawyers and sitting judges avoid
meeting frequently in private. Persons who occupy high public offices must take care to see that those who claim to be close to them are not allowed to exploit that closeness, alleged or real.

6. Too much of activity and participation in social functions be avoided:—
It is often said that as a result of a very considerable amount of ordinary social activity, a Judge may become identified with people and points of view, and litigants may think they may not get fair trial. To repel that feeling, a Judge should avoid too much of social activity. Again, Judges should be very selective in attending social functions. Judges in England and USA generally decline such participation. If they attend even a private function, they ask for the list of invites.

In the chapter to follow, it is proposed to examine in detail the judicial decisions regarding challenges and issues of appointment and accountability.