

JUDICIAL ACCOUNTABILITY IN INDIA

UNDERSTANDING AND EXPLORING THE
FAILURES AND SOLUTIONS TO ACCOUNTABILITY.



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Abstract

In this paper, I am going to talk about the urgent need to bring the Judiciary under accountability. For long, the judiciary had cast a sacrosanct spell around it, such that the judges were considered demi-gods who could not commit any wrong; their decisions were final and unquestionable. But it is hard to turn a blind eye from what is happening in the name of justice delivery and the growing corrupt nature of the judges. It was soon realized that this is all happening because of lack of accountability. With a power like contempt of court they could terrorize anyone who would criticize the court. Questions arise like why a citizen cannot criticize the court and why the judiciary is immune from any accountability; they are raised in this paper. I have also looked at reasons why accountability has failed and have mentioned the solution where we can have 'clean judges in black robes'. The demand to have a National Judicial Commission, an independent mechanism is one of the workable solutions suggested by the civil society, media, jurist, lawyers, politicians and everyone who desires the judiciary to be accountable.

Together with accountability, I have also looked at the absolute need to strike a balance between accountability and independence. Just for the sake of maintaining independence, if we forsake accountability, then we will only see the crumbling of a very important organ of the government – the judiciary.

I. Introduction

The three organs of the Indian government – **Legislature**, **Executive** and **Judiciary** perform three essential functions of rulemaking, rule application and rule adjudication respectively. The main principle behind this formulation is **separation of powers**: which brings accountability, keeps the government restrained and in this way our rights and liberties are safeguarded. In fact the main driving force behind this is based on the simple saying that '**power corrupts man and absolute power corrupts absolutely**'. In the words of Montesquieu, "Constant experience has shown us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits'.

In short absolute power without accountability leads to corruption. Corruption in India is always in limelight. In his foreword to the UN Convention Against Corruption, the then Secretary General of the United Nations, Mr. Kofi Annan wrote, "Corruption is an insidious plague that has a wide range of corrosive effects on society. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and it allows organized crime, terrorism and other threats to human security to flourish."¹ However recently what has caught our attention is the corruption charges levied against judges; examples being a Calcutta High Court Judge Soumitra Sen guilty of misappropriating large sums of money and making false statements regarding it and Chief Justice of Karnataka High Court P D Dinakaran, alleged for land grabbing and corruption. It is nevertheless to be noted that the word 'recently' should not mislead us to think that corruption in Judiciary is a new thing, it has always been there, only less talked about. But given the increase in the rate of corruption charges one can't help but ask the question '**who is judging the judges?**'

There is another principle working together with the separation or balance of power i.e., **checks and balances**. Simply put the theory of checks and balances holds that no organ should be given unchecked powers. The power of one organ should be checked and restrained by the other two, thus a balance is secured. After all '**power alone can be the antidote to power**'. So we see in India how the executive is individually and collectively responsible to the legislature, although here the accountability has decreased because of anti-defection law, whereby if there is any amount of dissent from the legislator, he is threatened with removal which can cost his constituency being unrepresented. Thus all decisions of party leaders are now just rubber-stamped by Parliament.² The laws passed by the legislature are

¹ "Draft Lokpal Bill- Civil Society Version", The Hindu, in

² Harsh Gupta, "Defecting from anti-defection", in <http://www.livemint.com/2009/06/07212108/Defecting-from-antidefection.html> accessed on 15th July, 2011.

checked by the judiciary, if it goes against the Constitution the latter declares it null and void. Moreover the legislature is accountable to the people who elect them for five years. Given this it becomes clear that the judiciary is the guardian of the Constitution and protector of fundamental rights. In spite of this there is a sudden spate of judiciary corruption which is proving to be self-defeating and is indicating towards the lack of accountability in the institution, this is what I will be discussing in my project. This is important because in the preamble we give to ourselves **JUSTICE- Social, Economic and Political**.

Any authority that has some amount of public power must be responsible to the people. The fact is that in a 'democratic republic', power with accountability of the individuals enjoying it, is essential to avert disaster for any democratic system.³ But before moving into the concept of accountability, what is important to note and understand is another concept i.e. '**independence**' of judiciary. Both these concepts have to be studied together to understand any one.

³ J.S. Verma , 'Mechanism for judicial accountability' ,p.1,in http://www.judicialreforms.org/files/mechanism_jud_acc_verma.pdf, accessed on 4th of July, 2011.

II. INDEPENDENCE OF THE JUDICIARY

Independence is a bulwark of **rule of law**.⁴ If law is to be applied equally to all citizens in the country, then it is equally important that the judges should be independent in applying law and rendering judicial decisions. Judges can be subject to threats and pressures from litigants, including society's criminal element.⁵ Independence of judiciary is a recognized principle adopted by most of the democratic countries. Mona Shukla has provided us with the history of judicial independence in **United Kingdom, United States and India**.

United Kingdom: The concept first began from here. There had been a long struggle between the parliament and monarchy to control judiciary. In the 17th century, the parliament passed a settlement act, which stipulated that the tenure of the judges would be subject to good behaviour and their removal after an address to both houses of parliament.⁶

United States: Attempt for independence was seen in the 1985 *Basic Principles on the Independence of Judiciary* which states "the Judiciary shall decide matters before them... without any restrictions, improper influence, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason".⁷

India: Before independence, judges were appointed by the Crown, yet they had independence from it. After independence, this principle was taken seriously and it became a part of the Basic Structure of the Constitution, which cannot be amended. The independence is guaranteed by the Constitution which holds that the judges of the Supreme Court and the High Court hold office till he attains 65⁸ and 62⁹ years of **age**. The parliament is authorized to prescribe the **privileges, allowance, leave and pension** of the judges of the SC.¹⁰ The Constitution prescribes for **high qualifications** for the judges.¹¹

⁴ David Pimentel, 'Reframing the Independence vs Accountability Debate', p.5, in <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf>, accessed on 14th of June, 2011.

⁵ Ibid, p.6

⁶ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 24

⁷ David Pimentel, 'Reframing the Independence Vs. Accountability Debate', p.4, in <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf>, accessed on 14th of June, 2011.

⁸ Art 124(2) of the Indian Constitution

⁹ Art 217(1) of the Indian Constitution

¹⁰ Art. 125 of the Indian Constitution

¹¹ Art. 124(3) of the Indian Constitution

Further no judge can be removed from his office by the President except upon the presentation of him of an address by each house of the parliament for such **removal on the grounds of misbehaviour and incapacity**.¹² A judge of the SC and HC is **appointed** by the President of India in consultation with the CJ of India and such judges of SC and HC as he may deem necessary.¹³ The SC is also treated as the **court of record**.¹⁴ However this independence has been misused by many and it has also been the reason for the growth of enormous power. The problem actually lies in the understanding of independence; it should be understood as independence from executive and legislature and not independence from accountability. The spirit of independence has been captured very aptly by Lord Woolf, “the independence of the Judiciary is not the property of the Judiciary, but a commodity to be held by the Judiciary in trust for the public.”

III. JUDICIAL ACCOUNTABILITY

Judicial accountability is in fact a corollary of the independence of the judiciary. Simply put, accountability refers to taking responsibilities for your actions and decisions. It generally means being responsible to any external body; some may insist accountability to principles or to oneself rather than to any authority with the power of punishment or correction.¹⁵ Since accountability is a facet of independence the Constitution has provided in **Article 235**, for the ‘control’ of the High Court over the Subordinate Judiciary clearly indicating the provision of an effective mechanism to enforce accountability. Thus entrustment of power over subordinate judiciary to the High Court preserves independence as it is neither accountable to the executive or the legislature.¹⁶ The provision of the difficult process of impeachment has also been directed towards this goal. The absence of any mechanism for the higher judiciary except for extreme cases is because the framers of the Constitution had thought that ‘**settled norms**’ and ‘**peer pressure**’ would act as adequate checks. However it hasn’t happened completely in that manner. The main problem is that the judiciary is neither democratically accountable to the people nor to the other two organs.

The Supreme Court had rightly asserted that “A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system.”¹⁷ This brings us the section on **why do we need accountability**. A campaign issued by the people’s convention on Judicial

¹² Art 124(4) of the Indian Constitution

¹³ Art. 124(2) of the Indian Constitution

¹⁴ Art 129 of the Indian Constitution

¹⁵ David Pimentel, ‘Reframing the Independence Vs. Accountability Debate’, p.15, in <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf>, accessed on 14th of June, 2011.

¹⁶ J.S. Verma, ‘Mechanism for judicial accountability’, p.1, in http://www.judicialreforms.org/files/mechanism_jud_acc_verma.pdf, accessed on 4th of July, 2011.

¹⁷ Anil Divan, ‘Judicial Integrity’, p.1, in http://www.judicialreforms.org/files/Hindu_judicial_integrity_lessons_from_the_past.pdf, accessed on 15th of July, 2011

Accountability and Reforms had mentioned, “ The judicial system of the country far from being an instrument for protecting the rights of the weak and the oppressed has become an instrument of harassment of the common people of the country.... The system remains dysfunctional for the weak and the poor... (and has been) displaying their elitist bias.”¹⁸

Mona Shukla has listed down **three promotions** done by Judicial Accountability:

1. It promotes the **rule of law** by deterring conduct that might compromise judicial independence, integrity and impartiality.
2. It promotes **public confidence** in judges and judiciary.
3. It promotes **institutional responsibility** by rendering the judiciary responsive to the needs of the public it serves as a separate branch of the government.¹⁹

Transparency is facilitated through the process of accountability. It is best achieved when one is accountable to law. The existing systems of accountability have failed, and the growing corruption is eating away the vitals of this branch of democracy. This lack of accountability has been best put forward by Pt. Nehru in a diatribe, “judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them.” The demi god’s image has to be replaced, after all judges are also humans capable of making mistakes and committing vices. But what has gone wrong? The problem in making the judiciary accountable is discussed below which will help us in understanding the issue and later find solutions to achieve it.

¹⁸ Mona Shukla, ‘Judicial Accountability: an aspect of judicial independence’ in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 4

¹⁹ Ibid, p.4

IV. PROBLEMS IN REGARD TO MAKING JUDICIARY ACCOUNTABLE:

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

1. **Impeachment:** The only available mechanism is too impractical.

According to the Indian Constitution, the only way through which the members of the higher judiciary that is the Chief Justices and Judges of Supreme Court (SC) and High Courts (HC) are accountable or can be removed is through impeachment. Many regard impeachment as a failure, but before moving into that it is important to see the constitutional provisions. Under **Article 124(4)**, the process of impeachment is carried out only on the grounds of proven misbehaviour or incapacity. The Judges Inquiry Act, 1968 states that a complaint against a judge is to be made through a resolution signed either by 100 members of the Lok Sabha or 50 members of the Rajya Sabha to their respective presiding officers. There is a three member committee comprising two judges one from SC and the other Chief Justice of India if it is against a HC judge; and two SC judges if it is against a sitting judge at the apex court. Investigations are carried out before making a recommendation to the house. If the committee has concluded for the impeachment process to take place, the matter is discussed in both houses.²⁰ The alleged judge is also given opportunity to rebut the charges. After the debate is done and the judge is heard, the house decides to put the motion to vote, a resolution passed by 2/3rds majority in both houses. This whole process has to be completed in a single session. After the resolution is passed, it is sent to the president who then orders for removal.

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

Reasons:

- To begin an impeachment one needs signatures to pass the resolutions. However, that becomes quite an impossible task since many MPs have their own pending individual or party cases in these judges court, so they are not willing to risk themselves. Conclusive documentary evidences are also required before they put their signatures to the motion²¹. In one of his interviews, Prashant Bhushan cites an example where in an impeachment proceeding against Justice Bhalla, the BJP declined to sign because

²⁰ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 7

²¹ Background paper for the Seminar on Judicial Accountability, 'Securing Judicial Accountability' p.1, in <http://www.judicialreforms.org/files/securingjudicialaccountability.pdf> accessed on 4th of July, 2011.

L.K. Advani had been acquitted by him in the *Babri Masjid* demolition case²². One can also not forget the Justice Ramaswamy case, who had been charged with misusing of courts fund, yet the Congress (I) refused to cast their vote. Few points that definitely proves his misbehaviour.

1. "That he is misappropriated some of the furniture, carpets, and some other items purchased from the court's funds for his official residence costing more than Rs 1,50,000 and did not account for the same at all.
2. "That he misused public funds to the extent of Rs 9.10 lac by making the court pay for non-official calls made on his residential telephones at Chandigarh during his 22 months in office as a Chief Justice of Punjab and Haryana High Court.
3. "That he gave unjustified promotions to several members of subordinate staff of the HC whom he misused for aiding and abetting his acts done for his personal gain."²³

He was the first judge to face impeachment proceeding but it failed even though there were conclusive evidences against him.

- The Investigating Committee comprising the judges themselves doesn't seem the correct mechanism. It has often been said that the judges act together like a 'trade union', so they generally wouldn't like to charge their fellow colleagues of corruption. A solution to this can be the National Judicial Commission, an independent institution. Such a commission will have their own investigating machinery. Thus it will also not harm the independence since the judiciary is not accountable to either the executive or legislature.
- I do agree with the special 2/3rd majority. This will maintain the independence and also adds the seriousness to the issue. It is important to understand that at the end of the day judiciary is an important organ with huge responsibilities. An organ with extraordinary functions demands to be treated differently. A simple majority on the other hand can prove to be detrimental to independence.

2. The Veeraswamy case:

The additional immunity with which the judges have cloaked themselves was in the Justice R. Veeraswamy case, in which it was declared that judges of SC or HC cannot be subjected to investigation in any criminal offence of corruption, or a FIR be registered against them without the prior permission of

²² Shoma Chaudhury, 'Half of the last 16 Chief Justices were corrupt', p.1, in <http://www.judicialreforms.org/files/Tehelka%20interview%20with%20Prashant%20Bhushan.pdf> accessed on 4th of July, 2011.

²³ Frontline, 'Motion for presenting an address to the President under Clause(4) of the Article 124 of the Constitution', vol.10, no.11, May22-June4,1993, p.18 in <http://www.judicialreforms.org/files/Motion%20of%20Impeachment%20-%20Ramaswami.pdf> accessed on 5th of July,2011.

the CJJ.²⁴ Again it's not likely that the CJJ will allow such permission, as it can bring shame to the entire Judiciary.

3. Contempt of Court:

The contempt of court can be seen as a means to protect the independence of the court, however it is mostly seen that the court has used this as a means of shielding themselves from any criticism. Contempt is defined as any act that is offensive and critical to the dignity and the authority of courts. According to Oswald, "contempt of court is so manifold in its aspect that it is difficult to lay down the exact definition of the offence."²⁵ Contempt can be classified into two groups:

- **Civil:** means wilful disobedience of any, judgment, decree, direction, order or any other processes of court.
- **Criminal:** means publication of any matter or the doing of any other act whatsoever which scandalizes or tends to lower the authority of any court.

It has often been referred that contempt of court for much part is a hangover from the British rule. During the British rule, India was not free and democratic, but today the situation has changed. Questions therefore arise as to how can laws of those days be applicable today.²⁶ There is also problem with the definition, as there is no definition as to what constitutes scandalizing the court as what was regarded scandalous earlier may not be regarded today. The Contempt of Court Act 1952 has also been criticized on the basis that it infringes two important fundamental rights of the citizen, namely, the right to personal liberty and the right to freedom of expression. Given this allegation one is reminded of two important cases that took place:

- **Arundhati Roy case:** the problem arose as a result of the decision of the SC, which ordered the concerned state governments to raise the height of the Sardar Sarovar Dam up to 90 ft. This came as a great disappointment to the *Narmada Bachao Andolan* as it would lead to more submergence of the nearby villages. This was severely criticized and a notice of contempt was served against Arundhati Roy, Medha Patkar and advocate Prashant Bhushan. The three however asserted that they were exercising their freedom enshrined in the Constitution. The court held Arundhati Roy guilty and sentenced her to one day imprisonment and a fine of Rs. 2000.²⁷ What was shocking and rather patriarchal was

²⁴ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 8

²⁵ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 10

²⁶ Markandey Katju, "Contempt of Court", p.1 in <http://www.judicialreforms.org/files/1%20Contempt%20of%20Court%20-%20Markandey%20Katju%20-%20The%20Hindu.pdf> accessed on 4th July, 2011

²⁷ S.P. Sathe. "accountability of Supreme Court", p.1384, *Economic and Political Weekly*, 13th April, 2002 in <http://www.judicialreforms.org/files/Accountability%20SC%20EPW.pdf> accessed on 4th July, 2011

condescendingly referring her as a “woman” whom they had treated leniently by giving her one day punishment.²⁸

- **Mid-Day journalists** had published documentary evidences against Justice Sabharwal, who passed the orders of sealing commercial properties in residential areas in Delhi, after his sons had got partnership with leading shopping malls. These orders stood for their benefits. Yet no action was taken against him. It was only after the convictions of four Mid-Day journalists for contempt, by Delhi HC, that the news got coverage in the mainstream media²⁹. This shows a fear in the media which has deterred them from investigation against corruption in judiciary. The fact is that this power is like a Damocles’ sword which hangs over the neck of the people, particularly the media.³⁰

4. Exemption from the Right To Information (RTI):

One of the ways the Judiciary can be held accountable is when the people have the right to know what exactly they are doing. This comes naturally in a democratic form of government. In the famous “Raj Narain Vs Indira Gandhi” case, the foundation for the RTI was laid by the SC. It stated “the people of the country have the right to know about every public act ... this is derived from the concept of freedom of speech... To cover it with the veil of secrecy the common routine business is not in the interest of the public.”³¹ This is chief safeguard against corruption.

There are in fact, in many countries where public disclosure of asset is required as a measure for good government. In the US, the Ethics in Government Act 1976 requires the annual disclosure of financial information by all related to policy making responsibility. This issue of asset declaration arose when Subhash Agarwal, inquired about the information whether the judges were complying with the 1997 “Code of Conduct”. The Central Information Commission had directed the information officer of the court to obtain the information from the CJ’s office and provide it to the applicant. This prompted the SC to file a writ petition in the Delhi HC, claiming that asset disclosure was exempted under RTI act on the basis that this information was disclosed by the judges to the Chief Justice under “fiduciary relationship”.³² The double standard of the courts on RTI Act was seen when although the courts were

²⁸ Ibid

²⁹ Background paper for the Seminar on Judicial Accountability, ‘Securing Judicial Accountability’ p.2, in <http://www.judicialreforms.org/files/securingjudicialaccountability.pdf> accessed on 4th of July, 2011.

³⁰ Prashant Bhushan (on behalf of the Committee on Judicial Accountability), ‘Committee on Judicial Accountability’, p.2 in <http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf> accessed on 4th July, 2011

³¹ Prashant Bhushan, “judicial accountability”, p.1 in <http://www.judicialreforms.org/files/EPW%20judicial%20accountability%20asset%20disclosure%20and%20beyond.pdf>, accessed on 4th July, 2011.

³² Prashant Bhushan, “judicial accountability”, *Economic and Political Weekly*, vol. XLIV No.37, 12th September, 2009, p. 9 in <http://www.judicialreforms.org/files/EPW%20judicial%20accountability%20asset%20disclosure%20and%20beyond.pdf>, accessed on 4th July, 2011.

included in the definition of Public Authorities most of the HCs did not even appoint Public Information Officers (PIOs) even months after this act came to force. Moreover information regarding the appointment of Class 3 and 4 employees by the High Court had been denied under the Delhi HC rules that provide for:

“5. Exemption from the disclosure of information- the information specified under section 8 of the act shall not be disclosed and made available and in particular the following information shall not be disclosed:-

- (a) Such information which is not in the domain or does not relate to Judiciary functions and duties of the court and matters incidental and ancillary thereto.”³³

5. **Judges Inquiry Act:**

The judiciary claims that any outside body having disciplinary powers over them who compromise their independence so they have set up an “**in-house mechanism**” investigating corruption. This was proposed by the Judges Inquiry Act Amendment Bill 2006 which provided for a National Judicial Council consisting of the CJI, two senior-most judges of the SC and two CJ’s of HCs as members to enquire allegations.³⁴ The problem which arises is that in this in-house procedure the judges regard themselves as a ‘close brotherhood’³⁵ and therefore are unwilling to take any step against them. What is objectionable is Section 33, which says not to disclose any information relating to the complaint to any person in any proceeding except when directed by the Council. This will make it impossible to publicise the charges.³⁶ Moreover, even if it finds a judge guilty of serious misconduct, it can only recommend impeachment which again goes for voting in the parliament, ultimately failing as we saw in the Ramaswamy case. The only positive feature of the bill is that it initiates an enquiry into the allegations of misconduct of a judge.

6. **Judicial activism**

The lack of accountability has been especially egregious when in recent times we see the higher judiciary making inroads into and passing orders which are within the domain of the executive and legislature. For instance laying down policy regarding demolition of *Jhuggis* from *Yamuna Pushta*, hawkers, cycle

³³ Prashant Bhushan , “ Right to Information and the Judiciary”, p.2 in <http://www.judicialreforms.org/files/3%20-%20RTI%20&%20the%20Judiciary%20-%20Prashant%20Bhushan.pdf> accessed on 4th July, 2011.

³⁴ Mona Shukla, ‘Judicial Accountability: an aspect of judicial independence’ in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 62.

³⁵ Background paper for the Seminar on Judicial Accountability, ‘Securing Judicial Accountability’ p.4 ,in <http://www.judicialreforms.org/files/securingjudicialaccountability.pdf> accessed on 4th of July, 2011.

³⁶ Prashant Bhushan (on behalf of the Committee on Judicial Accountability), ‘Committee on Judicial Accountability’ , p.6 in <http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf> accessed on 4th July, 2011

rickshaws etc. are to name a few³⁷. Last year the Supreme Court directed the centre to release five million tons of food grains immediately for distribution, because millions of tons of food grains were lying in the open for years because of inadequate storage capacity³⁸. To cite another striking example is when the SC issued a notice to the union govt. regarding the steps taken by it to ameliorate the plight of Indian students who were being racially attacked in Australia. It is to be noted that foreign policy is non-justifiable, but that did not put a stop to the court's action. Another example of interference was when the SC issued a notice questioning the proliferation of the Mayawati statues, worth crores of rupees, in Uttar Pradesh. Just like foreign policy, budgetary allocations are non-justifiable. In 2006, SC issued guidelines to reform the police administration which is completely a state subject³⁹. A more recent case being the judgment given by the Supreme Court in appointing two former justices to superintend the Special Investigating Team (SIT) on black money issue of the government.⁴⁰ The SC is right in holding the government accountable, but imposing such a judgment is not justified. It is in a way encroaching in the spheres which is not allocated to it by the Constitution. Second, the SIT comprising of only judges also doesn't seem the correct mechanism; the members should belong from both judicial and non-judicial background. Third, the Supreme Court should have examined the claim of the charges initiated by the petitioners against the RBI, rather than legitimizing it. After all it has questioned the integrity of an institution. If someone had alleged the SC in a similar manner of having close association with any other institution (like the way the RBI has been associated with the UBS), it would have counter attacked it, with its power of contempt of court. It is to be noted that although the decisions may be well intentioned but the 'micro-managing' nature of the judges has to be curbed.

7. Other causes:

- **Appointment system:** in 1993, a nine judge bench of SC laid down a new system for making appointments of judges in HC and SC. This gave enormous powers to the collegium of senior judges of the SC to select and make recommendation to the government for these appointments.⁴¹ There is no transparency in the process, no system followed for preparing the shortlists or for choosing among eligible members. The whole process is entirely ad hoc and arbitrary, which has lead to political

³⁷ Prashant Bhushan (on behalf of the Committee on Judicial Accountability), 'Committee on Judicial Accountability', p.1 in <http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf> accessed on 4th July, 2011

³⁸ J. Venkatesan, "Release 5 million tonnes of foodgrain: Supreme Court" in <http://Indialawyers.wordpress.com/category/judicial-activism/> accessed on 8th July, 2011

³⁹ Abhinav Chandrachud, "Dialogic judicial activism in India", in <http://www.hindu.com/2009/07/18/stories/2009071852820800.htm> accessed on 8th July, 2011

⁴⁰ Pratap Bhanu Mehta, "Overreaching?" in <http://www.Indianexpress.com/news/overreaching/813221/> accessed on 8th July, 2011.

⁴¹ Shanti Bhushan, 'Clean up the Judiciary', pg 1 in <http://www.judicialreforms.org/files/shantibhushancleanup.pdf> accessed on 5th July, 2011

favouritism when appointments were in the hands of the executive and nepotism when it has been in the hands of the judiciary.⁴²

- Apart from the above there are other serious loopholes like **Inaccessibility**- highly expensive beyond the reach of common man, who can hardly afford the long duration of the entire procedure.

Another problem is the **Pending of cases**: one judge of the HC in Delhi calculated that 464 years will be required to clear the arrears with the present strength of the judges in that High Court. In Allahabad HC, more than eight and a half lakh of cases are pending.⁴³

The above problems, are evidence of the grave situation in the judiciary and it certainly calls for accountability. It is important to have accountability that will slightly compromise the judge's independence than to have an increase in corruption due to lack of accountability. The need of the time is to come up with solutions before there is a decay of the judiciary. Some of them are discussed below:

⁴² Prashant Bhushan, "judicial accountability", *Economic and Political Weekly*, vol. XLIV No.37, 12th September, 2009 ,p.10 in <http://www.judicialreforms.org/files/EPW%20judicial%20accountability%20asset%20disclosure%20and%20beyond.pdf> , accessed on 4th July, 2011.

⁴³ Law Commission of India, "Reforms in Judiciary", Report No. 230, August 2009, p.14 in <http://lawcommissionofindia.nic.in/reports/report230.pdf> accessed on 14th June, 2011

IV. SOLUTIONS

1. RESTATEMENT OF VALUES OF JUDICIAL LIFE: CODE OF CONDUCT.

The conference of Chief Justices of all HCs was held on 3rd and 4th December, 1999, where all the Chief Justices unanimously resolved to adopt the “Restatement of Values of Judicial Life”. This would serve as a guide to be observed by the judges, essentially for an independent, strong and respected judiciary in the impartial administration of justice. Some of codes that must be followed are –

- Judges should not conduct election to any office of club, society or other associations
- A judge should not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
- A judge should not speculate in shares, stocks or the like.⁴⁴ (for a full view of the Code of Conduct, please see the link at footnote no. 42)

2. The NATIONAL JUDICIAL COMMISSION (NJC):

Growing dissatisfaction with the failure of in-house mechanism, it has been rightly felt that an independent mechanism like the NJC would help in achieving the much needed accountability. The suggestion for a NJC has been made by the 80th Report of the Law Commission of India and the 121st report of the Law Commission of India.⁴⁵ This body will consist of five members:-

- (i) One member nominated by a collegium of all the judges of Supreme Court.
- (ii) One member nominated by collegiums of all Chief Justices of High Court
- (iii) One member nominated by the cabinet
- (iv) One member nominated by a collegium of the Speaker, Leader of the Opposition in the Lok Sabha and the leader of Opposition in the Rajya Sabha
- (v) One member nominated by a collegium of Chief Vigilance Commissioner of the Central Vigilance Commission (CVC), Comptroller and Auditor General (CAG) and the Chairperson of the National Human Rights Commission (NHRC).⁴⁶
- (vi) They will work as full time members. They will have investigating machinery, where charges against judges will get investigated. According to the committee on judicial accountability, this commission

⁴⁴ Hon. Satya Brata Sinha, ‘Judicial Independence, Fiscal Autonomy and Accountability’, p. 11 in http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_India (SB Sinha).pdf accessed on 14th June, 2011

⁴⁵ Mona Shukla, ‘Judicial Accountability: an aspect of judicial independence’ in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 83

⁴⁶ Prashant Bhushan (on behalf of the Committee on Judicial Accountability), ‘Committee on Judicial Accountability’, p.7 in <http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf> accessed on 4th July, 2011

will also select judges for appointment to HC and SC, which will be notified for public information.⁴⁷

Thus in this way independence is maintained as they are not accountable to the Parliament or the Government.

3. **JUDICIAL STANDARD AND ACCOUNTABILITY BILL:**

This will replace the previous Judges Inquiry Act. It will be headed by a former Chief Justice of India, where the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts. The five-member committee will be appointed by the President. Here the President is bound to accept PM's recommendation. Now if this recommendation is done by a three member committee two from government and one recommended by the leader of the opposition, then the minority dissent will also be addressed. On receiving a complaint, the committee will forward it to a system of scrutiny panels, which will have the powers of a civil court. If the charges are serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal. The bill mandates that the judges should not have any close association with the individual members of the bar. All the details concerning the investigations will be put up in the SC and HC websites.⁴⁸

4. **JUDICIAL RESTRAINT AGAINST ACTIVISM:**

The above mentioned extreme activism is not justified as the courts should be concerned with the legality of the law only. It raises accountability question since they are not directly elected by the people, neither they are answerable to the executive or legislature. Furthermore, on what grounds are the bench that decides a case selected is also not clear. We can learn from the USA judicial courts where there is a private meeting of nine judges deciding on a petition, if four justices vote to grant the petition, the case proceeds, otherwise it ends.⁴⁹ Similar clear cut methods are also desired in our country. This surely calls for the curtailment for activism after all one cannot just start doing others function, which is against the principle of separation of powers. It may be argued by the courts that because of incapacity of the other two organs, they are indulging in activism and this is being proved by the growing number of cases filed in the PIL, however this explanation does not justify in what the judiciary is doing. There should be *suo-moto* cognizance but preferably after some delay and it should be followed by recommending an array of alternatives. Its role should be more of advisory, accepting or

⁴⁷ Prashant Bhushan (on behalf of the Committee on Judicial Accountability), 'Committee on Judicial Accountability', p.7 in <http://www.judicialreforms.org/files/4%20Comments%20of%20COJA.pdf> accessed on 4th July, 2011

⁴⁸ P. Sunderarajan & J. Venkatesan, "Cabinet nod for judicial accountability bill" in <http://www.hindu.com/2010/10/06/stories/2010100664441200.htm> accessed on 15th June, 2011.

⁴⁹ Supreme Court of United States, "process" in http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States

rejecting it would on the other hand depend on the two organs. What is therefore required is **judicial restraint**, i.e., limitation on judicial decision making, other than those explicitly imposed by the Constitution or statutes.

5. **AMENDMENT OF THE CONTEMPT OF COURTS ACT:**

It is high time that the Contempt of Courts Act be amended. The Contempt of Courts (Amendment) Bill, 2003 was introduced in the Lok Sabha and the same was referred to the Parliament Standing Committee on Home Affairs for examination and report. The committee received several memoranda containing suggestions, few are discussed below.

- a. Accused should be given reasonable opportunity to defend himself according to law.
- b. Cases of contempt should not be tried by courts but by an independent commission of concerned district.
- c. The Act should be amended to remove words, 'scandalizing the court or lowering the authority of the court' from the definition of criminal contempt.⁵⁰

It is to be noted that the recently introduced amendment of truth may be a good defence in contempt action while mitigating a problem, but it does not solve the issue, because one often needs to prove the truth of the allegation before the same judge against whom the allegation has been made, thus the whole exercise become meaningless.

6. **ALERT CIVIL SOCIETY:**

The merits of accountability are being well recognized in the society today and this is taking the shape of campaign against corruption and for judicial accountability. It is a well-accepted fact that it is the common man who is the main consumer of all judicial decision; therefore they have the full right to have a clean Judiciary.

7. **ROLE OF MEDIA AND NGOS:**

Media is considered to be the forth pillar of democracy. Earlier media had always been silent because of the threat of the Contempt of Court Act, but with the amendment of this act, it seems that the freedom of expression will not be infringed. It is true that the media has its own negative sides but one cannot fail to give credit to its positive aspect, for instance in the investigating role it played in the Jessica Lal

⁵⁰ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 16-17

case. The way it brought the truth out was indeed incredible. The negative aspects can be solved through a common ethics for media with regard to honesty and fairness.⁵¹

Judicial reforms issues were also raised by the **NGO's**. Some that were discussed are:

- (a) Weak governance and corruption in judiciary
- (b) Lack of laws to govern magistrate.
- (c) Lack of judges and lawyers
- (d) Low salary of judges and prosecutors.⁵²

8. **LOKPAL BILL:**

With the Lokpal bill being in news, it becomes necessary to look at what it thinks about judicial accountability. To begin with there are two versions of Lokpal bill. In the **Government version**, the judges are not brought under scrutiny. It will be only an advisory body and therefore the Lokpal cannot register an FIR on any complaint. The Lokpal will comprise of three members and all will be retired judges, now this committee will be selected by politicians themselves.⁵³

The **Civil Society** version brings the judges under its jurisdiction. Complaints can be initiated by Lokpal itself or from the public directly. The Lokpal will comprise of 11 members which will be broad based.⁵⁴

According to me, the Lokpal should only take matters relating to politicians and bureaucrats and not judges. For the judges an entirely different, independent and exclusive mechanism should be there. Second, I have a problem with the government version of three members, the 11 member of civil society is more workable and less biased, and thus it will not be dominated by any one institution. Third, if the judges are included, then the public shouldn't be allowed directly to initiate action, the grievance should be processed by the committee, this will then manage frivolous cases from infringing independence of judiciary.

9. **PRIVATE ARBITRATION:**

This is recognized as an effective method whereby parties who are involved in a dispute, upon an agreed rules and regulation, share of expense, try to reach a settlement. A qualified arbitrator who is a licensed professional and expert in that area is hired to solve the issue. The parties involved also decide that after

⁵¹ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 36

⁵² Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 37

⁵³ "Draft Lokpal Bill- Civil Society Version", The Hindu, in <http://www.thehindu.com/news/national/article2123870.ece> accessed on 6th July, 2011

⁵⁴ "Draft Lokpal Bill- Civil Society Version", The Hindu, in <http://www.thehindu.com/news/national/article2123870.ece> accessed on 6th July, 2011

the completion of the resolution it may further not be appealed. This saves them from the prolonged litigation experience.

In India, arbitration involving commercial disputes is being recognized as an effective method. Equitable solutions are reached more quickly than litigation, at less costs and it allows parties to adopt whatever procedures they choose for the resolution of the disputes. The courts in India have offered full support and encouragement for arbitration; they do not review the merits of an award in arbitration, unless requested by any party and only under restricted grounds of challenge laid down in the Arbitration Act.⁵⁵

10. LAW COMMISSION REPORT NO. 230, AUGUST 2009:

This report has come up with certain recommendations. Some of which are discussed below:

- **Increase in number of working days:** considering the huge number of pendency which has been discussed above it becomes necessary to increase the number of working days. This introduction must be done at all levels of judicial hierarchy and it must begin from the apex court.
- **Speedy justice** is a right of every litigant and this has been guaranteed in Article 21 of the Constitution. In fact it has been rightly said that 'justice delayed is justice denied'. Therefore effective steps have to be taken; an attempt has been made by Gujarat state and Delhi to have evening courts.
- **Alternative dispute resolution (ADR):** with new demands emerging, sometimes the existing ones fail, the ADR has emerged out of this vision. Provisions has been made in the Legal Service Authorities Act for settling cases through Lok Adalats these are voluntary mediating agencies where by lawyers, retired judges and social activists can take up pending cases in the lower courts and secure a settlement.
- **Technology:** Modern technologies help to collect a lot of information and also build judicial database, which enables us to assess the performance of judiciary as an institution.⁵⁶

11. INTERNATIONAL TAKE ON ACCOUNTABILITY:

World conferences of independence of judiciary at Montreal, 1993: it dealt with independence and accountability of international judges. It also discussed about selection, training, promotion, transfers, privileges etc.

Caracas Conference, 1999: this passed a plan of action upholding the principle of rule of law, independence of Judiciary and human rights.⁵⁷

⁵⁵ "Arbitration in India", in <http://www.ficci-arbitration.com/htm/arbiinIndia.htm> accessed in 8th July, 2011.

⁵⁶ Law Commission of India, "Reforms in Judiciary", Report No. 230, August 2009, p.13-14, 23 in <http://lawcommissionofindia.nic.in/reports/report230.pdf> accessed on 14th June, 2011

Bangalore Principle of Judicial Conduct, 2002: after referring to the UN Basic Principles on the Judiciary formulated six values: independence, impartiality, integrity, equality, propriety and competence and diligence. Under each value the principle describe considerations and situations of which judges are aware of. It recommended certain points:

That civil society and policy makers should utilize these standards as a basis of their engagements with governments and judiciaries. Attempt must be made to bring to attention of all judiciaries about Bangalore Principles and encourage their adoption. Discussion among national judges on the issues of judicial conduct and accountability must also be encouraged.⁵⁸

⁵⁷ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 27

⁵⁸ David Pimentel, 'Reframing the Independence Vs. Accountability Debate', p.15, in <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf> , accessed on 14th of June, 2011.

V. CONCLUSION:

The fact that independence may need some interference shows that there are other ideals i.e. unbiased and fair trials, more important than the former and these ideals can be achieved only through an accountable judiciary. Independence should be used only as a means to achieve this end and not an end in itself. If accountability is not taken seriously we can witness a dangerous nexus between corrupt judges and politicians which will bring an end of democracy. It is also important to keep in mind that accountability in judiciary is different from the other two organs, the distinctive nature of the office demands separate treatment and this is in view of the nation's benefit.

The main task of judiciary is to dispense speedy justice and bring relief to the litigant. It is through this way that public trust can be maintained. As the saying goes 'let justice be done, even though heaven fall'. However it is not that the judiciary has completely failed; Lok Adalats and Nyaya Panchayats have definitely helped the people in having an equal and fair justice. A judge can ultimately be deemed accountable if she/he adheres to the normative and ethical principles of her society and culture.⁵⁹

It was once said by the former President K.R. Narayan that, "It is not an exaggeration to say that the degree of respect and public confidence enjoyed by the SC is not matched by any other institution in the country."⁶⁰ This trust can be maintained only when the judiciary is constantly subjected to people's 'ombudsmanning'.⁶¹ It has to accept that criticism is a way of reinforcing accountability and therefore it must be tolerant. The best judicial reform would be the one where judiciary functions according to the philosophy of the Constitution. An organized public opinion and campaign is required to bring about greater accountability.

⁵⁹ David Pimentel, 'Reframing the Independence vs Accountability Debate', p.15, in <http://www.clevelandstatelawreview.org/57/issue1/Pimentel.pdf>, accessed on 14th of June, 2011.

⁶⁰ Mona Shukla, 'Judicial Accountability: an aspect of judicial independence' in *Judicial Accountability*, Regal Publications, New Delhi, 2010, p. 79

⁶¹ S.P. Sathe. "accountability of Supreme Court", p.1384, Economic and Political Weekly, 13th April, 2002 in <http://www.judicialreforms.org/files/Accountability%20SC%20EPW.pdf> accessed on 4th July, 2011

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