JUDICIAL ACCOUNTABILITY AND INDEPENDENCE : EXPLORING THE LIMITS OF JUDICIAL POWER

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Given the need and urgency of a transparency measure in governance in the light of the controversy surrounding the elevation of Justice P. Dinakaran to the Supreme Court ,the present article seeks to examine the accountability-independence continuum in the context of the Indian judiciary .Through the course of this article, we opine that judicial independence and accountability are a necessary concomitant of the process of governance and an isolated evaluation of the two is undesirable for the proper functioning of democracy. If one takes an approach which views accountability to be at loggerheads with independence, one runs the risk of not appreciating the subtle relationship between corruption and independence. The former, if unchecked, leads to a situation of disrespect of the law and therefore poses a challenge for the judiciary to establish its independence in letter and in spirit. Our central argument is that an independent evaluation of judicial independence and judicial accountability is unwarranted and we seek to suggest the same through an analysis of public accountability debate and the controversy surrounding the recent Judge's (Declaration of Assets and Liabilities) Bill 2009.

I. INTRODUCTION

There is no difference between the Judge and the Common Man except that one administers the law and the other endures it…We (Judges) have indeed a 50 percent chance of being right in any case we try, and of course, the usual chance of not being found out if we are wrong. The last chance is something else we share with the Common Man.

- McKenna J.[1]

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[1] *The Judge and the Common Man*, 32 Mod L.R. 601 as cited in O.Chinnappa Reddy, The Court And The Constitution Of India 310 (2008).

The institution of judiciary in a democratic setup is perhaps one of the most important organs as it is entrusted with the great responsibility of administering justice, one of the core needs of the citizenry. As the custodian of rights of the citizens of a country, the judiciary is bestowed with the task of realizing the constitutional values to its fullest extent, in furtherance of the vision of the Constitution Makers. The Preamble to the Constitution enshrines the ideals of securing social, economic and political justice to all its citizens. Justice, failed to be meted out in a fair manner, jeopardizes the interests of the civil society, vitiating the principle of rule of law. An independent judiciary can be stated to be the cornerstone of a democracy.[2] In *Union of India* v. *Sankalchand Himmatlal Seth*,[3] Untwalia J. called the judiciary as a "watching tower above all the big structures of the other limbs of the state from which it keeps a watch like a sentinel on the functions of the other limbs…". Therefore, the presence of a strong, independent and efficient judiciary, both in letter and spirit, is an absolute necessity to achieve the laudatory goals imbibed in the Constitution, for it is an established principle of natural justice that justice is not only to be done but should be manifestly seen to be done.

It is needless to say that the judiciary and the judicial decisions, over the years, have shaped the Indian polity to a great extent. The role played by the judiciary has been pivotal in ensuring a process of fairness in governance and administration. Thus, be it the pragmatic interpretation of Article 21 or propounding doctrines of equality, the judicial decisions in India have infiltrated through every strata of the society. While many of these decisions are laudable, in recent times, allegations, questioning the integrity of this great institution have multiplied. Lack of accountability and the alleged wide spread corruption have endangered the spirit of democracy, calling into question the integrity of the conscience keepers of the law. As a result, constant public debates and scrutiny have subjected the judiciary to stand the touchstone of accountability to ensure an increased transparency in the judicial process and restore the lost public faith. However, the demand for greater accountability in the judiciary has been met with resistance from within the judiciary, afraid of encroachment into the realm of judicial independence.

This article, in its limited scope, aims to examine the veracity of the rhetorical resistance between the judicial independence and judicial accountability especially in the light of the recent Judge's (Declaration of Assets and Liabilities) Bill, 2009 (hereinafter Bill). While critically examining the provisions of the Bill, we seek to argue that judicial independence and accountability fortify each other and thus should not be viewed in isolation to each other. Proceeding from there on, we

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[2] It is a part of the basic structure of the Constitution of India: *see generally* All India Judge's Association v. Union of India (2002) 4 SCC 247 ¶ 24; S.C. Advocates –on- Record v. Union of India AIR 1994 SC 268, 421; S.P. Gupta v. Union of India AIR 1982 SC 149,197,198; L. Chandra Kumar v. Union of India (1997) 3 SCC 261,301; Kumar Padma Prasad v. Union of India AIR 1992 SC 1213, 1232.

[3] AIR 1977 SC 2328.

then seek to examine the idea of "public accountability" in light of the said Bill drawing from the applicability of the Right to Information Act, 2005. The concluding part examines a similar legislation in South Africa with a view to suggest requisite changes in the Bill to ensure a greater accountability and transparency.

II. THE IMPERVIOUS JUDICIARY: DOES ACCOUNTABILITY NECESSARILY IMPEDE INDEPENDENCE?

> "[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self restraint."[4]

Corruption is a malaise which has penetrated through all strata of the society. The absence of a mechanism to curb the menace of corruption leads to an unchecked arbitrariness which in turn results in a widespread malaise of corruption and delinquent environment. It is, thus, in an attempt to bypass such perverse manifestation of widespread arbitrariness and corruption that the underlying philosophy of accountability operates. Accountability functions on the framework of seeking integrity, a sine qua non for the efficient functioning of any authority entrusted with responsibility. Justice Krishna Iyer, emphasizing the need for an accountable mechanism in a democratic framework considered it to be fundamental, so that the dreams of Constitution makers envisioned in Part III, IV and IVA of the Constitution do not remain a mere illusion.[5] The need for accountability, thus, cannot be over emphasized. While the need for the same is desirable for the efficient functioning of any institution, it assumes a greater degree of responsibility when Judiciary is called into question.

Judiciary, as one understands, is the edifice of a strong democracy as it endeavors not merely to interpret the black letter of the law but also adopting an activist stance of creatively interpreting it to suit the needs of the society.[6] The office of the robed brethren is based on the great trust reposed by the citizens who seek recourse to judicial powers to defend their democratic rights.[7] Hence,

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[4] Justice Harlan F.Stone in United States v. Butler 287 US 1 (1936).

[5] V.R. Krishna Iyer, *Limits of Judicial Conduct*, THE HINDU, August 7, 2009, available at http:/ / www.thehindu.com/2009/08/07/ stories/ 2009080754240900.htm (Last visited on January 16, 2010).

[6] In our opinion, in so far the facets of Article 21 of the Constitution is concerned, it has been often seen that Judges have *read into* the given law in an attempt to widen the scope and achieve the goals of social justice. The recent judgment of *Naz Foundation* v. *Government of NCT*, (2009) 160 DLT 277, too has been an indicator of the same where *sexual orientation* has been read into the grounds of "sex" under Article 15(1) of the Constitution. These are the instances where the interpretation has demonstrated judicial creativity and has realized the goals of the Constitution.

[7] Nathubhai Bhat, *Accountability of Judiciary to Bar and Society at Large*, 28 INDIAN BAR REVIEW 163 (2001).

the need for accountability in Judiciary arises from within, to ensure a system of checks and balances operative to prevent any unwarranted usurpation of power. Of late however, as stated earlier, the integrity of this great institution has been called into question,[8] more so since there has been a complete absence of a transparent mechanism in place to cure the malady. It is interesting to note that while the demand for greater accountability on such counts has been constantly pressed for, unanimous voices of dissent have also risen in a defence "to enforce silence in the disguise of preserving dignity."[9]

A. JUDICIAL ACCOUNTABILITY: A THEORETICAL UNDERSTANDING

At the outset, one needs to understand and appreciate the idea of demanding judicial accountability. As stated earlier, accountability primarily entails instilling a sense of transparency, subjecting the judicial regime to a strict public scrutiny so as to prevent any judicial delinquency from infiltrating. At the same time, the long-standing debate between accountability impinging upon the independence of judiciary often becomes imperative to be addressed. An interesting observation surrounding the innate resistance between the two has been drawn from the Constitution as the Constitution makers did not expressly provide for any mechanism to make the judiciary accountable.[10] The underlying presumption behind the same was to prevent the violation of the fundamental edifice of judicial independence, a prerequisite for a free and fair judiciary to exist.[11] The objective sought to be achieved was to promote accountability through

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[8] With respect to the Indian position, one of the landmark controversy regarding the same was of Justice Ramaswamy when he was sought to be impeached on grounds of brazen financial irregularities committed during his tenure as the Chief Justice of Punjab and Haryana High Court. (*See* Sarojini Ramaswami v. Union of India AIR 1992 SC 2219). In recent times, there were allegations against the former Chief Justice of India, Y.K.Sabharwal of having directly benefited his sons by ordering the demolition of the commercial outlets in New Delhi. In an interview with Tehelka, Prashant Bhushan, spear heading the movement of Campaign for Judicial Accountability Reform (CJAR) opined it to be a watershed in the movement for demanding judicial accountability. *See, Half of the Last 16 Chief Justices were Corrupt*, TEHELKA, available at, http://www.tehelka.com/story_main42.asp?filename=Ne050909half_of.asp, (Last visited on January 13, 2010).

[9] Justice Black in Bridges v. California (314 V.S. 252) observed that "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion...An enforced silence, however limited, solely in the name of preserving the dignity of the Bench, would probably endanger resentment, suspicion and contempt much more than it would enhance respect."

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

[11] *See* R.S. Pathak, *Administration of Justice and Public Accountability*, 15 INDIAN BAR REVIEW 213 (1988). It is also interesting to note that while Article 235 was included to make the subordinate judiciary accountable to the higher judiciary, no similar provisions were enacted for the higher judiciary. The underlying idea was to subject the higher judiciary to self

a mechanism of self-regulation without compromising the facet of independence. It is rather interesting to note that it has only been in recent times, that a public outcry for holding the judiciary accountable has been a matter of public debate and deliberations in all corners of the world, thereby making it a global phenomenon. As Justice Sir Moti Tikaram of Fiji notes, judiciary is "no longer a sacrosanct and inviolable sanctuary of its occupants."[12]

While the debate regarding the need for judicial accountability has gained significant momentum in the recent years with civil society and the media, assuming the role of alert watchdogs, a question to ponder upon often has been the need for judicial accountability. In its Comments on the Judges Enquiry Bill 2006, the Committee on Judicial Accountability noted that the dire need of an accountability mechanism stems from the over-assertiveness of the judiciary to the extent of declaring themselves immuned from any form of enquiry into their actions.[13] Such a reprehensible and autocratic practice makes it all the more onerous to ensure that an accountability mechanism be operative as it is imperative to note that Judiciary is about the law and not above the law.[14] Accountability is imperative as, inter-alia judges are appointed in most countries and thus the public at large has no control over them.[15] Also, there are hardly any provisions disciplining the judges and this is deeply associated with what Rowat terms as "arrogance of office" leading to the arbitrary use of discretionary powers by the Judges in the form of holding someone in contempt.[16] He also notes that since the ordinary process of removal of a Judge by way of impeachment is rather cumbersome, an accountability framework becomes the need of the hour. We opine that the need

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regulation. Former Chief Justice J.S. Verma notes that the enactment of Article 235 is *per se* a clinching evidence of accountability being intricately associated with the idea of judicial independence. The element of accountability thus was envisaged to co exist with independence, ensuring the relationship to be harmonious. *See* J.S.Verma, *CJI, please declare my assets*, August 12, 2009, available at http:// www.indianexpress.com /news/ cji-please-declare-my-assets/ 501022/ (Last visited on August 21, 2009).

[12] Sir Moti Tikaram, *Public Accountability – Who Judges the Judges?*, 19 COMMW.L. BULL. 1231 (1993).

[13] *See Comments of the Committee on Judicial Accountability on the Judges Enquiry Bill 2006*, Committee on Judicial Accountability, 2006, available at http:// www.judicialreforms.org/ files/Comments_of_COJA. pdf, (Last visited on January 13, 2010).

[14] At this juncture, perhaps it will be interesting to note the observations made by David Pannick in his celebrated book *Judges*. Pannick notes that unless judges are treated as fallible human beings and choose to remain above the rest of the community, isolated from them, they will be misunderstood to their mutual disadvantage. *See* DAVID PANNICK, JUDGES OMBUDSMAN JOURNAL, 204 (1998).

[15] Donald Rowat, *Why an Ombudsman to supervise the Courts?*, 10 OMBUDSMAN JOURNAL 1992 as cited in Tikaram, *supra* note 11, 1232.

[16] As Prashant Bhushan notes, the "sword of contempt" has kept the Judiciary isolated and immuned from any form of public criticism. Contempt of Court in the recent years, as observed by the critics, has been used indiscriminately. *See* Prashant Bhushan, *Judicial Accountability or Illusion: The National Judicial Council Bill, available* at http:// www.judicialreforms.org/ files/ judicial_ acc_ or_ illusion_ pb. pdf (Last visited on August 21, 2009). Recent notable case on point would be In Re: Arundhati Roy (2002) 3 SCC 343.

for judicial accountability needs to be an all inclusive mechanism where not only would the judiciary be accountable to an external authority, independent of the institution but also to the public at large as Judiciary is an office of public trust. Stephen Burbank[17] argues that the judicial accountability proceeds further to the representatives of the People or the law makers, having a legitimate interest in the functioning of the judiciary.

One is to also note that the rhetoric surrounding judicial accountability is confined not only to the elucidation of the idea per se but also extends to the definitional aspects of the same. In so far as accountability is concerned, in most instances of any moral turpitude, the interpretation has mostly been with respect to seeking accountability towards an external authority. The proposed Judges Enquiry Bill, 2006 which sought to create a National Judicial Council is an example of the same.[18] However, the irony of such an approach is writ large as the legislation proposes that an in-house committee consisting of sitting judges be appointed to investigate into the alleged charges of misconduct, thereby guising itself in the garb of an external authority. In our opinion, such an approach largely defeats the purpose of seeking accountability as it is violative of the principles of Natural Justice which seeks to mandate that no man shall be the judge in his own cause.

Prashant Bhushan notes that not only is it highly inefficient to have the already overburdened sitting judges to investigate upon such matters, but also unnecessary and quite rightly, promotes the view of holding the judiciary accountable to no one but itself.[19] What is needed is a regime to ensure a neutral and objective accountability as opposed to the adoption of an in-house procedure to provide a mere lip service.[20] However at the same time, one cannot deny the importance of personal accountability as Pimentel observes that accountability

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[17] *See* Stephen Burbank, *Judicial Independence, Judicial Accountability and Inter branch Relations*, 95 THE GEORGETOWN LAW JOURNAL 909 (2007). (Burbank argues that since it is the legislature which legislates the laws and also appropriates funds for the Judiciary, it accords them the legitimate right to be interested in the functioning of the Courts, in a due process. He further notes that there is a need of "an appropriate intra branch accountability" in order to avoid "inappropriate inter branch accountability" with respect to the Federal Courts of United States).

[18] The Bill was subject to wide criticism due to its lack of investigative powers and the provisions for an in house committee for investigation. *See generally* Comments of the Committee on Judicial Accountability on the Judge's Enquiry Bill, 2006, *supra* note 13.

[19] Prashant Bhushan, *Judicial Accountability or Illusion: The National Judicial Council Bill* available at http://www.judicialreforms.org/files/judicial_acc_or_illusion_pb.pdf, (Last visited on January 13, 2010).

[20] Judge Wallace takes a contrary view, in so far he suggests that "that to preserve judicial independence, these investigations should be left primarily to the judicial branch." Otherwise, he argues, there might be a strong operative relationship between the decisions given and the extent to which a politician can influence a Judge if accountability were to be towards an external authority. *See* J.Clifford Wallace, *Resolving Judicial Corruption while Preserving Judicial Independence: Comparative Perspectives*, 28 CAL.W.INT'L L.J 341 (1998).

to one's self and ethics, termed as "subjective or personal accountability" is also an essential facet of judicial accountability.[21] While it is highly impossible to approximate the level of such personal accountability, it remains extremely desirable as the triumvirate of moral accountability, public accountability and judicial independence cannot be disintegrated. In Benjamin Franklin's words "only virtuous people are capable of freedom"[22] and therefore, we opine that the element of personal accountability leads to an enhanced public accountability which significantly determines the element of judicial independence. Certain jurisdictions provide for a public access to the regimes of accountability of the Judges and judicial discipline.[23] This, in turn facilitates the aspect of independence to be largely dependant on public perception as accountability seeks to promote increased legitimacy and furthers justification for judicial independence.[24]

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

B. THE RELATIONSHIP BETWEEN JUDICIAL ACCOUNTABILITY AND INDEPENDENCE

> "The principle of the complete independence of the judiciary from the executive is the foundation of many things in our island life. It has been widely imitated in varying degrees throughout the free world .It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule."
>
> -Sir Winston Churchill[25]

The existence of an independent judiciary can be said to be the bulwark of governance. Needless to say, there has always existed a tussle between the legislature and the executive to assume control over the judiciary as can be traced back to the Constituent Assembly Debates in India. Deciding on the independence of the judiciary was thus a key concern that the Members of the Constituent

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[21] *See generally* David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in light of Judge's Courage and Integrity*, 57 CLEVELAND STATE LAW REVIEW 1 (2009).

[22] *See supra* note 21, 345.

[23] An example of the same would be the appointment of Ombudsman which has been discussed in details in Part III of this article.

[24] Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 SOUTHERN CALIFORNIA LAW REVIEW 625 (1999).

[25] P.J. Dhan, *Dr. Ambedkar and the Principle of Independence of Judiciary*, 24 INDIAN BAR REVIEW 97 (1997).

Assembly thereby sought to address. At this juncture, one needs to take note of the fact that the facet of independence was sought to be achieved by enactment of various constitutional provisions, most importantly the appointment of the Judges. Appointment of Judges in England by the Lord Chancellor and in America by the Senate was felt to be an unsupervised and politicized process and was a sentiment shared by many in the Constituent Assembly.[26]

A contextualized understanding of judicial independence in India therefore entails a plethora of rulings pronounced by the Hon'ble Supreme Court (hereinafter SC), emphasizing the need for an independent judiciary time and again. In State of Bihar v. Balmukund Shah,[27] independence of judiciary was elevated to the status of being a constituent of the Basic Structure of the Constitution, the seeds of which were borne in the locus classicus Keshavananda Bharati v. State of Kerala.[28] In a host of other rulings, the need for an independent judiciary free from the interference of unwarranted political processes has been advocated as the sine qua non of a democratic society.[29] Thus, the need for judicial independence cannot be over emphasized. However, literature has shown that in spite of being an appealing concept per se,[30] judicial independence is often caught in the conundrum of structuring itself, thereby obfuscating its very existence. While it has been identified as a 'means to an end', what the end is sought to be achieved has often been obscured, leaving numerous loose ends.[31] While there are several dimensions to explore the concept of judicial independence, in the present piece, we will restrict ourselves to specifically the relationship between judicial accountability and independence.

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[26] *See generally Constituent Assembly Debates*, Vol.VIII, 258.The provisions of appointment of the Judges to SC and High Courts (Article 124 (2) and Article 217 (1)) and insulation of the conduct of the Judges by the enactment of Articles 121 and 211, which provides that the discharge if the duties by a SC or a High Court judge cannot be discussed in the Parliament or State Legislature crystallize the concept of judicial independence by making the judiciary insulated from the political processes of the outside.

[27] AIR 2000 SC 1296, ¶ 294.

[28] AIR 1973 SC 1461. (Sikri C.J. had mentioned the separation of powers between the Legislature, Executive and the Judiciary to be one of components of the basic and foundation structure of the Constitution).

[29] *See generally* S.P. Gupta v. Union of India, AIR 1982 SC 149, where it was stated that independence of judiciary constitutes the foundation over which the edifice of the Indian democratic polity rests. *See also* Union of India v. Sankal Chand Himmatlal Seth AIR 1977 SC 2328.

[30] *See supra* note 20, 9.

[31] While some scholars have recognized fairness and impartiality to be the ends sought to be achieved by the means of judicial independence (*See* Shirley Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*,64 OHIO STATE LAW JOURNAL 3 (2003)), some others have argued that ends are often politicized, i.e., politics does not remain outside the confines of judiciary but well within it, often shaping the ends it seeks to achieve.(*See* Stephen Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO STATE LAW JOURNAL 323 (2003)).

The idea of judicial independence shares an inextricable relationship with judicial ethics, of which accountability is one of the dimensions. It is often thought that the two are antithetical to each other and hence, one cannot exist in the presence of the other. This has often been a favorite area for the legal scholars to deliberate upon[32] and thus has been subject to extensive scrutiny. However, there seems to have been a unanimous opinion about the same as most authors have noted that there exists an accountability-independence continuum and weighing one in the complete absence of the other is fatal to the existence of the other.[33]

We further suggest that judicial independence cannot be viewed to have a separate existence because it is only in an accountable judiciary that the faith of the citizenry can be reposed. The element of accountability is a necessary concomitant to establish the supremacy of the institution. This in turn, seeks to promote the element of independence and thus forms a vicious cycle and one runs the risk of not appreciating the delicate relationship between corruption and independence. The central argument that we are contending through this piece is that the tension between judicial independence and judicial accountability is an artificial one since judicial independence is largely dependant on the public acceptance of the judiciary to be a fair institution, executing its responsibilities in accordance with the law of the land. It is to ensure this element of fairness that it is patently wrong to argue that accountability is in conflict with independence. It seems that the dichotomy between the two is rather superimposed and dispelling the myth surrounding the same is the need of the hour. The demand of accountability, according to us, is the first step towards eradicating the occurrence of any event of misfeasance as a dishonest Judge should not be serving the Bench. Thus, as Prashant Bhushan stated in a recent interview, the fact that a greater demand of accountability, if at all, compromises with the need for independence, is welcome as a step to eradicate any disastrous consequences of letting a dishonest adjudicator decide on the fate of the people.[34] It is rather ironical that despite being one of the few nations in the world where a Right to Information legislation functions effectively, the judiciary seeks insulation from public view defending its independence. The fact of the matter however remains that the need for integrity is a means of achieving the cherished goal of judicial independence and therefore, shying away from making oneself accountable is sheer naivety on the part of judicial institutions.

With the above said theoretical understanding, the article now attempts to view the position of Indian judiciary in the accountability-independence debate.

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[32] For example, Stephen Burbank argues that judicial independence is not a monolith and inquires as to whether there is a long felt need of making different mechanisms of accountability and independence operative on the consideration of the different functions performed by the Courts. *See* Burbank, *supra* note 31, 323.

[33] *Id.*, 325.

[34] V. Venkatesan, *Of Accountability to the People*, FRONTLINE, September 2009, 33.

While the recent judgment by Delhi High Court ruling the Chief Justice of India (hereinafter CJI) to be a public authority has created ripples, the introduction of the Bill seems to be a half-baked effort as the legislation falters at various counts. Thus, by a detailed examination of the recent judgment as well as the Bill pending in the Parliament, we shall endeavour to bring to light, the apparent tension between accountability and independence in the Indian context.

II. THE JUDICIARY AND THE RIGHT TO INFORMATION ACT : TO TELL OR NOT TO TELL?

The deliberation surrounding the lack of transparency and the demand for an accountability mechanism has gathered much momentum in the recent past with various fora vociferously demanding the same. While there have been ambitious citizen initiatives like CJAR, a number of members within the judiciary too have voiced their opinions in unison with the civil society. Undoubtedly, the public debate surrounding the Bill has catalyzed the need for accountability emphasizing on the need of preserving the sacrosanct judiciary in the environment of weakening credibility.

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."[35] This led to adoption of a self-regulation mechanism by the Supreme Court on May 7, 1997. The later Chief Justice's Conference of 1999 endorsed the same, followed by the Bangalore Principles of 2002.[36] Since there were no mechanisms

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[35] 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 Thiruvengadam 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 .Thiruvengadam 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).

[36] J.S.Verma, *CJI: Please Declare my Assets*, available athttp://www.indianexpress.com/news/cji-please-declare-my-assets/501022/ (Last visited on September 9, 2009). *See also, Restatement of Values of Judicial Life*, adopted by a Full Bench of Supreme Court on May 7, 1997, http://www.judicialreforms.org/files/restatementofvalues judlife.pdf (Last visited on January 16, 2010).

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.[37]

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 Agarwal*[38] (*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.[39] 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 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*[40] 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

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[37] 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-creates-impression-that-judge-has-something-to-hide-majority-of-judges-are-definitely-not-reluctant/505436/7 (Last visited on January 17, 2010).

[38] 162 (2009) DLT 135.

[39] The case has been discussed in details later in II.A.

[40] AIR 1975 SC 865, ¶ 74.

> 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." [41] (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 Liberties* v. *Union of India*,[42] 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."[43] (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.

A. 'RIGHT' TO DICLOSURE OF ASSETS: EVALUTING THE SUPREME COURT JUDGE'S ASSETS CASE

The Supreme Court Judge's Assets case throws upon a plethora of questions with regards to the immunity sought by the CJI from the applicability of the RTI legislation. However, what applicant Subhash Agarwal essentially sought by means of the RTI application filed was not to seek the actual asset disclosures.

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[41] *Id.,* ¶ 74.

[42] AIR 2002 SC 2112.

[43] *Id.,* ¶ 50.

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

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

He also rejected the submission that the 1997 Supreme Court resolution imposed a confidentiality obligation on the CJI to ensure non-disclosure of the asset declarations by the judges by noting that "the mere marking of a document as 'confidential' does not undermine the overbearing nature of § 22."[44]

The Delhi High Court reserved its verdict on an appeal filed by the Supreme Court challenging its order after two days of arguments. It contended that the central information officer cannot be an appellant in the case representing

the Supreme Court and asked either the Registrar General or Secretary General to represent the Court. Further, the CIC could not be a party to the case as it was a constitutional body and only the RTI applicant could be included as a party.

In its appeal before the Delhi High Court seeking to set aside the single-judge order, the Supreme Court registry contended that Justice Bhat failed to appreciate that information on " voluntary" declaration of assets by the judges to the CJI could not be sought under the RTI Act. The Supreme Court Registry contended that there was no law providing for declaration of assets to the CJI. Information could be sought under § 2(j) of the Act only if it was held by or was under the control of any public authority under the provision of any statute or any law. It is noteworthy that the judgment of the Hon'ble Delhi High Court brought judges under the purview of public authority. The registry claimed that Justice Bhat erred in holding that "all" information received by the CJI was within the purview of the Act and had interpreted the provisions of the Act too broadly which was "unnecessary" and "illogical". It further claimed that the judgment failed to consider that there was a plethora of information which was available with the judiciary but could not be made public.[45]

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

The Court on January 12, 2010, delivered its reserved verdict from November 12, 2009. It ruled that a move towards ensuring accountability will preserve the independence of judiciary. The Court observed that "well-defined and publicly-known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant."[46] Affirming the observations of Justice Bhat, it further ruled that the CJI's office is a public office for the purposes of RTI as it is created by or under the Constitution of India. Consequentially, the phrases 'held by' or 'under the control of' under § 2(j) of the

[44] § 22 (**Protection of action taken in good faith**):The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

[45] Delhi High court website, available at, http://lobis.nic.in/dhc/ (Last visited on January 16, 2010).

[46] LPA No.501/2009 para 88, available at http://lobis.nic.in/dhc/ (Last visited on January 16, 2010).

RTI Act not only includes information obtained by a public authority but also all of the information that is received or used or consciously retained by the public authority in the course of its functions and official capacity. Any other interpretation would render the right to information ineffective. The declarations furnished to the CJI are not done in a private capacity or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life, and are in larger public interest. Thus, the Court reinforcing the greater need of ensuring accountability, stated that the asset information shared with the CJI by the SC judges are not held by him in fiduciary capacity and revelation of the same would not result in breach of any duty.

What is interesting to note with respect to the judgment is the emphasis of the Court on considering the right to information not merely as a paper tiger but according it the status of a constitutional right by stating that the office of the CJI was not exempt from the transparency framework. The overreaching purpose of having a right to information is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. By holding that every public authority is liable to provide information, the Court has broadened the scope of the act to a large extent. The judgment has been of a conclusive nature in so far the Court has held that notes, jottings and draft judgments would not come under information as these are tentative and can be changed. This in turn has settled the confusion regarding the scope of information, inclusion of draft judgments would hinder the decision making process and lead to frivolous charges, thus compromising its independence. At the same time, concerns have been raised regarding the consequences of including judiciary as a 'public authority'. Questions have been raised as to the existence of a right to obtain the notes made by the CJI and the collegium of judges in the appointment of the Judges to Supreme Court and the High Courts in accordance with the law laid down in the Second Judges Appointment case.[47] In the event of such notes being made public, there are greater concerns if a candid opinion on the merit of individual judges will be expressed by the Collegium. We believe that the task of the legislature should therefore be addressing these critical points in the proposed legislation so as to overcome the conundrum.

Above all such concerns, what is rather endearing is the fact that the Delhi High Court reiterated the accountability-independence continuum by observing that "the greatest strength of the judiciary is the faith people repose in it."[48] In our opinion, the appreciation of the need for accountability as a method to strengthen the independence is an essential concomitant to ensure the working of an effective judiciary. Hence, in the light of the proposed Bill on asset declaration, the decision seems to be a new ray of hope in the murky waters of combating corruption as judicial corruption now has become a living reality.

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[47] S.C.A.O.R v. Union of India, AIR 1994 SC 269.

[48] *Supra* note 47. *See* ¶ 73 of the judgment.

Instances of widespread judicial delinquency[49] in the recent past thus necessitate the enactment of a legislation so as to ensure that effective measures are taken to prevent the same.

With the appeal now lying with the Apex Court, greater questions seem to be looming large. Can the court adjudicate upon a matter in which it is an interested party? In the light of the allegations advanced against several members of the Bench, it seems imperative to us that clear guidelines concerning the constitution of the Bench to hear the matter should be framed. As the Government moves ahead with its agenda of enacting the proposed legislation, such policy questions should be given a deeper thought so as to make the legislation more comprehensive in its substance and form.

The recent spate of controversy surrounding Justice P.D. Dinakaran's elevation to the Supreme Court has once again reiterated the need for an accountability framework to be in place. On August 28, 2009, Justice Dinakaran, who is presently the Chief Justice of Karnataka High Court, was recommended by the Collegium for elevation to SC. Subsequently, Forum for Judicial Accountability, a Chennai based organisation made a representation to the CJI, contending that in the light of the corrupt practices and abuse of office practiced by Justice Dinakaran, his appointment to the Apex Court should be reconsidered. In its fourteen page long representation, the Forum highlighted several instances of Justice Dinakaran amassing wealth and misappropriating public property, pronouncing certain inappropriate judicial orders as well as abusing office to the extent of having a number plate on his car, contrary to the mandates of the Motor Vehicles' Act.[50] It is indeed a matter of great concern that the Collegium appointed to recommend Judges for elevation to the Apex Court missed out on such crucial information of one of its recommended appointees.[51] While Justice Dinakaran

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[49] We have briefly tried to highlight some of the recent instances of judicial corruption. Former Chief Justice Y. K. Sabharwal was accused of being guilty of serious offenses under the Prevention of Corruption Act. *See Investigate Justice Sabharwal*, available at http:/ www. petitiononline.com/ CJIProbe/ petition.html (Last visited on January 13, 2010). The Ghaziabad PF Scam followed soon after which involved more than 30 judges including 10 from the higher courts. (*See* Avinash Dutt, *My Lords, There's a Case Against You*, available at http://www.tehelka.com/ story_main24.asp? filename=Ne123006My_lords.asp (Last visited on January 13, 2010). Justice Jagdish Bhalla of the Lucknow Bench of Allahabad High court acquired several illegal properties in the name of his wife and other close relatives. Shanti Bhushan along with other noted lawyers, founders of the Committee on Judicial Accountability demanded that impeachment proceedings to be initiated against him, though no steps were taken. Chief Justice of Punjab & Haryana High Court, Justice Jain, was charged of violating the code of conduct for judges by deciding in favour of someone with whom he has 'family relations'. The complaint was pending before the former CJI Y K Sabharwal, who dismissed it saying he found no merit in it.

[50] *See* Forum for Judicial Accountability, available at http://judicialreforms.org/files/Dinakaran_ Representation.pdf (Last visited on January 15, 2010).

[51] Leading journalist V. Venkatesan observes that the Collegium while recommending Justice Dinakaran also narrowly interpreted the law laid down in the *Second Judges* case by not consulting the two senior most judges of the Madras High Court where Justice Dinakaran

vehemently denies any such allegations,[52] scholars have opined that the choice made by the higher judiciary to be closely guarded behind the veils of secrecy, immunizing themselves from any public scrutiny, has led to a situation such as Justice Dinakaran's where he stands deprived of his right to a fair hearing.[53]

In our opinion, the appointment of Justice Dinakaran seems to be a real opener in the times of the accountability-independence debate as most jurists, emphasising on the greater need of preserving the sanctity of the judiciary, have opined that a questionable integrity should be a necessary and sufficient condition to render an appointment void, without meeting the standard rigors of evidence.[54] Justice Dinakaran's nomination would not have created such a controversy had there been an existing framework for declaration of assets.[55]

B. PRESENT SCENARIO

Voluntary disclosure of assets or the Delhi High Court's decision does not in any way preclude the need for a parliamentary legislation for a declaration of assets, which would enable the judiciary to preserve its independence while ensuring judicial accountability. The fact that there is some measure of a check and balance system in the executive and legislature ensures accountability, which is entirely absent in the institution of judiciary. The strict application of the doctrine

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has spent his tenure. He further argues that the Collegium should subject the recommended appointees to public scrutiny so as to shed light on such controversial backgrounds which legally renders them misfit. *See* V. Venkatesan, *The non appointment of Justice Dinakaran*, available at http:// lawandotherthings.blogspot.com/2009/10/non-appointment-of-justice-dinakaran.html (Last visited on January 15, 2010).

[52] Although Judges are hardly encouraged to give press conferences, Justice Dinakaran in an exclusive interview to Times of India vehemently denied the allegations leveled against him. *See* A. Subramani, *Judge Speaks out*, THE TIMES OF INDIA (Chennai), November 9, 2009, 5.

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

[54] Participating in a talk show on the Dinakaran issue, legal stalwarts like Fali Nariman, Ram Jethmalani and Prashant Bhushan, unanimously voiced their dismay on the mechanism adopted by the Collegium to elevate judges to the Supreme Court. *See* R. Sedhuraman, *Keep Dinakaran out to save Supreme Court's image*, available at http:// www.tribuneindia.com/2009/20091107/edit.htm#6 (Last visited on January 10, 2010).

[55] Prashant Bhushan, *Judicial Accountability: Asset Disclosures and Beyond*, ECONOMIC & POLITICAL WEEKLY, September 12, 2009, 8.

of contempt of court has ensured that judges are not even held accountable to public opinion. Despite the resolution, judges can refuse to declare asset details on the SC's website. Voluntary disclosure of assets without any regulatory mechanism, as is the case now, might lead to possible harassment from unscrupulous litigants, which are the primary concern of all judges, or even result in easy forum-shopping. Safeguards must be erected in addition to the contempt powers of the court and the common remedy for civil and criminal defamation.[56]

In a Compendium of Instructions,[57] the Election Commission made it mandatory for all candidates to submit a statement of expenses relating to their electoral campaigns during the campaign period. These figures are displayed by them on the notice boards of the returning officers. Upon winning an election, every Member of Parliament and State Legislator is required to submit an annual statement of assets owned by him/her and his/her dependents to the presiding officer of the house.[58] These documents are not made public ordinarily. Access to such records has not been granted under the RTI Act either. Several states have passed subordinate legislation granting a right of access to the records and documents of Panchayat and municipal bodies to (a) the elected representatives, and (b) all adults eligible to vote in the elections to these bodies. For example, § 9 of the Punjab Panchayati Raj Act 1994 requires the officers of the panchayats at the village level to proactively disclose a statement of income and expenditure at the annual meetings of the village body.

The Apex Court judges agreed on August 26, 2009 at a full court meeting of its judges, under the chairpersonship Chief Justice K.G. Balakrishnan, to make their assets public. They passed a resolution that the details of their assets, which are already available with the office of the CJI in varying formats, would be tabulated in a uniform format and placed on the court website at the earliest. Following their lead, several other High Courts have also made it mandatory for the judges to make their assets public. On August 28, 2009, a full court bench of the Delhi High Court judges unanimously decided to declare their assets to the Chief Justice of

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[56] Sriram Panchu, *Make declaring judges' assets mandatory for all further appointments*, THE HINDU, September 8, 2009, available at http://beta.thehindu.com/opinion/op-ed/article16588.ece (Last visited on September 9, 2009).

[57] Election Commission of India, Compendium of Instructions, Conduct *of Poll and Election Expenditure* available at http://eci.nic.in/eci_main/ElectoralLaws/compendium/vol4.pdf (Last visited on January 13, 2010).

[58] *See* The Members of the Lok Sabha Declaration of Assets Rules (MLSDAR) 2004 at http://164.100.47.133/ls/templates/Rules_L_A_2004_E.pdf (Last visited on January 13, 2010) and The Members of the Rajya Sabha Declaration of Assets Rules, (MRSDAR) 2004 at http://www.rajyasabha.nic.in/rsnew/general_information/GI_Declaration Assets.pdf (Last visited on January 13, 2010). According to Rule 4(4) of MLSDAR and MRSDAR, the information on assets and liabilities is entered into a register and treated as confidential. Access is denied unless the presiding officer gives written permission for disclosure. Similar regulations exist in the legislatures of all of India's 28 states and two Union Territories, which are directly administered by the Central Government.

Delhi and place the data on the website, in terms of the May 7, 1997, resolution.[59] However, the modality and manner of declaration are being finalised. Judges of the Kerala High Court, including the Chief Justice, have declared their assets and put the information on the website of the high court for scrutiny.[60] Judges of other high courts including the Madras High Court have also declared their assets, which is available on the website.[61] The details furnished by them would be hosted on the High Court website. The decision was unanimously taken by a Full Court meeting; however, at present there is no fixed format for presenting the details. The Bombay High Court judges passed a unanimous resolution at a special full-court meeting on September 2, 2009, declaring that all of them will publicly declare their assets. Himachal Pradesh High Court and Punjab and Haryana High Court have also placed the judges' assets in the public domain.[62] However, finer details, for instance, declaring the market value of the assets remain a grey area.

III. THE JUDGES (DECLARATION OF ASSETS AND LIABILITIES) BILL, 2009: PUBLIC BOON OR JUDICIAL BANE?

In the midst of the ongoing debate seeking to resolve the apparent tussle between accountability and independence, August 3, 2009 will be marked as the red letter day in the movement for demanding greater judicial accountability as the Bill was introduced in the Rajya Sabha. The said legislation has been enacted with an underlying objective of addressing the concerns of transparency by means of "enhancing the credibility of the judiciary".[63] While the criticisms advanced against the Bill from within the Judiciary have been counterbalanced by the overwhelming positive response from the civil society and campaigns championing the cause of the same for long, one cannot be ignorant of the much light and heat generated. As a Bill directed towards unveiling the deep hidden

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59 Restatement of Values of Judicial Life (Adopted by Full Bench of Supreme Court on May 7, 1997). available at http://www.judicialreforms.org/files/restatement_of_values_jud_life.pdf (Last visited on January 17, 2010).

60 High Court of Kerala, *Declared Assets & Liabilities of Hon'ble Judges at a glance*, available at http://highcourtofkerala.nic.in/assets.html (Last visited on February 5, 2010). *See also,* assets of the Chief Justice of Kerala available at http://highcourtofkerala.nic.in/assets/cj.pdf (Last visited on February 5, 2010).

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

62 *Himachal HC judges to make public their assets*, August 30, 2009, available at http://blog.taragana.com/law/2009/08/30/himachal-hc-judges-to-make-public-their-assets-11545/ (Last visited on January 17, 2010).; *Punjab & Haryana HC judges to declare assets*, September 1, 2009, available at http://www.punjabnewsline.com/content/view/18377/38/ (Last visited on January 17, 2010).

63 *See* Statement of Objects and Reasons, The Judges (Declaration of Assets and Liabilities) Bill, 2009 available at http://www.judicialreforms.org/files/Judges_Declaration_Assets_and_Liabilities_Bill_2009.pdf (Last visited on January 16, 2010).

veils of secrecy donned by one of the most important limbs of the government, it therefore poses a direct challenge to the independence-accountability continuum. What the Bill has in store as its repercussions is perhaps best left for the time to come. However, at this juncture it is worth mentioning that while this rather radical step on the part of legislature is indeed a welcome change in this era of growing concern towards good governance, the Bill might not be a balanced law, running the risk of reducing it to a mere paper tiger. Concerns about the same seem to have already surfaced as the road to reform the Judiciary seems to be a bumpy ride. In this part of the paper, we therefore make an attempt to critically analyze the Bill with an objective of a cost-benefit analysis to ensure a successful implementation of the law. We opine that although the introduction of the Bill in the Parliament is desirable, it is only through the incorporation of further changes that the objective of the law will be furthered.

The draft of the Bill specifically refers to the Supreme Court's Resolution of May, 1997. The Bill seeks to address the growing concern about the standards of probity in public life and also bring transparency and enhance the credibility of the judiciary.[64] Innocuous as the move may be, the Bill sought to bring into limelight the public accountability of the Judiciary thereby ruffling quite a few feathers.[65] And there are no prizes for guessing that the inherent conflict arises due to the nature of the Bill per se which in so far insulated the judiciary by prohibiting the disclosure made to the public or in any other manner except in court proceedings where an offence is alleged or in proceedings involving misbehaviour.[66] It was this contentious clause which raised the stormy debate

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[64] Judges (Declaration of Assets and Liabilities) Bill, 2009, Statement of Objects and Reasons.

[65] At this juncture, one could perhaps trace the history of the Bill back to the RTI application filed by S.C. Agarwal which sought to know whether the Judges declared their assets under the May 7, 1997, Resolution which provided that every Judge is to make a declaration of all the assets within a reasonable period of time after assuming office or adopting the Resolution. The beauty of the Resolution was however that the disclosure was to be made to the Chief Justice and all such disclosures where to be confidential in nature. The Chief Information Commission ruled in favour of Agarwal and ruled that SC is an institution created by the Constitution and thus a 'Public Authority'. It also held the Chief Justice to be a 'competent authority' under § 2(e) of the Right to Information Act, 2005. (*See* Subhash Agarwal v. Supreme Court of India, Case No. W.P.(C) 288/2009. It was this decision that was put to appeal before the Delhi High Court and the judgment was subsequently delivered which ruled the same and as has been discussed in the preceding §. The Lok Sabha Speaker Somnath Chaterjee said "Judges of higher Judiciary should also be subjected to accountability on issues like declaration of assets". *See Judge assets: CIC Wonders why SC opposing 'innocuous' order*, January 22, 2009, THE INDIAN EXPRESS, available at http:// www.indianexpress.com /news / judge-assets-cic-wonders-why-sc-opposing-i/ 413758 (Last visited on January 13, 2010).

[66] Clause 6 of the Bill- Protection of Judges in relation to declaration

(1) Notwithstanding anything contained in any other law for the time being in force, the declaration made by a Judge to the competent authority shall not be made public or disclosed, or shall not be called for or put into question by any citizen, court or authority, and save as provided in sub-§ (2), no Judge shall be subjected to any inquiry or query in reaction to the contents of the declaration by any person.

spearheaded by Supreme Court Senior Advocate, Mr. Arun Jaitely, contending that it was clearly violative of Article 19(1) (a). The opposition to this clause was more so since the SC clearly ruled in Union of India v. Association for Democratic Reforms and Another[67] that all electoral candidates are to submit an oath detailing their movable and immovable assets owned by them as well as their spouses and dependants. Hence, the present clause clearly hinted towards a dichotomy as far the dual interpretation of Article 19(1)(a) is concerned. The former SC decision also ruled that the right to information was intrinsic in the essence of Article 19(1) (a) and hence the disclosures which were made, was to be in the public domain.[68]

The unanimous voices raised in opposition also hinted that the introduction of Clause 6 promoted to create a separate class of citizens comprising of the judiciary and thereby violating, in letter and spirit, the constitutional guarantee of equality before law. Ram Jethmalani raised a pertinent point by noting that the Bill seeks to make the Judiciary subservient to the Executive, thereby violating the Basic Structure of the Constitution, as it seeks a favour by insulating themselves from the purview of information disclosed in the public domain since it was alleged that it was on the insistence of the judiciary that Clause 6 was included.[69] The executive, in its defence, has now clearly placed the burden of deciding the fate of the Bill on the shoulders of the Standing Committee though there are strong apprehensions[70] as the suggestions made by the Standing

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(2) The information relating to assets and liabilities of Judges furnished under this Act shall be disclosed only in the following circumstances, namely:-

(a) where a Judge is accused of committing any offence and the contempt authority is of the opinion that the information need to be provided to the investigating authority;

(b) where action against a Judge has been initiated under the Judge (Inquiry) Act, 1968 or under any other law dealing with misbehavior of Judges and such information is required for the purpose of inquiring into allegations of misbehavior leveled against him.

[67] AIR 2002 SC 2112.

[68] *Id.*

[69] *See Rajya Sabha Debate on the Bill* available at http:// 164.100.47.5/ newdebate/ 217/ 03082009/ 12.00Noon To13.00pm.pdf 26-38 (Last visited on January 16, 2010). However, Law Minister Mr. Veerappa Moily subsequently rubbished the claim stating it was merely an impression created by the media. The authors do not wish to question the propriety of such a move but would however like to express a concern that the Bill should have also been subjected to a public scrutiny before being introduced in either House of the Parliament. The opinion of the civil society by means of public criticisms and examination of the Bill, in our opinion, is crucial to determine the standing of such legislation. Thus, it seems to be an inappropriate decision to have divorced the public completely from a question involving public accountability.

[70] Mr. Moily argued that "[I] must say that there is a need for a statute for declaration. Yes, making it public has its pros and cons which could be discussed in the Standing Committee. I am not now going to say or affirm or reaffirm the possibility of that. But, the Standing Committee can definitely deliberate on that…unlike the other classes of people like the Civil Servants or the political executives or other executives, there is a limitation on Judges to reply when the allegations are made and the will not be in a position to pursue their petitions. Sometimes, that may be used as an instrument to intimidate the Judges or hold them to ransom." *See Rajya Sabha Debates on the Bill,* available at http://164.100.47.5/ newdebate/217/03082009/12.00NoonTo13.00pm.pdf (Last visited on January 13, 2010).

Committee are merely recommendatory in nature and therefore not binding on the legislature. However, Clause 6 has undoubtedly emerged as the Achilles heel which needs attention at the earliest.[71] Although the fate of Clause 6 is yet to be determined, we opine that such an attitude on the part of the law makers can raise serious questions regarding the transparency and objectivity of the legislation per se since the contentious clause, without a hint of doubt, seeks to protect the judiciary thereby defeating the claim of public accountability. The law is to enshrine what it aims to achieve and hence, it would be onerous upon the legislature to re-look at the provisions so as to amend the same.[72]

In consonance with the deliberations surrounding the said provision, we seek to suggest improvements in the Bill drawing largely from the South African Judicial Commission Amendment Bill 2007 (*hereinafter* SA Bill) dealing with judicial conduct and ethics which was introduced in the South African Parliament in 2008 and was slated for enactment as a law soon thereafter. One of the chief reasons for choosing the South African legislation has been due to the innovative constitutional framework of the country which provides under § 180 the authority to the Parliament to adopt legislation to deal with the complaints against the judicial officers. Similar provisions in the Indian Constitution hints towards a similarity between the two and hence we would like to suggest that incorporation of provisions from such a legislation would be easier as well more beneficial as opposed to blindly following the "look west" policy where the constitutional framework per se is largely different. The constitutional background of India and South Africa are all premised on a shared history of violence and sharp inequalities. In the case of India, the birth of the constitution was preceded by the experience of colonialism and the violence of partition and in the case of South Africa the experience of apartheid. Upendra Baxi terms these as "transformative constitutions" whose responsibility to history is documented in the kind of promises made in chapters of the rights of individuals, as well as in the recognition of collective rights.[73]

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[71] Interestingly, Mr. Moily too defending clause 6 suggested that disclosure of assets to the public might result in using it as an instrumentality to intimidate Judges. *See* Rajya Sabha Debate, http://164.100.47.5/newdebate/217/03082009/12.00NoonTo13.00pm.pdf. However, surprisingly while interacting with the press in July this year, before the Bill was introduced in the Rajya Sabha, the CJI suggested that the Judiciary wanted such a Bill and therefore they welcome it. *See Judges welcome proposed Bill on asset declaration*, THE HINDU, July 26,2009, available at http:// www.hindu.com/ 2009 / 07/ 26/ stories/ 2009072657500100.htm (Last visited on October 22, 2009).

[72] The reader may, however, find it interesting to note that several democracies in the west have done without asset declarations for public officials; instead they have relied upon traditions of institutional ethics, efficient income tax systems and public access to information. A noteworthy exception is the USA, which has an extensive system of financial disclosure for public officials and members of government.

[73] Rebecca Kahn, *Comparative Study of Copyright in Brazil, India and South Africa,* available at http://icommons.org/article_print/comparative-study-of-copyright-in-brazil-india-and-south-africa (Last visited on January 13, 2010).

The SA Bill inter alia introduces the term "registrable interests" which this Bill seeks a disclosure for.[74] Though the term has not been defined, Clause 5 of the Bill provides that the Cabinet Minister responsible for the administration of justice in consultation with the Chief Justice will draw up regulations which would prescribe as to what is to be identified as the registrable interests.

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[74] Judicial Commission Amendment Bill 2007

§ 13. **Disclosure of registrable interests-**

(1) The Minister, acting in consultation with the Chief Justice, must appoint a senior official in the Office of the Chief Justice as the Registrar of Judges' Registrable Interests.

(2) The Registrar must open and keep a register, called the Register of Judges' Registrable Interests, and must-

(a) record in the Register particulars of Judges' registrable interests;

(b) amend any entries in the Register when necessary; and

(c) perform the other duties in connection with the Register as required in terms of this Act.

(3) Every judge must disclose to the Registrar, in the prescribed form, particulars of all his or her registrable interests and those of his or her immediate family members.

(4) The first disclosure in terms of sub§ (3) must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed.

(5) The Minister, acting in consultation with the Chief Justice, must make regulations regarding the content and management of the Register referred to in sub§ (2), which regulations must at least prescribe-

(a) the format of the Register;

(b) the kinds of interests of judges and their immediate family members that are regarded as registrable interests;

(c) the manner and the instances in which, and the time limits within which, registrable interests must be disclosed to the Registrar;

(d) a confidential and a public part of the Register and the interests to be recorded in those parts respectively;

(e) the recording, in the public part of the register, of all registrable interests derived from the application of § 11;

(f) a procedure providing for public access to the public part of the Register and a procedure for providing access to, and maintaining confidentiality of, the confidential part of the Register; and

(g) the lodging of a complaint in terms of § 14(1) by the Registrar, in the event of-

(i) failure to register any registrable interest by any judge, including any failure to register any such interest within a prescribed time limit; or

(ii) disclosure of false or misleading information by any judge.

(6) The regulations may determine different criteria for judges in active service and judges who had been discharged from active service or judges in an acting capacity, including in respect of matters referred to in sub§ (5)(d).

(7) The Minister must table the first regulations under this § in the National Assembly, for approval, within four months of the commencement of this Act, provided that if consensus could not be achieved as contemplated in sub§ (5) both versions of the regulations must be tabled in the National Assembly within the said period.

(8) When the regulations or any amendment thereto is tabled in the National Assembly, the National Assembly may, after obtaining and considering public comment thereon, approve the regulations or such amendment-

(a) without any changes thereto; or

(b) with such changes thereto as may be effected by the National Assembly.

§ 13 of the SA Bill introduces the requirement that judges and their immediate family members, including spouses and others living in the same household as the judge, must declare their interests and assets. It also envisages the drafting of regulations on the content and manner of disclosure. Accompanying regulations should address the compilation, maintenance, content and management of the Register of Judicial Officers' Interests and prescribe a format of the register; state what is regarded as 'registrable interests', provide for a confidential and public part of the register, stipulate the procedure for the public to access the public part of the Register, a procedure for maintaining confidentiality of the register, and, the procedure for lodging a complaint where there is a failure to lodge a registrable interest, where false or misleading information is registered, or where there is a breach of confidentially. Failure to comply would constitute valid grounds for complaint, and could attract a sanction. The SA Bill, in its § 7(g), gives a very broad meaning to the word 'judge'; it includes "a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court".[75] The judiciary is essentially defining and redefining South African jurisprudence and at the same time playing a key role in guaranteeing democracy such that the social and economic as well as positive and negative rights of the people are secured. Indian judiciary has performed much the same over the years, the Naz Foundation judgment[76] by the Delhi High Court being a burning example.

There have been several suggestions for setting up a national judicial complaints commission to entertain complaints against judges. However, concerns have been voiced as there may be conflicts of interest. If there is a complaint against one judge, how could the judge on the commission decide upon it if he they are the members of the same bench?[77] An alternative mechanism in our opinion is the office of Ombudsman,[78] who could inquire into complaints against High

[75] § 7(g) "judge" means any Constitutional Court judge or judge referred to in § 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), which includes a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court, as contemplated in § 166 of the Constitution, and, except for the purposes of § 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity.

[76] *Supra* note 6.

[77] It may interest the reader to note that the Seoul Bar Association has decided to record a score based evaluation of judges based on the following criteria: attitude, integrity, fairness and knowledge. The evaluation committee currently only consists of lawyers but judges will also be involved in the long run. Rashida Yosufzai, *Korean lawyers publish judges' first report cards,* February 13, 2009, available at http://asia.legalbusinessonline.com/news/breaking-news/33709/details.aspx (Last visited on January 16, 2010).

[78] In some counties, the Ombudsman is seen as being in a unique position to review and to monitor declarations of income and assets made by senior public officials (such as Papua New Guinea and Taiwan). Where a large number of applications for information are likely to be disputed, the option of establishing a separate Ombudsman's Office to handle them has been opted for by some countries, such as Finland. available at http://www.u4.no/helpdesk/faq/faqs2a.cfm (Last visited on January 17, 2010). *See also* http://www.transparency.org/ (Last visited on January 17, 2010).

Court and Supreme Court judges, keep them within the office, followed by a consultation with the Chief Justice and take the requisite steps.[79] The office of the ombudsman can be presided over by a set of officials, for instance the Election Commission. As compared to the Judges Inquiry Act, 1968, the Judges (Inquiry) Bill, 2006 provides a much wider scope in terms of its application. According to the Judges Inquiry Act, 1968, an investigative committee can be set up for the purpose an inquiry of a judge, if a motion is moved in Parliament for the removal of the judge.[80] The investigation is carried on for the misbehavior or incapacity of Supreme Court and High Court judges. The only penalty is of removal by impeachment. Till now, there has been the only one instance of Justice Ramaswami of the Supreme Court, who has been investigated for misconduct under this Act. The Inquiry Committee ruled against him, but the motion was not passed in Parliament.[81]

The 98th Amendment Bill introduced in 2003, sought to establish a National Judicial Commission (*hereinafter* NJC) and amend Articles 124, 217, 224 and 231 of the Constitution relating to the appointment of judges and acting judges, and the creation of common High Courts for two or more states. The Bill lapsed because of the dissolution of Lok Sabha. The Law Commission presented a report on the draft version of the Bill in its 195th report.[82] The Judges (Inquiry) Bill 2006 has incorporated almost all of the Law Commission's recommendations. This Bill seeks to replace the 1968 Act and establish a National Judicial Council. All complaints by everyone against High Court and Supreme Court judges, as well as a motion for removal of a judge moved in Parliament, shall be investigated by this body. The NJC comprises of the Chief Justice of India, two Supreme Court judges and two High Court Chief Justices to investigate High Court judges; or the Chief Justice of India and four Supreme Court judges to investigate Supreme Court judges. If the allegations are proven, the NJC may impose minor measures or recommend the removal of the Judge; however removal of a judge shall be through impeachment by Parliament. Judges may appeal to the Supreme Court against impeachment or any other measures taken by the NJC. Among the many glaring issues therein, the fact that the Council consists exclusively of members of the judiciary, may be problematic when investigating members from the same community. The provision of appeal to the Supreme Court goes straight against the Constitutional provision of Presidential Order not being open to challenge.

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[79] *Crisis: we need ombudsman over SC collegium: Nariman*, September 19, 2009, available at http:www.expressindia.com/latest-news/Crisis-we–need-ombudsman-over-SCcollegium/Nariman/519019/ (Last visited on January 16, 2010).

[80] *See* Judges Inquiry Act, 1968, § 3.

[81] For detailed discussion, *see* Rajeev Dhawan, *Judicial Corruption*, The Hindu, February 22, 2002, 9; Prashant Bhushan, *A historic non-impeachment*, Frontline, June 4, 1993, available at www.judicialreforms.org/files/cover_story_ramaswami.pdf.(Last visited on January 16, 2010).

[82] *See* http://lawcommissionofindia.nic.in/reports/Report195.pdf (Last visited on January 16, 2010).

This Bill was referred to the Parliamentary Standing Committee in August 2007 but nothing has happened ever since.[83]

A Judicial Bureau of Investigation under an independent Judicial Complaints Commission needs be set up to investigate complaints and taking action against judges. There should be a National Judicial Complaints Commission which would be independent of both government and judiciary, comprising of five members and investigating machinery under it. However the law laid down in K. Veeraswami v. Union of India[84] expressly restrains criminal investigation of judges without the prior written permission of the CJI. This has tied the hands of investigating agencies from investigating judges of the higher judiciary.

In our opinion, voluntary public disclosure of assets by judges is not solution to the problem of judicial accountability. The need of the hour is a body which is independent of the government and the judiciary which is the forum for admitting all complains against judges, sitting and retired, and conduct investigation and take action. This must comprise of people from all fields and not just legal personalities as it would eliminate all possibilities of bias and conflict of interest.[85] Candidates should be selected on the basis of eligibility only after extensive discussion and a thorough scrutiny of his past record. This would ensure accountability keeping the independence of the judiciary intact and uncompromised. The South African Constitution establishes the office of the Public Protector,[86] which

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[83] Nagendar Sharma, *Judges Inquiry Bill gathers dust*, HINDUSTAN TIMES (New Delhi) April 28, 2008, available at http://www.hindustantimes.com/News-Feed/newdelhi/Judges-Inquiry-Bill-gathers-dust/Article-307339.aspx (Last visited on February 5, 2010).

[84] (1991) 3 SCC 655.

[85] Brijesh Pandey & Sanjay Dubey, *Burn after reading*, October 17, 2009, available at http:/ / www.tehelka.com/ story_main43. asp? filename=Ne171009burn_after.asp (Last visited on January 15, 2010).

[86] *See* S. Afr. CONST. § 182 & § 183: Public Protector

§ 182. Functions of Public Protector-

1. The Public Protector has the power, as regulated by national legislation

a. to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

b. to report on that conduct; and

c. to take appropriate remedial action.

2. The Public Protector has the additional powers and functions prescribed by national legislation.

3. The Public Protector may not investigate court decisions.

4. The Public Protector must be accessible to all persons and communities.

5. Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

§ 183. Tenure

The Public Protector is appointed for a non-renewable period of seven years.

is nearly identical to the institution of Ombudsman.[87] The word ombudsman has its origin in Old Swedish where it literally means representative. The first modern usage of this office began in Sweden in 1809 and later on several other countries followed suit.[88] In Sweden, the Ombudsman has constitutional status and can even admit complaints against court decisions.[89] As of 2004, there are around 120 countries in the world where the office of the ombudsman is fully functional.[90]

IV. CONCLUSION

The goal sought to be achieved by emphasizing on a greater need for accountability and transparency is elimination of corruption. This will secure and maintain public confidence in the judiciary which is essential as the judiciary is a cornerstone of the Indian democracy. As stated earlier, the element of accountability in judiciary needs to be secured steadfastly so as to be able to ensure independence of the same. Accountability therefore needs to be seen as a supplement of independence and not a hindrance. While most countries, following common law traditions, don't have requirements for asset declaration or interest disclosures of any kind for the members of judiciary, many countries are now contemplating the same as there is a general move towards disclosure of assets by public servants. Regulations regarding declaration of assets help in preventing conflicts of interest in public office holders. It also goes a long way in ensuring the transparency of decision making process, thus laying down the foundations for accountability of the judges. However, we are of the opinion that this disclosure will have little or no impact without open public access or oversight. While the judgment of the Delhi High Court is indeed a ray of hope in the murky waters of lesser accountability, one needs to ensure that the proposed legislation for asset disclosure realizes the same in letter and spirit.

The mechanism for declaration of assets should be fair, objective and transparent. The recommended appointment of Justice P.D. Dinakaran to the Supreme Court by the Collegium is an example of the situation where a lack of a clear and definite disclosure mechanism might result in unforeseen circumstances, bringing in disrepute to the institution of judiciary. The need of the hour therefore, in our opinion, is a clear set of guidelines with respect to asset disclosure. Who will monitor the declarations and how will the information be kept and communicated are crucial question looming large. The introduction of the Bill is indeed a welcome change but as has been stated earlier, in the absence of a proper

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[87] Advocate Thulisile Madonsela became South Africa's third Public Protector in October 2009. *See also,* the Public Protector South Africa's website, available at http:// www.publicprotector.org/ (Last visited on February 5, 2010).

[88] International Ombudsman Institute, *Ombudsman History and Development*, available at http:// www.law.ualberta.ca/ centres/ ioi/ About-the-I.O.I./ History-and-Development.php (Last visited on February 5, 2010).

[89] *See* Swed. Const. ch. XII Article 6.

[90] *Supra* note 88.

mechanism to regulate the process of disclosure, the legislation will have no teeth. At the same time, applicability of RTI Act in the present context of ensuring accountability too has to be considered carefully, drawing from the lines of the Delhi High Court judgment. While the civil society waits for the Apex Court to pronounce the final verdict, one hopes that the executive and the legislature ensure that any new legislation to ensure accountability enhances the integrity and capacity of the institution of judiciary as a whole.