INDEPENDENCE OF THE JUDICIARY

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India, famed as the world's youngest and largest democracy, with a population of over 1.2 billion, is at the threshold of evolving into a sophisticated democracy. A nation, where the principles championed in its Constitution are at the crux of all executive policies, where all legislative action is directed toward making progressive laws and where the functioning of the judiciary renders a thriving civil society and assures the most coveted rights to the people of the country. An Independent Judiciary is the *sine qua non* to protect Rule of Law in any civilised society.

A panoramic view of the concept of Independence of the Judiciary is needed. Starting from the origin of the concept in Montesquieu's Doctrine of Separation of Powers, we need to bear in mind the provisions relating to the Independence of the Judiciary in the Constitution of India and various legislations, and the practicalities of its operation in the last over 60 years. Taking cognisance of the state of Independence of the Judiciary across nations around the world will help in the analysis of the Judicial Standards and Accountability Bill, 2010 which is currently making its way through the Parliament of India. The main question which needs consideration is whether the Bill will succeed in protecting and strengthening Independence of the Judiciary.

Doctrine of Separation of Powers:

The keystone of the Democratic arch is the **Doctrine of Separation of Powers**.[1] It is a theory on the functional division of governmental power, which was first expounded by Montesquieu, a French political philosopher of the Age of Enlightenment, having roots in the Greek philosopher Aristotle, the father of Political Science. The evolution of the State from its beginnings in the "State of Nature", as described in the Theory of Social Contract of Hobbes, Locke, and Rousseau, and the formation of what we perceive as a democracy today- a State where man loses natural liberty, and gains civil liberty, was fortified by the implementation of Montesquieu's Doctrine of Separation of Powers. Structurally, the division of governmental power was attributed to three organs, each with a separate function, the Legislature or law making body, the Executive, or the body that administered laws and gave effect to them, and the Judiciary that interpreted the law. Montesquieu, who was a great advocate of human dignity, formulated the Doctrine of Separation of Powers to uphold the liberty of the individuals that made up the State. Montesquieu believed that the application of the Doctrine would prevent the concentration of power in one particular organ of governance, as concentration of power posed a threat to political liberty. When the executive and legislative powers were vested in one organ, there could be no liberty, because the same organ would enact oppressive laws and execute them tyrannically. If judicial and legislative powers were exercised jointly, the life and liberty of individuals in the State

[1] Doctrine of Separation of Powers, first published in Montesquieu's, "*The Spirit of laws*," 1748.

would be jeopardized for the judge would then be the legislator. If judicial and executive power were vested in the same organ, the judges might behave with violence and oppression, as they would then interpret the law, as well as have the power to enforce it. Lastly, and the most catastrophic of scenarios would be if a single body were to exercise all three powers- of enacting laws, executing them and adjudicating them, it would lead to a tyrannical, despotic form of governance and eventually spell the doom of the entire nature of the State. Montesquieu's belief could be summarized in the quote, "*power tends to corrupt, and absolute power tends to corrupt absolutely.*[2]*"* He argued that the three organs of government should be so organized that each organ should be entrusted to different persons who perform distinct functions within the sphere of power assigned to them. He also envisaged that political liberty in a State is possible when restraints are imposed on the exercise of powers. He advocated that the functions of the government should be differentiated and assigned to separate organs so as to limit each organ to its own sphere of action so that these organs independently interact amongst themselves. Thus, the concept of Independence of the Judiciary was born.

The Constitution of India:

Emerging from Montesquieu's Doctrine in the early 18th century, the concept of Judicial Independence continues to hold a place of prominence in all modern democracies. The framers of the **Constitution of India**[3] found that it was imperative to incorporate in the Indian Constitution provisions for establishing and maintaining Judicial Independence. Dr. B.R. Ambedkar, the Chairman of the Drafting Committee encapsulated the kind of Judiciary that the Constitution of India would afford to the people of India in the following words:

"*There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself."*

Independence of the judiciary is the cornerstone of our Constitution. Maintenance of Separation of Powers has been held to be a part of the inviolable "basic structure" of our Constitution.[4] The power of appointment, transfer, discipline and all the other conditions of service of the subordinate judiciary are placed entirely in the hands of the judiciary; while the executive is merely expected to make or issue formal orders. The power of appointment of higher judicial officers lies with the President in consultation with the Chief Justice, of the Court to which the appointment is made. The judiciary that Dr. B. R. Ambedkar envisioned for India finds a place of eminence in the following provisions of the Indian Constitution:

- **Separation of the Judiciary from the Executive:** The Directive Principles of State Policy in Art. 50 mandate that the State take steps to separate the judiciary from the executive in the public services of the State and also contemplates a separate judicial service free from executive control.
- **Constitution of the Supreme Court and the High Courts:** Articles 124, 126, 127, 214, 216, 217 of the Constitution provide for the establishment of the Supreme Court of India and the High Courts in various States, their composition, and the

[2] "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men." This was written in a letter by the first Baron Acton, the historian and moralist, in his letter to Bishop Mandell Creighton in 1887.
[3] The Constitution of India, 26 January 1950.
[4] *Keshavananda Bharati v. State of Karnataka* AIR 1973 SC 1461.

procedure for removal of judges. Subordinate courts fall within the control of the High Court of the State under the Art. 235, and the appointment of Judges to these courts are made by the Governor of the State in consultation with the High Court.

- **Security of Tenure:** The Judges of the Supreme Court and High Courts have been given the security of the tenure. Once appointed, they continue to remain in office till they reach the age of retirement- 65 years in the case of judges of Supreme Court (Art. 124(2)) and 62 years in the case of judges of the High Courts (Art. 217(1)). A member of the higher judiciary can be removed from service only through the process of impeachment envisaged under Article 124 (4) of the Constitution on grounds of proven misbehavior or incapacity.
- **Salaries and Allowances:** The salaries and allowances of judges are a charge on the Consolidated Fund of India in case of Supreme Court judges, and the Consolidated Fund of the State in the case of High Court judges, thereby insulating the Judges from any executive or legislative action to curtail their remuneration. Their emoluments cannot be altered to their disadvantage (Art. 125(2)) except in the event of grave financial emergency.
- **Powers and Jurisdiction of Supreme Court:** Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail them. In civil matters, Parliament may change the pecuniary limit for appeals to the Supreme Court. Parliament may enhance the appellate jurisdiction of the Supreme Court or confer supplementary powers on the Supreme Court to enable it to work more effectively (Art. 138). Framing of Rules has also been conferred upon the Supreme Court (Art. 145).
- **No discussion on conduct of Judge in State Legislature/Parliament:** Art. 211 provides that there shall be no discussion in the legislature of the state with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties. A similar provision is made in Art. 121 for Parliament, with an exception with respect to a motion for presenting an address to the President praying for the removal of the judge.
- **Power to punish for contempt:** Both the Supreme Court and the High Courts have the power to punish any person for their contempt under Art. 129 and Art. 215, respectively.

Judicial Enquiry Act, 1968

The Constitution of India provides for a Judiciary which functions in its own sphere, free from the overbearing influence of the Executive or the Legislative. In order to ensure accountability in the Judiciary and to give effect to Art. 124 of the Constitution, the Judicial Enquiry Act, 1968 was enacted, which lays down the procedure for investigation into allegations of misbehaviour and incapacity of a Judge of the Supreme Court or the High Courts.

Unfortunately, as is the case with most of the coveted tenets set out in the Constitution of India, there is a wide chasm between Independence of the Judiciary envisioned in the Articles of the Constitution and the actual working thereof. An examination of the working of the Constitutional provisions in India relating to the Independence of the Judiciary is necessary.

- **Selection and Appointment of Judges:** The mechanism for selection, appointment and transfer of judges has been subject to judicial scrutiny. The procedure for selection and appointment of Judges has undergone changes after three judicial pronouncements of the Supreme Court, which need to be considered for a more incisive understanding of the present constitutional position and its effect on the selection and appointment of judges.

In *SP Gupta v. Union of India*[5] otherwise known as the 1st Judges case, , the Supreme Court considered the question of transfer of a judge from one High Court to another, without his consent, and the confirmation of an ad-hoc judge. The decision of the majority of the seven judges affirmed the power of the executive to decide these issues and dismissed the petitions. The question of initial appointment of judges was nowhere in issue, but the majority judgment, ruled that the expression 'consultation' used in Art 124 (2) and 217 of the Constitution did not mean 'concurrence', and declared that the Executive could appoint a judge, even if the Chief Justice had different views on the matter. Justice Bhagwati, delivering the majority judgment, held that 'consultation' with the Chief Justice would mean that there should be a 'collegium' to advise the Chief Justice.

In the year 1991, doubts were expressed about soundness of the S.P. Gupta judgment in *Subhash Sharma vs. Union of India*[6], by a Bench presided over by Chief Justice Ranganath Misra, with regard to the interpretation of the word 'consultation' occurring in Articles 217 and 224 (2) of the Constitution, and the matter was referred to a larger Bench saying that:

"The view that the four learned judges shared in SP Gupta's case, in our opinion does not recognise the special and pivotal position of the Chief Justice of India. The correctness of the opinion of the majority in S.P. Gupta's case, relating to the status and importance of the Chief Justice of India and the view that the judge's strength is not justiciable, should be reconsidered by a larger Bench".

Consequently, in *Supreme Court Advocates-on-Record Association v. UOI*[7], otherwise known as the 2nd Judges case, a Bench of nine judges was constituted and judgment was pronounced on 6-10-1993, declaring that "the opinion given by the Chief Justice in the consultation process has to be formed, taking into account the views of the two senior most judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior most judge of the Supreme Court, whose opinion is likely to be significant in adjudicating the suitability of the candidate, by reason of the fact that he has come from the same High Court or otherwise. Art 124 (2) is an indicator that ascertainment of the views of some other judges of the Supreme Court is requisite. The object underlying 124 (2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court, which are likely to be conversant with the affairs of the concerned High Court, or those of one or more senior judges of that High Court, and

[5] AIR 1982 SC 149
[6] AIR 1991 SC 631
[7] (1993 (4) SCC 441)

must be formed only after ascertaining the views of at least the two senior most judges of the High Court".

This procedure continued till the Government of India during the Presidentship of Sri K.R. Narayanan had doubts and required clarification from the Supreme Court with regard to the appointment procedure in *Special Reference 1 of 1998*[8], otherwise known as the 3rd Judges case, Special Reference No. 1 of 1998, came to be made under Article 143 of the Constitution. The President referred 9 questions and a Bench of nine judges was constituted, headed by Justice S.P. Bharucha. Normally, an advisory opinion under Article 143 does not have to be binding, but the Attorney General made a statement before the Court that government would abide by the opinion of the Court. The 9 judge Bench answered the reference unanimously, and expressed the view that the Chief Justice of India must make a recommendation to appoint a judge of the Supreme Court and to transfer a Chief Justice or puisne judge of a High Court in consultation with the four senior-most puisne judges of the Supreme Court. In so far as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior-most -judges of the Supreme Court.[9]

- **Removal of Judges:** In India, a judge of the Supreme Court or a High Court can be impeached on the ground of proven misbehaviour or incapacity and the power in this regard is vested in Parliament vide Articles 124(4) and 217(1)(b). When a judge is impeached, Parliament acts as a judicial body and its members must decide the guilt or otherwise of the judge facing the indictment objectively uninfluenced by extraneous considerations. The Supreme Court has neither administrative control over the High Courts nor the power to inquire into the misbehaviour of a Chief Justice or a judge of a High Court. The Supreme Court has ruled that the Chief Justice of India and two senior colleagues on being prima facie satisfied about the correctness and truth touching the conduct of a High Court judge inconsistent with such high office, could proceed against him through a process other than impeachment. In such a case, the judge concerned could be offered the option of resigning or facing an inquiry. The constitution of a Committee of Judges to inquire into the misconduct could be initiated by the Chief Justice and his two colleagues and need not await the initiation by the Members of Parliament required for impeaching the judge, as mandated by the Constitution.

Though the framers of the Constitution in incorporating the aforementioned provisions sought to strike a balance between judicial independence and judicial accountability, these provisions have not been successful in achieving the intended purpose or in acting as deterrent to judicial indiscipline. The working of these provisions is illustrated below:

Impeachment proceedings were initiated against former Justice of the Supreme Court of India, Sri V. Ramaswami in the light of allegations against him pertaining to ostentatious expenditure on his official residence during his tenure as a Chief Justice of Punjab and Haryana. Of 401 members present in Parliament that day, there were 196 votes for impeachment and no votes against and 205 abstentions. The motion, which

[8] 1998 (7) SCC 739
[9] Judicial Reform, Appointment and Transfer of Judges, Dr. Shyamlha Pappu, Senior Advocate of the Supreme Court of India, member of the Law Commission of India, http://www.halsburys.in/judicial-reform.html

required not less than two-third majority of the total number of members present in both houses of the Parliament and an absolute majority of its total membership, thus failed to pass.

Justice Sri Soumitra Sen, a former judge of the Calcutta High Court was held guilty of misappropriating public funds he received in his capacity as receiver appointed by the High Court of Calcutta, and misrepresenting facts by a committee of three judges set up by then Chief Justice of India Sri K. G. Balakrishnan in 2007. On 18 August 2011, the Rajya Sabha passed the impeachment motion by overwhelming majority of 189 votes in favour and 17 against. Ahead of the impeachment motion against him in the Lok Sabha on September 5 & 6, 2011, he resigned on September 1, 2011, and the impeachment process was frustrated.

Justice Sri Dinakaran Premkumar, Chief Justice of the Karnataka and Sikkim High Courts, accused of accumulating huge assets and properties in several places and of acts of Judicial Impropriety was subject to a motion of impeachment before the Rajya Sabha seeking his removal on charges of corruption and abuse of his judicial office. He resigned from the post of Sikkim High Court Chief Justice on 29th July 2011 ostensibly expressing lack of faith and confidence in the three-member inquiry Committee probing charges against him, after his petition for judicial review was dismissed by the Supreme Court of India.

An analysis of the above makes it evident that inspite of provisions in the Constitution of India and the Judges Enquiry Act, uniform standards in selection and appointment of judges and judicial accountability in India, have been elusive. The law makers of the country recognising the burgeoning need to revamp the existing system in order to provide for steady and progressive laws with respect to selection, appointment and removal of judges, improvement of the judicial system, bringing about judicial accountability and to strengthen judicial independence, have been assisted by several reports enumerated hereunder:

The Law Commission of India:

- The 58th Report of the Law Commission deliberated upon the Structure and Jurisdiction of the Higher Judiciary.[10]
- The 72nd Report of the Law Commission explored the question of whether Article 220 of the Constitution should be amended so as to permit retired High Court Judges to practise in their own State after the lapse of a certain period of time and the Commission was of the view that the amendment was not necessary and that the ban on practise by a High Court Judge in the very High Court where he was a permanent Judge was a step towards securing the independence of the judiciary.[11]
- The subject-matter of the 80th Report of the Law Commission was the Method of Appointment of Judges and this Report by and large approved the constitutional scheme for appointment of judges with some recommendations for improvement.[12]

[10] Sixth Law Commission, 58th report on '*Structure and Jurisdiction of the Higher Judiciary'* 1974.
[11] Eight Law Commission, 72nd report on '*Restriction of practice after being a permanent Judge*' 1978.
[12] Eight Law Commission, 80th report on '*The method of appointment of Judges'* 1979.

- The 95th Report of the Law Commission ventured into a Constitutional Division within the Supreme Court of India and it was suggested herein that the Supreme Court of India must have two divisions- Constitutional Division and Legal Division.[13]
- The 116th Report pertaining to All India Judicial Services and recommendations herein paved way for the setting up of the All India Judicial Services.[14]
- The focus of the 124th and 125th Report were recommendations for expediting the process for filling out vacancies in the High Courts and Supreme Court, respectively and handling the arrears of cases before these Courts.[15]
- The 195th Report of the Law Commission was confined to examining the draft Judges (Inquiry) Bill and the Commission expressed the view that the measures envisaged in the Bill to ensure accountability of the judiciary by way of imposing minor measures, including issuing advisories, warnings, stoppage of assignment of judicial work, etc., were constitutional. The constitution of a National Judicial Council consisting only of judges was also considered to be constitutionally valid and consistent with the concept of independence of judiciary, judicial accountability and doctrine of separation of powers. The Report affirmed the need to have a mechanism in place for filing complaints against all members of the higher judiciary.[16]
- The 214th Report of the Law Commission dealt with the need to revisit the law laid down in Judges' Cases I, II and III and was of the view that the collegium system for appointment of judges needed to be changed and that there were two options open to the Government of the day- one is to seek a reconsideration of the three judgments by Supreme Court or to pass a law restoring the primacy of the Chief Justice of India and the power of the executive to make appointments.[17]

The National Commission to Review the Working of the Constitution[18]

The National Commission to Review the Working of the Constitution gave impetus to the establishment of the institutional framework of the National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. It was the Commission's view that the power of appointment should cease to be exclusively an executive function and should involve an institutional framework so that some consultation with the judiciary is provided for before making such appointments.

The Commission recommended the establishment of a National Judicial Commission under the Constitution and proposed the composition of the Collegium which ensures the effective participation of both the executive and judicial wings of the State, in appointing judges and it was affirmed that the functioning of the Commission was integral in order to preserve the independence of the judiciary. The Commission recommended that the retirement age for High Court Judges be increased to 65 years. It suggested that Judicial Councils be set up for the preparation of short and long term plans, and annual budget for the Judiciary.

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[13] Tenth Law Commission, 95th report on '*Constitutional Division Within the Supreme Court – A Proposal For*' 1984.
[14] Eleventh Law Commission, 116th report on '*Formation of an All India Judicial Service*' 1986.
[15] Eleventh Law Commission, 1985 – 1988.
[16] Seventeenth Law Commission, 195th report on '*The Judges Enquiry Bill*' 2005.
[17] Eighteenth Law Commission, 214th report on ' *Proposal for reconsideration of the Judges case I, II and III – S.P Gupta V. UOI*' 2008.
[18] The National Commission to Review the Working of the Constitution (NCRWC) was set up vide Government Resolution dated 22 February, 2000 under the Chairmanship of former Chief Justice Sri. M.N. Venkatachaliah. Report submitted on 31.03.2002

Parliamentary Standing Committee on Law & Justice[19]

The 46th Report dated 9th June, 2011 of the Standing Committee, recommended that the Judiciary, including the higher Judiciary, Regulatory Authorities etc, be brought within the ambit of this Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010 by making necessary amendments therein. The Bill made provisions for establishment of a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power or willful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimization of the person making such complaint.

In spite of the aforementioned recommendations, the judicial system in India has been not changed - All India Judicial Service is not in place, a Constitutional Division has not been set up in the Supreme Court of India, the age of retirement of High Court Judges continues at 62 years, there are no efforts to augment or revamp the judiciary to reduce the arrears of cases, the revised Judges (Inquiry) Bill, 2006 incorporated almost all the Law Commission's recommendations but it was allowed to lapse.

Independence of the Judiciary is multi-faceted. It begins with ensuring that the Executive, Legislature and the Judiciary function in conformity with the cardinal principle of Separation of Powers. But, true Judicial Independence flows from a system wherein its independence co-exists with Judicial Accountability. Therefore, Independence of the Judiciary lies in the working of the Judiciary in a manner which is congruent with the doctrine of the Separation of Powers, while being accountable for its actions, amenable to correction for misconduct and not acting outside the ambit of powers vested in it.

The Judicial Standards and Accountability Bill, 2010

The Constitution of India has been in force for over six decades now and many a change has been made to ensure that the canons of Independence of the Judiciary are afforded to the Indian people both in letter and spirit. The latest and perhaps the most extensive of changes envisaged till date is the Judicial Standards and Accountability Bill, 2010[20] which is currently making its way through the Indian Parliament. The Bill is the tallest endeavor till date, for an overhaul of the Judiciary in India. It is an endeavour to lay down the highest standards for Judicial Conduct and for bringing about transparency in the Judges' conduct.

- The Bill seeks to

  (a) Lay down standards of conduct for the judiciary
  (b) Provide for the accountability of judges by mandating declaration of their assets

[19] Committee on Personnel, Public Grievances, Law and Justice, Department Related to Parliamentary Standing Committees, Parliament of India.
[20] The Judicial Standards and Accountability Bill, 2010 was introduced in the Lok Sabha, the Lower House of the Indian Parliament, on December 1, 2010. The Bill was introduced by the Sri M. Veerappa Moily, Union Minister for Law

(c) Establish mechanisms for investigating individual complaints for misbehavior or incapacity of a judge of the Supreme Court or High Courts
(d) Provide a mechanism for the removal of judges, while repealing the Judges (Inquiry) Act, 1968[21] which presently regulates the procedure of removal of judges
(e) Maintain confidentiality in inquiry into complaints and penalize frivolous complaints.

- The Bill aims at a metamorphosis in the working of the Indian Judiciary by mandating the judges to adopt universally accepted values of judicial life which include, a prohibition on:

  (a) Close association with individual members of the Bar who practise in the same court as the judge
  (b) Allowing family members who are members of the Bar to use the judge's residence for professional work
  (c) Hearing or deciding matters in which a member of the judge's family or relative or friend is concerned
  (d) Entering into public debate on political matters or matters which the judge is likely to decide
  (e) Engaging in trade or business and speculation in securities.

- Judges will be required to declare their assets and liabilities, and also that of their spouse and children within 30 days of the judge taking oath of office.
- Every judge will have to file an annual report of his assets and liabilities. The assets and liabilities of the judge will be displayed on the website of the Court to which he belongs.
- The Bill establishes three authorities to investigate complaints against judges:

  - **National Judicial Oversight Committee:** to which initial complaints will be made, comprising of a retired Chief Justice of India as the Chairperson, a judge of the Supreme Court nominated by Chief Justice of India, a Chief Justice of the High Court, the Attorney General for India, and an eminent person appointed by the President. The Bill seeks to eliminate frivolous or vexatious complaints at the outset by vesting the Oversight Committee to penalize such complaints.
  - **Scrutiny Panel:** to which the Oversight Committee refers complaints comprising of former Chief Justice and two sitting judges of that court. It will be constituted in the Supreme Court and every High Court. If the Scrutiny Panel feels there are sufficient grounds for proceeding against the judge, it shall report on its findings to the Oversight Committee. If it finds that the complaint is frivolous, or that there not sufficient grounds for inquiring against into the complaint, it shall submit a report to the Oversight Committee giving its findings for not proceeding with the complaint.
  - **Investigation Committee:** If the Scrutiny Panel recommends investigation into a complaint against a judge, the Oversight Committee will constitute an investigation committee to investigate into the complaint. The investigation committee will consist of not more than three members. It will have some

[21] *The* Judges *(*Inquiry*)* Act, 1968. Act No. 51 of 1968 [5th December, 1968.]

powers of a civil court and also the power to seize documents and keep them in its custody. The investigation committee will frame definite charges against the judge and shall communicate the same to the judge. The judge shall be given an opportunity to present his case, but if he/ she chooses not be heard, the proceedings may be heard without the Judge's presence.

- If the charges against a judge are proved, the Oversight Committee may
  (a) Recommend that judicial work shall not be assigned to the judge
  (b) Issue advisories and warnings if it feels that the charges proved do not warrant the removal of the judge
  (c) If the Committee feels that the charges proved merit the removal of the judge, it shall request the judge to resign voluntarily, and if he fails to do so, advise the President to proceed with the removal of the judge. In such a case, the President shall refer the matter to Parliament.
- A motion for removal of a judge can also be introduced in Parliament by members of Parliament. In such a case, the Speaker or the Chairman can either admit the notice, or refuse to admit it. If the notice is admitted, the matter shall be referred to the Oversight Committee for inquiry.
- The Bill exempts documents and records of proceedings related to a complaint from the purview of the Right to Information Act, 2005. The reports of the Investigation Committee and the order of the Oversight Committee shall be made public.

A critical analysis of the Judicial Standards and Accountability Bill raises a few causes for concern in the following provisions:

- The 195th Report of the Law Commission and the 21st Report of the Parliamentary Standing Committee on Personnel, Public Grievances, and Law and Justice in their respective reports on the Judges (Inquiry) Bill, 2006, recommended a broad-based Oversight Committee to represent members of executive, legislature, judiciary and the Bar. There is no member of the legislature in any of the authorities proposed in the Bill.
- The Bill provides that judges from the same High Court shall first scrutinize whether a complaint against a judge needs to be investigated, however, there is no provision for a review mechanism by the Oversight Committee if the Scrutiny Panel decides that there is no merit in the complaint.
- In 1997, the Supreme Court adopted a different in-house procedure for inquiring into complaints of misbehavior against judges. It stated that the inquiry committee would consist of two Chief Justices of High Courts other than the High Court to which the judge belongs, and one other High Court judge to ensure that judges of the same High Court would not sit in inquiry against a judge of that Court. In violation of the rationale behind this, the Bill provides for a scrutiny Panel headed by a former Chief Justice of the High Court and two other sitting judges of that court.
- The Bill requires all complaints to be kept confidential. Any breach of confidentiality carries a penalty. In addition, a vexatious or frivolous complaint, if made in public, may also be penalised under the Contempt of Courts Act, 1971. However, judges cannot be defamed if complaints are kept confidential, therefore, the need for an additional safeguard against frivolous complaints may be questionable.

- In C. Ravichandran Iyer v. Justice A.M.Bhattacharjee[22], the Supreme Court has held that a judge can seek 'judicial review' against an order of the President removing him. The Bill makes no mention of whether a judge who has been removed has a right to appeal to the Supreme Court. Therefore, in the absence of any provision in the Bill rendering finality to the Presidential order, based on this judgment, a judge will to have the right to appeal to the Supreme Court to review the order of removal passed by Parliament.

Independence of the Judiciary- an international overview:

Independence of the Judiciary occupies a place of prominence world over. The importance of an Independent Judiciary is accentuated by the United Nations and thereby all member nations of the UN. **The Universal Declaration of Human Rights**[23] enshrines the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

International Covenant on Economic and Cultural Rights[24] and on **Civil and Political Rights** both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay. **The International Covenant on Civil and Political Rights** ("ICCPR")[25] states the fundamental rights that belong to human beings everywhere and specifically provides that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" under Article 14.1.

The United Nations General Assembly adopted the **Basic Principles on the Independence of the Judiciary**[26] at the crux of which was the Constitutional guarantee of Independence of the Judiciary promoted by governmental organs, ensuring that the judiciary shall decide matters before them impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect. This Resolution also emphasized, *inter alia*, the conduct of the Judges, the process of selection of Judges and their tenure, standards for judicial discipline while accentuating professional secrecy and immunity from prosecution for acts or omissions in the exercise of their judicial functions.

Judicial independence in the US and UK:

Judicial independence has always been recognized as a core political value in the United States since the foundation of the republic. Alexander Hamilton in Federalist: no 78 spoke of the need for "the impartial administration of laws by a judiciary of firmness

[22] 1995 (5) SCC 457
[23] Universal Deceleration of Human Rights, 10 December 1948.
[24] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.
[25] International Covenant on Civil and Political Rights, 16 December 1966.
[26] The Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

and independence." It is an element of constitutional checks and balances, which are the primary source of assurance of judicial impartiality. Hand in hand with this independence comes the necessity of democratic accountability. A government must derive all its power, directly or indirectly from the people[27], and therefore it must be equally responsible to them for the proper administration of the power they are given for a specific purpose. This is, at its core, the idea that judges must be democratically accountable, and that the public, either directly or by representation must have a legitimate say in how the Courts should perform. A valid point to be mentioned in this age of transparency and democracy is that accountability is required nowadays in every sphere of public life, and the judiciary is no exception to this rule. The precarious balance between judicial independence and accountability is imperative in any democracy to ensure a fair and impartial adjudication of justice. The former of this two-fold continuum, which is, judicial independence, is similar to what can be seen in several other states across the world. It is safeguarded by mechanisms such as:

- *Secure Tenure:* Article III of the U.S. Constitution vests the judicial power of the United States in federal judges, who shall hold their offices during good behaviour, and shall at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. For Federal judges, tenure during good behavior essentially means, life tenure. The term "good behavior" implies that justices may serve for the remainder of their lives, unless they are impeached and convicted by Congress or resign or retire. The resonance of the term "good behavior" and the weight of its implication can be seen from the fact that only thirteen federal judges have ever been impeached in the history of the United States and of those only seven were convicted.
- *Compensation:* Federal judges are paid exceedingly well and the salaries of federal justices are in the top percentile of all salaries in the United States. The Annual pre-tax salary of a federal district judge is approximately $141,300[28], Court of Appeals judges earn roughly $149,000 and Supreme Court justices $173,000. Being highly paid, incidences of corruption in the judiciary are very slim and independence is maintained as judges seldom feel the need to line their pockets in addition to the handsome salary and the prestige they have already earned with their own perseverance; and
- *Self administration:* The Judicial Conference of the United States, which is the national administrative governing body of the U.S. Federal Court system is the perhaps the foremost mechanism of ensuring judicial independence in the country. It is composed of 26 federal judges and the Chief Justice of the United States who is the presiding officer and acts as a body of general oversight and recommendation and is responsible for making the policy that governs the nationwide administration of the federal court system. The function of the conference is to study the workings of different courts, their budgets, workload and matters concerning the good conduct of judges etc. The conference meets twice a year and makes annual recommendations to Congress, with respect to any legislation affecting the judiciary and proposes amendments to the federal rules of practice and procedure. The conference is also empowered to help relieve backlogs in the federal court system and make reallocations of judicial manpower etc. A function that in most other

[27] Government, James Madison wrote during the ratification debate, "must derive all its power directly or indirectly from the great body of the people." Federalist No's: 37, 39.
[28] Bureau of Labor Statistics Report, 2000

states is manipulated and used as a mechanism to intimidate justices and infringe on their independence.

The latter of the twofold requirement of judicial independence, that of judicial accountability is the flipside of the coin, without which no judicial mechanism can flourish and function in a democratic society. While the abovementioned safeguards protect the independence of the judiciary, it is imperative at the same time that there is some mechanism or legislation that provides a check and balance on the power of the judiciary, such that it can function in a transparent manner and not hinder the operation of the other organs of governance. There is a wide array of prophylactic legislations and rules that are designed to promote judicial independence by making the judicial system more transparent and safeguarding judges from censure and at the same time making the judicial system more accountable. Most of these legislations require judges to disclose personal information that might lead to conflicts of interest, such as a 1989 law, which limits the gifts that judges and other high government officials may accept and imposes caps on outside earnings to 15 percent of their government salary[29]. In addition, Federal judges and other public officials may accept no honoraria for giving a speech or writing an article[30] as a payment in such situations could trigger the suspicions of ulterior motives. Another law requires judges and other high government officers to file annual reports of their financial holdings[31] and those of their family members as well, mandating that the reports be available for public inspection. In addition, in 1980, Congress passed the Judicial Conduct and Disability Act[32], which permits any person to file a complaint with the clerk of the U.S. Appeals Court for the Circuit, on the ground that the federal judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the Courts or is unable to discharge all the duties by reason of mental or physical disability." The Chief Judge upon stating his reasons by written order may dismiss the complaint if he finds it *directly related to the merit of the decision or frivolous.* If it is not dismissed, a special committee is appointed to investigate and file a written report, of the findings and recommendations with the judicial counsel of the circuit. The judicial counsel may then conduct its own investigation and decide what action must be taken, except for removal and may also refer the same to the Judicial Conference for further action. In addition to these statutory and other provisions, both federal and state judiciaries have adopted judicial codes of conduct, which contain rules detailing and advising judges on the propriety of serving on boards and committees and holding membership in private organizations, public speaking, associating with political parties, etc. An advisory committee has also been established within the judicial conference in order to advise judges who seek guidance, on how the code applies to specific situations, as a violation of the provisions of the code may subject judges to censure and discipline by circuit councils. In addition the following is the machinery that has been put in place to ensure judicial accountability amongst judges:

- *President appoints Federal judges:* The Constitution provides that the President shall nominate judges of the Supreme Court and all other officers of the United States (which today includes federal appellate and district judges) and with the advice and

[29] United States Code, 5 U.S.C. §§501-505
[30] Section 601(a) of the Ethics Reform Act, 1989 [5 U.S.C. App 7, § 501(b)]
[31] Title I of the Ethics in Government Act, 1978
[32] The Judicial Conduct and Disability Act, (28 U.S.C. §§ 372[c])

consent of the Senate shall appoint them. Congress has enacted no statutes to regulate the appointment of life-tenured judges and has adopted no age, professional, or training prerequisites, so the country relies on the selection process to screen potential federal judges for quality and integrity, and a vast amount of faith has been placed on the decision of the president and his appointing power of judges and other officers based solely on merit.

- *Judicial Discipline and Removal:* While the federal constitution provides federal judges tenure during good behavior, it also authorizes the removal of life tenured judges by impeachment (indictment) by the House of Representatives and trial in the Senate. The grounds for impeachment are, "*treason, bribery, or other high crimes and misdemeanors*[33]*"* While impeachment and conviction are laborious and time consuming and haven't been used often in the history of the United States, they have been used before and provide one of the strongest checks on the power of the judiciary.
- *Accountability through legislative oversight.* While the judiciary in the United States is administered by the judicial conference, the legislature nevertheless retains the authority to determine the expenditure of public funds toward the judicial branch and in particular they also have the authority to direct how such expenditure is to be distributed within the judiciary. In addition, the legislature also has the power to change court organization and jurisdiction, which together with the power of purse creates a legislative oversight, that promotes public accountability within the judiciary and provides a stringent check and balance of its power.
- *Accountability through statistical reporting*. Another good mechanism to promote judicial accountability is that of statistical reporting, which provides descriptive statistics on judicial activity, such as how many cases were presented to the courts for decision and how many the courts disposed, what methods were used for disposal, etc. Data such as this creates a good benchmark or a framework or even a pre-existing standard of the efficient functioning of courts, which must be emulated by other courts. Such reporting exerts some amount of pressure on judges to change their methods and conform to the norm and to dispose of cases expeditiously so as to avoid the embarrassment of a public report.

The UK is another great Democracy which values the fundamental requirement of an impartial judiciary which is secured by the rigorous application of the rule of law, the bedrock of any modern democratic society. Like most other nations, they have a similar mechanism to secure the independence of the judiciary through an independent process of meritorious judicial appointments. Prior to the Constitutional Reforms Act of 2005, judicial appointments were made after appropriate enquiry on the recommendation of the Lord Chancellor, however that was not to say that they were in any way biased or unfair. The Reform Act established a Judicial Appointments Commission, which was represented in minority by judges, who then recommended candidates to the Lord Chancellor who had a very limited power of veto. The Commission is statutorily bound to encourage diversity in making appointments and to ensure that these appointments are purely merit based. The revised appointment process somewhat solidified the guarantee of institutional independence. In addition, they have the requirement that the salaries of judges must be set by an independent body, the value of which must be maintained, and paid directly out of the Consolidated

[33] United States Constitution, Article II Section 4

Fund such that security of tenure is maintained as an important safeguard of judicial independence. The establishment of the Supreme Court of the United Kingdom by the Constitutional Reform Act, 2005 was an important indicator of the need for an institutionally independent judiciary in any modern democracy, even in a nation that can trace its history back to the very inception of Common law, during the Reign of Henry II in the 12th Century. The Supreme Court was proposed to be an independent statutory body responsible for appointing its own staff for administrative service, headed by a chief executive in order to exclude political interference. The Court staff would also be civil servants accountable to the chief executive and not to any minister, who would in turn be answerable to the president of the Supreme Court. The Lord Chancellor would however ensure that the Supreme Court would be provided with appropriate offices and resources as are required to carry on its business, and the funding needed to ensure its smooth functioning would be collected from several avenues such as from contributions taken from civil court fees and others and the remainder would be provided by the treasury. Judicial salaries are all drawn directly from the Consolidated Fund and there are various other provisions that ensure judicial accountability. On the issue of judicial independence, decisions of the Supreme Court are not subject to appeal, however it is possible for Parliament, composed of representatives elected by the people, to legislate if they do not approve of an interpretation by the Court of the law on a particular matter, which they sometimes do, ensuring accountability in required circumstances. With respect to judicial misconduct, the Act has a statutory disciplinary scheme whereby disciplinary proceedings can be instituted and taken to completion on the assent of the Lord Chief Justice and the Lord Chancellor. The removal of a High Court judge requires a resolution of both Houses of Parliament and judges at the lower levels can only be removed after disciplinary proceedings. The formation of a Supreme Court in the UK was intended to enable all to see that the final court of appeal as wholly independent of the legislature and the executive and to increase accountability through greater openness and transparency and easier access.

The framework of judicial independence, which has been established in the US and the UK to a certain extent along with the safeguards that have been implemented, to ensure accountability, that can be dated back to the very inception of these countries and their Constitutions have lead to a norm of fastidiousness in the judiciary which allow very little room for manipulation and corruption. For the remainder of times where the impartiality of judgments are put into question, there are numerous legislations and preventive mechanisms that have been put in place whereby such wrongs can be addressed and remedied in an expedient manner. It has become somewhat of a cultural expectation among not just judges, but lawyers, legislators and the public in general, that surpasses the legal provisions that have been implemented, that judges ought to behave independently and impartially despite the pressure of popular opinion and political clout and it has become a state of mind, or matter of expectation and more so, a habit or one could even say, a modern day, state of nature. A state of nature, such that all members of society can have the confidence, that the judicial decisions affecting them were adjudicated by a judiciary, accountable to the very people that gave them power, and representative of the diversity of the populace in which we now live.

Judicial Independence and Accountability in other European countries:

European Charter on the Statute for Judges (1998)[34]

Conceptually, the court system belongs to the people and the courts must be functionally feasible to enable every individual to knock its doors to seek remedies against injustice. The statute aims at adopting this profound philosophy of ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary. Judges must, the Statute says, show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings. The Statute further declares that a decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are to taken by the independent authority referred to above or on its proposal, or its recommendation or with its agreement or following its opinion.

The Statute also imposes liability on erring judges. The dereliction by a judge of one of the duties expressly defined by the statute, gives rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. Compensation for harm wrongfully suffered as a result of the decision or the behavior of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to above.

Spain

Judiciary is the most sublime instrumentality in any democracy. Independence of judiciary is an indispensable element in the effective functioning of a democracy. The evolution of Spain into a democracy was marked by the enactment of the Spanish Constitution of 1978[35], the highest law of the land. The Constitution makes express provisions for protecting the independence of judiciary. The judges and magistrates are

[34] Adopted by the participants at the multilateral meeting on the statute for judges in Europe, organized by the Council of Europe, between 8-10 July 1998

[35] Enacted after the Referendum held on the 6th December 1978

appointed for fixed tenure by the supreme law of the land. They are independent in discharge of their duties not being answerable either to the Parliament (*Cortes Generales)* or the Executive. Judges and magistrates may not be dismissed, suspended, transferred or retired except on the grounds provided for in law.[36]

However, the notion of judicial independence should not be misused to make judiciary infallible. It is incumbent upon the judiciary to express the will of the people. Therefore, judicial accountability is as important as judicial independence in fostering rule of law. To ensure the judges and magistrates discharge their duties in fair and unbiased manner they are according to the Constitutional mandate, subject to the rule of law. Judges and courts are not authorized to exercise any powers other than those expressly provided under law and allocated to them.

To address the elusive concept of judicial accountability the 'General Council of the Judicial Power' is established as the governing body of all the Courts and Tribunals which composed of the President of the Supreme Court and twenty members appointed by the King for a term of five years, of which twelve shall be judges and magistrates of all judicial categories, four nominated by the Congress and four by the Senate thus ensuring the accountability of judiciary and at the same time maintaining its independence.[37]

Germany

Judicial independence constitutes one of the fundamental principles of the German Constitution. The status and structure of the judiciary is elaborated in Chapter XI (Articles 92-104) of the Constitution of Germany ("Grundgesetz"/ "Basic Law"). The Grundgesetz provides for the establishment of federal and state courts presided over by federal and land (state) judges and the constitutional guarantee of judicial independence covers both classes of courts and judges. Article 97 provides that the judges, in discharge of their duties, are bound only by the law, thus providing them substantial independence in their decision-making process. Further, strengthening the independence of judiciary and also providing a mechanism for accountability, the Article provides that judges appointed permanently to full-time positions may be involuntarily dismissed, suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision.

Obligated by the imperatives of the Basic Law, the Judiciary Act, 1972 was enacted which stands as the primary legislation incorporating provisions concerning independence and accountability of judiciary. Section 25 copies verbatim Article 97 (1) of the Grundgesetz which provides for the basic principle of independence of the judiciary and it reads as follows- "A judge shall be independent and subject only to the law." The Basic Law vests in the judiciary vast power of concrete judicial review enabling it to decide the constitutional validity of any national law of Germany. Larger the power, greater the responsibility. Thus, the Judiciary Act, 1972 includes provisions for supervision of service of judges which also include the power to censure an improper mode of executing an official duty and to urge proper and prompt attention to official duties.

[36] See Article 117
[37] See Article 122

France

The separation of powers between the Legislature, the Executive and the Judiciary as well as the fundamental concept of an independent judiciary are given a constitutional status in the French Republic. The duty of protection of independence of the curial organ has been cast on the President of the Republic. The Constitution provides for the enactment of an Institutional Act or an Organic Law to determine the status of members of the judiciary. Furthermore, to ensure independent and efficient functionalism of judiciary, the judges are made irremovable from office.[38]

Denmark

The Constitution of Denmark provides for three organs- the Legislature, the Executive and the Judiciary to govern the country's administration. The judicature commands functional independence with the administration of justice remaining independent of the other two organs. The Constitution does not vest with the executive the power of dismissal or transfer of judge against his will except in exceptional circumstances where rearrangement of courts of justice is made. The judges are obligated to act and discharge their duties solely according to the law. [39]

Judicial Independence in some of the member nations of SAARC:

Country and form of government	Constitutional Guarantee to Judicial Independence	Who appoints judges of the higher judiciary?	Comments
Sri Lanka Democracy	Yes, under Articles 107-111 of the Constitution	Appointment by President Removal by President, supported by a majority of the total number of Members of Parliament (including those not present) on grounds of proved misbehaviour or incapacity	Impeachment process is underway against the Chief Justice of the Supreme Court under a Standing Order of the Parliament which is disputably in contravention with the constitutional provisions.
Bhutan Constitutional Monarchy	No	Appointment by the King, in consultation with a National Judicial Commission Removal on expiry of term	
Maldives Presidential Republic	Yes	Appointment and removal Judicial Services Commission	On 16 January 2012, the Maldives military, on orders from former President Nasheed, un-constitutionally arrested Judge Abdulla Mohamed, the Chief Justice of the Maldives Criminal Court; on charges that he was blocking the prosecution of corruption and human rights cases against the allies of former President Gayoom.

[38] Article 64 of the French Constitution
[39] Sections 62 & 64 of the Constitution of Denmark.

Nepal Federal Republic	Yes, in the Interim Constitution, 2007	President appoints the Chief Justice on the recommendation of the Constitutional Council and the Chief Justice appoints the other judges on the recommendation of the Judicial Council Removal by a motion of impeachment moved in the Parliament and passed by 2/3rds of the members on grounds of incompetence, misbehavior or failure to discharge the duties of his or her office in good faith or his or her inability to discharge his or her duties because of physical or mental reason	
Pakistan Federal Parliamentary Republic	Yes	President appoints the Chief Justice. Other judges are appointed by a Judicial Commission comprising of members of judiciary and executive Removal on expiry of term or be motion of impeachment	On November 3, 2007, then-President Pervez Musharraf declared a Provisional Constitutional Order, which declared a state of emergency and suspends the Constitution of Pakistan. High court judges, including the Supreme Court justices, were asked to take oath under this Provisional Constitutional Order which also suspended the Constitution. Those who didn't take oath were placed under house arrest. The names of Judges who took oath under the Order were referred to the Supreme Judicial Council of Pakistan which in its order dated 31.07.2009 decided to initiate contempt of court charges against these judges. On 26 April 2012, Prime Minister Gillani was convicted on the charges of Contempt of Court, becoming Pakistan's first Prime Minister to be convicted while holding office and on 19 June 2012, the Supreme Court of Pakistan ousted and further disqualified citing the earlier conviction on 26 April 2012

Conclusion

It is in the backdrop of the prescribed international standards and judicial system prevailing in India and in others parts of the world, that an understanding of Independence of the Judiciary in its true sense is possible. In the words of Churchill:

“Our aim is not to make our judges wealthy men, but to satisfy their needs and to maintain a modest and a dignified way of life suited to the gravity, and indeed, the majesty, of the duties they discharge.” Independence of the Judiciary stems from the Judiciary being politically shielded from the reprehensible influence of other branches of government, or from personal or adherent interests. Nations across the world are seen to deal with Judicial Independence in their own unique way.

The process adopted in the selection and appointment of Judges, into positions in the Higher Judiciary is the first indicator of a prevalence of Judicial Independence. In India, there is ambiguity on the policy pertaining to appointment or selection of Judges. The system that prevails as a result of the mandate that flows from Judges' Cases I, II and III is that there is collegium system comprising of the most senior Judges of the Supreme Court who determine the composition of judges in the Supreme Court and the High Courts. This system is not in tandem with the progressive systems across the world, wherein the process of selection of judges is a result of executive fiat and judicial consultation. To this end, the National Commission to Review the Working of the Constitution recommended the establishment of a National Judicial Commission comprising of members of the executive and judiciary.

The principal consideration behind appointing members of the higher judiciary must be, that the Judiciary must not be given a free-rein and be left to the devices of self-governance as it would result in tyranny, wherein all the vital decision-making powers pertaining to the Judiciary are vested in the top-five members. The need of the hour is the constitution of a National Judicial Commission contemplated in Justice Venkatachaliah’s report of a larger collegium in order to instill democracy in the process of selection and appointment of judges and evade judicial despotism. The current system has failed to meet the "felt need of the times". The system has no institutional mechanism or resources to make a proper selection of candidates for appointment, insulated from the "pressures". The appointment process, without the effective participation of the elected representatives of the people leaves much to be desired. The scope of judicial accountability in the Judicial Standards and Accountability Bill, 2010 has been restricted to judicial transparency and mechanism for complaints, and the establishment of the National Judicial Commission, which is a crying need today is conspicuous by its absence.

Another key issue that emerges in the context of Independence of the Judiciary is the tenure of the judges. Dynamic judicial systems across the world promote Judicial Independence by granting life-tenure for the Judges which imbues judicial discretion and empowers the Judiciary to adjudicate in accordance with rule of law and free from the sway of powerful vested interests. The downside of long-tenure judges lies in the fact that it could result in incumbency and the adjudicatory process could be thwarted from evolving with changing times. It is crucial that the Judiciary is dynamic and that it caters to the demography. In countries world over including India, long-tenure judges are the norm and they are considered the cornerstone of Judicial Independence. For the policy of tenure-judges to prevail, there must be a system conducive to supporting the same. Though there are provisions in the Bill, establishing standards for judicial conduct and for making the Judges answerable to misconduct and corruption, the Bill falls short of prescribing the highest standards of conduct for the members of the Judiciary as laid down by the United Nations General Assembly.

Higher Judiciary can be reckoned as an exclusive club wherein the personal rights of its members have to be fettered to achieve the end of maintaining the highest judicial standards. In order to retain the impartiality of the judiciary, it is imperative that members of the Judiciary disassociate themselves from members of the Bar, not hear cases in which the Judges or members of their family might have vested interests, refrain from publicly expressing views on matters which are the subject-matter of adjudication before them, disclose assets and maintain transparency in finances. This is essential from the point of view of Judicial Independence being achieved by ensuring restraint from the members of the Judiciary. Chapters II and III of the Judicial Standards and Accountability Bill, 2010 lay down sweeping provisions for ensuring transparency and regulating the conduct of the members of the judiciary.

Also, pertinent here is the duty vested in the Judiciary of protecting and inculcating the principles enunciated in the Constitution. The Judiciary under the garb of interpreting the Constitution is often seen in confrontation with the legislature and the executive for overstepping into realms of legislative and executive action. While on the one hand Judicial Activism, as expounded by Chief Justice Sri P.N. Bhagwati is seen making sweeping changes to the manner in which justice is dispensed to the Indian people, there is a calling for Judicial restraint, from what is perceived as Judicial over-activism, in order to prevent the judiciary from usurping the functions of the executive or the legislature, in keeping with the Doctrine of Separation of Powers. For an all-pervading Judicial Independence, it is imperative that the Judiciary be vested with unfettered powers for judicial review within the confines of the Constitution and that there is also scope for judicial activism within the confines of Separation of Powers. At the same time, slights on behalf of judges and scores of incidences of corruption that have left the country reeling, time and time again to no avail, have to be dealt with. With a multitude of legislations and the longest written constitution in the world, India has no dearth of laws, but a shortfall in implementation. Disciplinary procedure such as impeachment etc., must be implemented in cases where corruption is proven. Investigations must take place and perpetrators must not be allowed to go scot free just by a mere resignation of their post. While the price, for those trying to shy away from obligation might be too high, it is the only route to steer clear of the irresponsibility that is wrought within our system.

It is imperative for Judiciary in India to constantly evolve in order to sustain Judicial Independence. Independence of the Judiciary is not genuflexion, nor is it opposition to Government; it is a "Constitutional Religion". It is a live wire of our judicial system, where if the wire were snapped, the doomsday of the judiciary would not be far-off.[40]

[40] Speech delivered by Hon'ble Justice Arijit Pasayat, Judge, Supreme Court of India on 24 November 2007 at New Delhi.