NATIONAL JUDICIAL ACADEMY

CONFERENCE ON FUNCTIONS OF REGISTRAR (VIGILANCE/INTELLIGENCE)

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READING MATERIAL

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INTRODUCTION

Highest standard of professional conduct and ethics is the greatest asset of all the public functionaries. Especially, in the Constitutional set-up like India, every organs of the state including judiciary is accountable to the real sovereign- *the people*. The position of Judiciary is more pertinent, it has control over neither purse nor sword, and it's only asset is the trust and confidence of the people.

In India, Independence of Judiciary is constitutionally assured, from appointment to the retirement of Judicial Officers and Staff, opinion of the judiciary has pre-eminence. Judicial Independence is the *shield* from the external influences, and it is a *responsibility* as far as internal administration of the system is concerned. Primarily it is the constitutional duty of Apex Courts to guard the judiciary from external influences, internal confrontations and inadequacies. In the recent past, the reverence of judiciary seems to be eclipsed by dark clouds of corruption and non-judicious conduct of its members.

The dichotomy of preserving judicial independence at the one hand and regulating the cancer of corruption at the other has remained to be major concern of Writ Courts. To ensure judicial accountability and maintain higher judicial standards, all the High Courts in exercise its supervisory power, established 'in-house' Vigilance mechanism. However, with increase in revelation of corruption cases within the judiciary, 'in-house set-up' came under public scanner. Regrettably, some of the members of the judicial fraternity are inclined to and demanding external vigilance over the judiciary and it is not without reasons also, though vigilance cells have been constituted in every High Court, their efficiency is far from satisfactory. The present set of 'in-house' vigilance, have not been able to achieve the desired deterrent effects and earn confidence of the litigating public. Inquiries conducted by these cells (as alleged) do not proceed expeditiously and are not monitored regularly. They seem to be satisfied with processing the complaints received by the High Court, which many a time may be motivated and *mala fide*. There is an imperative need to galvanize the working of these cells in order to achieve the desired results.

Notwithstanding its inefficiency, the role of Vigilance Cell in ensuring judicial accountability is impeccable. Realizing the *need* of strengthening the vigilance wing of the judiciary, the National Judicial Academy has scheduled two programmes in Academic Calendar (2015-16) addressing the needs of Vigilance Cells of the High Courts.

At this juncture it is important to observe that, the functions performed by Registrar (Vigilance/Intelligence) vary as per the Rules of respective High Court. But, unfortunately camouflage of uncertainty is surrounding the functions of Registrar (Vigilance). For example-in some High Courts, Registrar Vigilance is authorised to conduct court inspections, inspection of records, assessment of ACRs, and in other High Court he is assigned with altogether different functions. Not only there is differences in functional heads but also in mode and manner of performing the duties. For example- 'Reporting' as per few High Court rules relating to the complaints against the Judicial Officer and inquiry conducted thereto, is to be made only to the Chief Justice and same is not true in other High Courts. This does not mean that it is high time to ponder over the issue of unification of rules, but certainly there shall be uniformity to certain extent, efficiency of the Vigilance Cell is proportionate to autonomy it has and support it receives from the High Court. In this milieu, the National Judicial Academy is pleased to provide a forum for fruitful deliberation, hoping for confirmatory changes in days to come.

Session-1
Role of Registrar (Vigilance/Intelligence) in ensuring Judicial Accountability

HIGH COURT RULES ON FUNCTIONS OF REGISTRAR VIGILANCE

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1. HIGH COURT OF CHHATTISGARH: BILASPUR

WORK DISTRIBUTION

II. REGISTRAR (VIGILANCE)

SL. NO	NAME OF THE WORK	TO BE SUBMITTED BEFORE
1.	Intimation regarding acquisition of movable properties and immovable properties by Judicial Officers	The Chief Justice
2.	Investigation into all complaints and allegations against Judicial Officers and the staff of the Subordinate Judiciary	The Chief Justice

2. ANNEXURE-III

GAUHATI HIGH COURT

In supersession of earlier orders, duties and responsibilities amongst the Officers of this Registry are redistributed and shall be as under with immediate effect.

Sl. No	Officer		Duties and Responsibilities	Reporting Authority
2.	**Registrar (Vigilance)**	1	Transfer and posting of all Judicial Officers of all Judicial Officers of all States	Administrative Committee
		2	Leave (only of Grade-I Officers), of all judicial Officers of all States.	JAD/Chief Justice
		3	Disciplinary matters (including complaints and inquiries) pertaining to all Judicial Officers in all States.	Portfolio Judge, JAD/ Chief Justice
		4	Inspection of all Courts and Tribunals under the supervisory jurisdiction of the Gauhati High Court.	Chief Justice
		5	ACRs of the Judicial Officers of all States	Portfolio Judge, JAD and Chief Justice, as the case may be
		6.	Communication of the ACR remarks of Judicial Officers	JAD
		7.	Scrutiny of Judicial Officers for continued utility	Appropriate Committee
		8.	In-charge of the matter relating to recruitment of Judicial Officers of all States under Gauhati High Court	Recruitment Committee
		9.	Any other matter pertaining to discipline and vigilance not covered by any other specific heading	Recruitment committee
		10.	ACP scheme of Judicial Officers	Appropriate Committee
		11	Selection Grade and Super-time Scale of Grade-I Officers	-Do-
		12	Any other matter entrusted by Hon'ble the Chief Justice	Chief Justice

3. THE ORISSA HIGH COURT RIGHT TO INFORMATION RULES, 2005

HIGH COURT OF JUDICATURE, ORISSA, CUTTACK

NOTIFICATION

The 23rd February 2006

No.77- In exercise of power conferred under Section 28 (1),Section 2(e) (III) and Section 2(h), read with Section 5 of The Right to Information Act, 2005 (Act No.22 of 2005), the Chief Justice of the High Court of Orissa being the Competent Authority with the concurrence of the Public Authority does hereby make the following Rules:

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2. Registrar (Vigilance)

1. All allegations against Judicial Officers as well as the Non- Judicial Staff of the District Judiciary.
2. All Vigilance enquires.
3. Acquisition of Movable and Immovable Properties of Judicial Officers.
4. All matters relating to the Rules Section.
5. Matters relating to the reports of the Law Commission.
6. Any other matter that would be specifically entrusted by the Hon'ble Chief Justice.

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4. ALLAHABAD HIGH COURT

Power and Duties of Officers

Sl.No	Officers	Responsibilities	Reporting
2	**Special Officer (Vigilance)**	1. Conducts all vigilance complaints against Judicial Officers and after conclusion of enquiry, submits the enquiry reports in sealed cover directly to Hon'ble the Chief Justice. 2.The Special Officer (Vigilance) in the High Court after receiving the reports submitted by the Vigilance Officers in the district Judgeship, be authorized to: (i) Examine the reports along with material forming part of the proceedings before the Vigilance Officer in the District Judgeship, be authorized to. (ii) And put up his report along with all material and records as received from the Vigilance Officer in district Judgeship, before the Hon'ble Administrative Judge of the concerned Session Division for His Lordship's kind perusal and orders. (iii) And further action be taken in accordance with the orders/directions of the Hon'ble Administrative Judge concerned. Further, the	Hon’ble the Chief Justice

		complaints received here at Allahabad against the staff in the district judgeships may be ordered to sent to the District Vigilance Officer through District Judge concerned after placing the same before the Hon'ble Administrative Judge concerned for preliminary enquiry and report of the Vigilance Officer in district Judgeship to be submitted to the Special Officer Vigilance through the District Judge concerned.	

5. GUJARAT HIGH COURT

(2)& (3) The powers and duties of its officers and employees & the procedure followed in the decision making process, including channels of supervision and accountability: The powers and duties of the officers, its employees and the channels of supervision and their accountability are summarized herein below, in the following manner:

REGISTRARS

SL. No	Officers	Responsibilities	Reporting
04.	Registrar (Vigilance)	1. All matters relating to the allegations of corruptions against the Judicial Officers and staff members working in the Subordinate Courts in the State, dealt with by the Vigilance Cell of the High Court. 2. Any other work assigned by the Honourable the Chief Justice.	1. Honourable the Chief Justice. 2. Honourable Administrative Judges. 3. The Registrar General, in the Administrative Matters

6. JHARKHAND HIGH COURT, RANCHI

REGISTRARS

Sl. No	Officers	Powers and Duties	Reporting
4.	Registrar (Vigilance and Inspection)	He will be in-charge of the Vigilance Department of the Court and assist the Judges in inspection of the Civil Courts and compliance of minutes of the inspecting Zonal Judges. Incidental returns from Civil Courts including disposal charts of Judicial Officers	Under the Rules

Following functions are assigned to Registrar (Vigilance)

1. Vigilance Cell
2. Complaints in respect of corrupt practices by High Court officers and staff and departmental proceeding against them

3. All matters relating to allegations against Judicial Officers, Ministerial Staff of civil courts, report of District and Sessions Judges against Judicial Officers and Staff
4. Matters relating to inspection of Subordinate Courts by Hon'ble Zonal Judges, in respect of Ranchi, Lohardaga and Simdega (Zone-I).Dhanbad Singhbum (West) and Saraikela (Zone-III), Bokaro and Gumla (Zone-iv), Hazaribagh and Chatra (Zone-V), Deognar and Dumka (zone-vi), Palamaum Garhwa and Lather (zone-VII), Giridh and Koderma (Zone-viii) and Sahebganj, Godda and Pakur (Zone-IX) and maintaining liaison with respective Zonal Judges.
5. Rules Section
6. Legal Cell including departmental proceeding of Judicial Officers
7. Supreme Court Department.

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8. HIGH COURT OF HIMACHAL PRADESH, SHIMLA

III. Registrar (Vigilance)

1. Complaints against Judicial Officers and staff of the High and Subordinate Courts.
2. Grant of station leave/casual leave to Judicial Officers and permission to make use of earmarked vehicles by them
3. Grant of earned leave to Judicial Officers and making leave arrangements including arrangements for looking after administrative and financial matters of courts during the leave period of Presiding Officers
4. Grant of increments to the Judicial Officers
5. General vigilance of the staff of the Registry, particularly with regard to punctuality and regularity.
6. Annual Confidential Reports of Judicial Officers except his/her own
7. Monthly work done statements of civil and criminal cases in respect of Subordinate Courts
8. Matters pertaining to holding of Circuit Courts by Judicial Officers
9. Permission in favour of Judicial Officers to proceed to a different station to conduct a departmental inquiry, or attend an inquiry as witness or a Court as witness pursuant to notice/ Summons within the State by performing journey in official vehicle.
10. All matters relating to grant of permission for purchasing/ disposing of the immovable properties by Judicial Officers/ADJs/DJs on lease, mortgage, sale, gift or otherwise.
11. Jail appeals and all matters relating to under trail prisoners
12. Periodical Statements regarding NDPS Act, Mentally ill persons, Under Workmen Compensation Act, Non-deposit of Judicial Fine, Citizens, Under trial Prisoners, Spot Trial under MY Act, expeditious disposal of summary cases Institution disposal and pendency of Civil and Criminal cases.

13. Processing of periodical statements regarding Jail Inspection and reports regarding inspection of Sub-ordinate Courts by the District and Sessions Judges and also reports regarding inspection of own courts
14. Monitoring the implementation of Mission Mode Programme
15. To act as Secretary of H.P. High Court Legal Services Committee and provide legal aid to the entitled person at High Court Level
16. Disposal of R.T.I appeals as Appellate at High Court level
17. Arrangements for holding *lok adalats* for High Court
18. Disciplinary proceedings against the Judicial Officers
19. Disciplinary proceedings against the Officers and staff of the Registry.
20. Processing of requests for advances and withdrawal from GPF received from Judicial Officers and Staff of the Registry.
21. Passport matters relating to employees of the High Court as well as of District Judiciary including the Judicial Officers
22. Monitoring the expenditure of the Grants under the Thirteenth Finance Commission
23. Matters pertaining to sexual harassment
24. Declaration of Judicial Officers as Drawing and Disbursing Officers in respect of other Courts, during the leave period of Presiding Officers of those other Courts.
25. All such functions/duties that may be assigned by Hon'ble the Chief Justice/High Court

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8. HIGH COURT OF KARNATAKA

REGISTRARS

Registrar (Vigilance):

1. **High Court Vigilance Cell**

The following subjects are dealt in the Vigilance Cell:-

(a) Compliant Petitions,

(b) Review of final orders passed by the Disciplinary Authorities in Enquiry Cases regarding the Officials of the sub-ordinate Courts.

(c) Appeals preferred against the orders of the Disciplinary Authority

(d) Review of quarterly returns regarding Disciplinary authority

(e) Maintenance of property statements of all Judicial Officers and the chief Administrative Officers of the District Courts

(f) To accord permission to sell and purchase movable/immovable properties by the Judicial officers and the Chief Administrative Officers

(g) Miscellaneous files

(h) Any other matter entrusted by Hon'ble the Chief Justice

9. THE KERALA HIGH COURT OFFICE MANUAL

Chapter I

VIGILANCE CELL

10. The Vigilance Cell in the High Court has been constituted for the purpose of enquiring into the allegations or complaints against Judicial Officers and Staff of the High Court and Subordinate Courts.

Petitions containing allegations or complaints received in the High Court are processed in the normal administrative channel without the involvement of the Vigilance Cell till a decision is taken by the Honourable the Chief Justice for enquiry by the Vigilance Cell and the Registrar (Vigilance) is then exclusively responsible for all steps including correspondence till the enquiry report is submitted. The Vigilance enquiry report would be treated as confidential. Apart from enquiry into the allegations in the petitions received in the High Court, the Officers of the Vigilance Cell should keep vigil for detecting instances of corruption/misconduct involving moral turpitudes among members of the staff of High Court and Subordinate Courts, verify confidentially the information and report to the Honourable the Chief Justice instances which merit discreet enquires.

10. HIGH COURT OF PUNJAB AND HARYANA

REGISTRARS

Sl.No	Officers	Responsibilities and Duties	Reporting Authority
2	**Registrar (Vigilance)**	(i) Processing of all the Complaints received against the Judicial Officers and to put up the same in a time bound manner. (ii) Holding of discrete or preliminary inquiries and evolving a confidential mechanism for such inquiries. Supervision of Inquiry Branch and Inquiry Cell (iii) Critical analysis of the complaints or discrete/preliminary inquiry reports to assist the competent Authority in deciding as to whether or not a regular inquiry into the allegation(s) is required. (iv) Preparation of Draft Charge-sheets/Memorandum of Allegations. (v) Preparation of Panel of former Judges and Judicial Officers for their appointment as Inquiry Officers. (vi) Preparation of panel of former Judges and Judicial Officers for their appointment as Inquiry Officers. (vi) Preparation of panel of former judicial Officers for their appointment as Presenting Officers in the regular inquiry.	Matters relating to clause (i) to (iii), shall be reported to- Administrative Judge and thereafter to the Chief Justice Matters relating to clause (iv) to (vi), shall be reported to Disciplinary and Vigilance Committee Matters relating to clause (vii)- shall be reported to- The Chief Justice Matters relating

		(vii) Scrutiny of 'assets and liabilities statements' of Judicial Officers and supervision of Vigilance Branch. (viii) Scrutiny of cases of Judicial Officers for their retention in service beyond the age of 50, 55 and58 years and supervision of Gazette-II Branch (ix) Maintenance of ACRs of the Judicial Officers and timely communication of the adverse/advisory remarks, processing of the representations, if any, received against such reports.	to clause (viii)- to Administrative Committee/ Full Court, (ix) to Adm. Judge/ ACR committee (x) to Adm. Judge/The CJ

11. HIGH COURT OF TRIPURA
AGARTALA

S. No.	Officer	Responsibility & duties		Reporting Authority
03.	Registrar (Vigilance & Rules)	1.	ACRs of the Judicial Officers & communication of the remarks in the ACR *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Chief Justice/ Portfolio Judge
		2.	Consideration of the representation submitted by the Judicial Officer for expunction of adverse remarks in the ACRs *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg. (Vig.)- Reg. (Vig &Rules)]*	Chief Justice/Full Court
		3.	Vigilance & Disciplinary matters (including complaints & inquiries) pertaining to all Judicial Officers *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Chief Justice/Full Court
		4.	Vigilance & Disciplinary matters (including complaints & inquiries) pertaining to all staff of the High Court *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Chief Justice
		5.	Consideration of continued utility of all Judicial Officers on	Chief Justice/Full Court

			attaining the age of 50/55/58 *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	
		6.	Granting of selection Grade/Super Time Scale to the District & Session Judges and also for granting ACP to Judicial Officers of the State *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Appropriate Committee/ Full Court
		7.	Matter relating to Inspection of Sub-ordinate Court by Hon'ble Portfolio Judges, District Judges and presiding Officers of the concerned Sub-ordinate Courts of their won Courts and all other matter connected thereto. *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Chief Justice/ Concerned Portfolio Judge
		8.	Maintenance of all confidential records including the ACPs of the Judicial Officers of the State *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Sole Responsibility
		9.	Keeping in safe custody the record pertaining to competitive examination conducted by the High Court in connection with recruitment of Judicial Officers and staff of the High Court *[matters be routed through concerned section- Asstt. Reg(Vig)/Dy. Reg (Vig)- Reg (Vig &Rules)]*	Sole Responsibility
		10.	Framing of Rules of the High Court & Sub-ordinate courts *[matters be routed through concerned section- Dy. Reg (Admn)- Reg (Vig &Rules)]*	Chief Justice/ Appropriate Committee

		11.	All matters relating to rule Section of the High Court [Matters be routed through concerned section *[matters be routed through concerned section- Dy. Reg (Admn)- Reg (Vig &Rules)]*	Chief Justice/ Appropriate Committee
		12.	All matters relating to Designation of Advocates as Senior Advocates by the High Court and verification of their Income Tax Returns *[matters be routed through concerned section- Dy. Reg (Admn)- Reg (Vig &Rules)]*	Chief Justice/ Full Court
		13.	Matters for recruitment including promotion f all Judicial Officers *[matters be routed through concerned section- Asstt. Reg(AdmnI)/Dy. Reg (Admn)- Reg (Vig &Rules)]*	Registrar General/ Chief Justice/ Full Court
		14.	Maters of recruitment, promotion & posting in respect of all staff including Officers under the High Court Service *[matters be routed through concerned section- Asstt. Reg(Admn.I)/Dy. Reg (Admn)- Reg (Vig &Rules)]*	Registrar General/ Chief Justice
		15.	All correspondence concerning the judiciary and to co-ordinate between High Court and the State/Central Government in administrative affairs. *[matters be routed through concerned section- Dy. Reg (Admn)- Reg (Admn)- Reg (Vig &Rules)]*	Registrar General/ Chief Justice
		16.	Matter relating to recruitment promotion, transfers etc. of all the staff members of Sub-ordinate/ District Judiciary *[matters be routed through concerned section- Asstt. Reg(Admn.I) -Dy. Reg (Admn)- Reg (Vig &Rules)]*	Concerned Committee/ Chief Justice
		17.	Secretary, High Court Mediation Committee & State Mediation Committee *[matters be routed*	Concerned Committee

			through concerned section- Dy. Reg (Judl)- Reg (Vig &Rules)]	
		18.	Member Secretary High Court Legal Services Committee *[matters be routed through concerned section- Dy. Reg (Judl)- Reg (Vig &Rules)]*	Executive Chairman of High Court Legal Service Committee
		19.	Lowazima Court of the High Court except the matters as mentioned in Order No. F.40 (21) HCT/ BENCH /REGISTRY /2013/4046-82 dated 10.05.13	Sole Responsibility
		20.	All matters relating to Judicial Officers of Sub-ordinate Judiciary including leave, Leave Encashment & vesting of Judicial Powers Concerned Committee *[matters be routed through concerned section- Asstt. Reg (Admn-II) - Dy. Reg (Prol)- Reg (Admnn)- Reg (vig.)]*	Concerned Portfolio Judge / Chief Justice/ Full Court
		21.	Any other matters assigned by the Hon'ble Chief Justice, Hon'ble Judges & Registrar General.	Chief Justice/ Judges/ Registrar General

11. HIGH COURT OF CULCUTTA

Gist of duties and responsibilities of Members of Registry of the High Court with effect from 4th June, 2012

Registrar (Vigilance

Member Secretary of High Court Legal Services Committee/ Training of Judicial Officers/ Supervision of Protocol Section, Judges Library and Transport of High Court/ Drawing and Disbursing Officer of A.S. except matters connected with judicial officers/ Supervision of the work of Joint Registrar (Ins), D.R. (Protocol), D.R. (Acc) and Librarian/work assigned by the Registrar General and the Hon'ble Chief Justice.

V. Duties and Responsibilities of Registrar (Vigilance and Protocol).

1. To perform all duties as Member Secretary of High Court Legal Services Committee

2. To lay before the Chief Justice all matters connected with the training of Judicial Officers and with National Judicial Academy, and W.B. Judicial Academy.

3. To supervise the work of Judges' Library and to ensure that books and Journals both in the Judge's Library and in the residential Library of the Hon'ble Judges.

4. To look after and supervise the work of allocation of transport to the Hon'ble Judges on official duty, members of Registry and Secretariat of the Chief Justice Officers and staff of Protocol Section of the High Court.

5. To make correspondence with other High Courts, Supreme Court, State Government and outside agencies for accommodation of Hon'ble Judges and reservation of tickets of Hon'ble Judges of the High Court and the Supreme Court.

6. To supervise the work of Joint Registrar (Inspection), Deputy Registrar (Accounts) and the Librarians.

8. To look after attendance and supervise the performance of duties of all officers and staff of Protocol Section and Judges' Library of High Court.

9. To revise and see off the high dignitaries, the Chief Justice of other High Courts and the Hon'ble Judges of the Supreme Court of India.

10. To supervise the work of Retired Judges' Cell and the Judges Accounts of the Original Side of the High Court.

11. To deal with the complaints against Judicial Officers and against officers and staff of the High Court.

12. To hold preliminary enquiry and departmental enquiry on the allegations of misconduct by the employees of this Court under the order of the Chief Justice or the Registrar General.

13. To prepare the charge sheet against the charged officers in the disciplinary proceedings initiated against the Judicial Officers under the order of the Chief Justice or Hon'ble Court.

14. To hold preliminary enquiry under section 340 of Cr.P.C under the orders of the Hon'ble Court.

15. To prepare and/or file complaints under Section 340 of Cr.P.C under the orders of the Hon'ble Court.

16. To prepare charge Sheet against the charged officers in the disciplinary proceedings initiated against the employees of this court.

17. To collect the information about parliamentary questions, assembly questions etc. from the District and Transmission of the same to the appropriate authorities.

18. To supervise and monitor the cases of Departmental enquiry of the Judicial Officers and employees of the High Court and to ensure speedy disposal of the same.

19. To do all such matters as are directed by the Hon'ble High Court or assigned by the Registrar General or directed by the Chief Justice.

Resolution of Chief Justices Conferences on Functions of Registrar Vigilance

1. Chief Justices Conference, 2009[1]

5. Strengthening of Vigilance Cells in the High Courts and progress made in setting-up of Vigilance Cells in each district.

Article 235 of the Constitution of India vests control over District Courts and subordinate courts thereto, in the High Court. In exercise of this supervisory power, the High Courts are required to keep vigilance on subordinate Judicial Officers so as to have a check on misadventures by an errant officer. Inspection of subordinate courts is one of the most important functions which the High Court performs for control over the subordinate courts. The object of such inspection is assessment of the work performed by a subordinate Judge, his capability, integrity and competency. It also provides an opportunity to the Inspecting Judge to point out the mistakes and deficiencies committed by the Judicial Officer, so that he may improve his working. Remarks recorded by the Inspecting Judge are normally endorsed by the Full Court in High Courts such as Delhi and by a Committee of Judges in some other High Courts and become part of Annual Confidential Report and are foundations on which the career of a Judicial Officer is made or marred. Inspection, therefore, has to be both effective and productive. It should not be a one-day or one-hour or few months' routine but round the year monitoring of the work of Judicial Officers by the Inspecting Judge is required. If used properly, this mechanism can be an effective tool in the hands of the High Court, to keep a check on Judicial Officers, and for regular assessment of their performance.

Though vigilance cells have been constituted in every High Court, it is felt that the process adopted and the methodology used by them does not yield quick and effective results. These cells have not been able to achieve the desired deterrent effect and earn confidence of the litigating public. Inquiries conducted by these cells do not proceed expeditiously and are not monitored regularly. They seem to be satisfied with processing the complaints received by the High Court, which many a time may be motivated and mala fide. There is an imperative need to galvanize the working of these cells in order to achieve the desired results. It is also necessary that these cells are headed by Senior Judicial Officers of proven merit and integrity, who work under direct control of the Hon'ble Chief Justice of the High Court.

The Joint Conference of Registrar Generals of High Courts and Law Secretaries of the States held on 23rd December, 2006 recommended that- 'there should always be a Vigilance Cell in each District, to be headed by a senior Judicial Officer. The Vigilance Cell shall keep effective control on the staff of the Courts and regularly monitor their activities so that the image of the Courts is not tarnished in the eyes of general public. The dates in the cases should invariably be given only by the Presiding Officer and the practices and procedures should be streamlined so as to minimize the contact of the litigants with the members of the staff.'

In this regard observations made in the Chief Justices Conference held on April 6-7, 2007 are highly relevant, and it was observed that,
(a) The Vigilance Cells constituted in every High Court should be headed by a Senior District Judge of impeccable integrity and should be under the direct control of the Chief Justice of the High Court.

[1] Available at: http://supremecourtofindia.nic.in/cjiconference/cjconference2009resolutions.pdf, visited on: 26/08/2015 at: 16:20

(b) To monitor and watch the members of the Ministerial staff of subordinate courts in the States, the High Courts will setup the separate Vigilance Cells in High Court. It should be manned by an officer of the rank of Senior District Judge and should have enough subordinate staff to assist him in the discharge of his duties, especially looking into the fact that the ambit of its application shall cover all the subordinate courts in the State."

This subject was again discussed in the Chief Justices Conference held on 17-18, April, 2008 and it was resolved as follows:

"That

(a) Vigilance cells in the High Courts strengthened, wherever required.

(b) Vigilance cells, headed by a senior District Judge with adequate supporting staff, be set-up for each region, to monitor and watch the activities of ministerial staff of Subordinate Courts."

As per the information received by the Supreme Court Registry, Vigilance Cells are working in most of the High Courts which are headed by an officer of the rank of a District Judge to monitor the activities of ministerial staff of Subordinate Courts and to look into the complaints against them. The High Courts where such Vigilance Cells have not been set up so far need to set up the same at an early date.

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2. Resolutions adopted in the Chief Justices' Conference, 2015

[20] Strengthening/Review of Vigilance Cells in High Courts and Subordinate Courts

Separate Vigilance Cells are exists in all the High Courts for attending to the duties entrusted to them.Resolved that the same be re-visited by prescribing modalities to deal with complaints against the judicial officers, staff members and others effectively. The respective Chief Justices may write to the State Governments to the State Governments to strengthen the Vigilance Cells by creating more number of posts of Vigilance Officers and supporting staff.

CORRUPTION AND THE JUDICIAL SYSTEM

By- Dr. G. Mohan Gopal[2]

This concise work is an example of a well directed, precise, clear and realistic critique. Author rightly highlighted the absence of adequate understanding of corruption, statutory standards and institutional mechanism to combat corruption in the Indian Judicial System. Absence of authoritative research and survey on the corruption within the system, and shrouded secrecy are rightly pointed to be major issues hampering the judicial transparency. Inefficiency of 'vigilance' mechanism operating at the High Court level is precisely narrated by the author highlighting the lack of autonomy, absence of well defined compliant procedure and lack of transparency in the process as important reasons. Author is of the view that unenforceability of ***"Restatement of Values of Judicial Life"*** *and absence of legislative standards allows the judicial corruption to be rampant and remain unhunt.*

In the second segment of the work author compared vigilance system prevailing in Maryland and concluded that lack of transparency lead to over estimation of the corruption prevalent in the judicial system and to the contrary transparent mechanism of accountability boost the public trust and confidence on the judicial system.

Author tried to mollify the myth of 'exceptional' socio-legal condition of India as reason to shield the Judiciary from openness. Another significant observation made by the author is- "the biggest cause of corruption in the Indian judicial system is found in the Bar." Lastly, author rightly concluded that "a corruption free judicial system that would hold the corrupt accountable on the timely basis would be a 'game changer' in the overall fight against corruption."

Corruption within the judicial system is one of the most important reasons for the persistence of high levels of corruption in India because a corrupt judicial system shields impunity. A corruption-free judicial system is an essential (although by no means sufficient) prerequisite for combating corruption. One of the most urgent – and yet most neglected – priorities in the fight against corruption is making the judicial system itself corruption free.

There is urgent need today for an effective strategy to rid the judicial system of corruption. The strategy will have to address four major challenges. **First,** we do not have an adequate understanding of the nature and extent of corruption in the judicial system, and its possible remedies. There is a lack of transparency about what is being done internally in the judicial system to combat corruption. **Second,** we do not have enforceable, statutory standards and definitions on judicial conduct and ethics that define, precisely and accurately, what constitutes corruption in the judicial system. The resulting ambiguity allows corruption to flourish.

Third, there is no effective independent institutional mechanism to combat corruption in the judicial system. Fourth, key 'duty holders' on whom the judicial system depends for its effectiveness and integrity – the Bar, the police and ministerial staff – are notoriously complicit in corruption and,

[2] Available at: http://www.india-seminar.com/2011/625/625_g_mohan_gopal.htm, visited on 17/08/2015 at:1:33 PM

powerful sections amongst them have emerged as a vested interest against much needed judicial reforms. Little wonder that the trickle of corruption cases that manages to wobble its way into courts, ends up being deliberately detained in the judicial system for years, postponing or even defeating accountability.

Virtually *nothing* is known authoritatively about corruption in the judicial system – there is lack of transparency and a shroud of secrecy over the issue. The general impression, widely held, and reflected, for example, in a perception survey done many years ago by Transparency International, is that the judicial system is highly corrupt. There has been no systematic study of corruption in the judicial system or research into it. There is no systematic data about the incidence of corruption in the judicial system. Research is impeded by considerable fear of the contempt power of courts.

Equally little is publicly known about steps being taken by the higher judiciary against corruption in the subordinate courts. All High Courts have strong and active (even internally feared) in-house vigilance sections addressing corruption amongst subordinate court judges. These vigilance units are usually staffed by judicial officers on deputation. Complaints received by High Courts against judicial officers and court staff are investigated by these units. Action is taken in a large number of cases by High Courts against court staff as well as judicial officers.

Though across the country, a significant (but publicly unknown) number of judicial officers are said to be expelled from service because High Courts have found substance in complaints of corruption against them. However, these actions remain shrouded in secrecy. Therefore, the adequacy of these actions cannot be independently assessed. India is perhaps the only major democratic country in the world that does not have an enforceable set of statutory standards on judicial conduct and ethics. Criminal liability under the Prevention of Corruption Act is not a substitute for statutory standards on conduct and ethics – the framework for administering a system of conduct and ethics is intended to protect the institution, and is fundamentally different from the criminal law framework in terms of types of wrongdoing, standard of proof and procedural law.

At the initiative of then Chief Justice of India, Justice J.S. Verma – known for his outstanding probity during and after his tenure in office – the full court of the Supreme Court of India adopted in 1997 a broad (and quite gentle) 'Restatement of Values of Judicial Life' consisting of sixteen values that should govern judicial conduct. The Restatement was subsequently ratified and adopted by the Chief Justices' Conference in 1999.

However, the Restatement of Values is only a set of non-enforceable, non-mandatory guidelines, rather than an enforceable law. Its content is very limited, covering three areas in a somewhat cursory manner: some types of conflict of interest, some aspects of engagement with social and political activities, and the acceptance of gifts. The Restatement does not come with an institutional framework for monitoring and enforcement.

There is no corresponding statement of values for judges of the district and local judiciary, who are covered today only by general rules of conduct applicable to civil servants of their state.
The enforcement mechanism to monitor and enforce even the cursory standards that currently exist for subordinate court judges is entirely in-house and non-transparent. Members of the public may file complaints with the High Court. However, the procedure for filing such complaints is not well established. Nor are complainants kept informed about action taken on their complaints. Where

corruption is established, it is not clear whether judicial decisions tainted by corruption – which may have wrongly altered rights and obligations – are corrected and if so how. In the absence of clear standards, enforcement of ethical standards amongst judges is often viewed by judicial officers as arbitrary, resulting in a pervasive sense of 'fear' amongst judicial officers about the vigilance function.

The framework to counter misconduct by Supreme Court and High Court judges is set out in the Constitution and the Judges Inquiry Act. It provides a narrowly restricted process for holding these judges accountable for misbehaviour and incapacity, filtered through a stiff requirement for support by Members of Parliament. The Supreme Court of India acknowledged as far back as in 1991 (in connection with judicial review of the impeachment proceedings against Justice V. Ramaswami) that removal of these judges from office is a 'political process' by Parliament. The worldwide best practice today is to provide independent judicial commissions that include a mixture of judges, lawyers and members of the public to process complaints against judges and hold them accountable, even while retaining the power of removal in the legislature. India lacks such a state of the art mechanism for its superior judiciary that will protect judicial independence while still ensuring transparency and accountability.

An illustrative example is the framework for judicial conduct in the State of Maryland in the United States of America. The statutory Maryland Code of Judicial Conduct, based on the model code developed by the American Bar Association, in contrast, covers in meticulous detail a wide range of rules of conduct that judges are legally mandated to follow. A most interesting enforceable, statutory legal obligation imposed on Maryland judges is: 'A judge shall comply with the law, including this Code.'

Other obligations cover such matters as promoting confidence in the judiciary, avoiding lending the prestige of judicial office, performance of judicial duties, impartiality and fairness, bias, prejudice, and harassment, external influences on judicial conduct, competence, diligence, and cooperation, ensuring the right to be heard, responsibility to decide, decorum, demeanour, and communication with jurors, ex parte communications, judicial statements on pending and impending cases, disqualification, supervisory duties, administrative appointments, disability and impairment, responding to judicial and lawyer misconduct, cooperation with disciplinary authorities, extra-judicial activity, appearances before governmental bodies and consultation with government officials, appointments to governmental positions, use of non-public information, affiliation with discriminatory organizations, participation in educational, religious, charitable, fraternal, or civic organizations and activities, appointments to fiduciary positions, service as arbitrator or mediator, practice of law, financial, business or remunerative activities, compensation for extra-judicial activities, acceptance and reporting of gifts, loans, bequests, benefits, or other things of value, reimbursement of expenses and waivers of fees or charges, reporting requirements and rules governing political activity.

There is a very transparent and independent mechanism in Maryland to enforce these standards. Complaints may be filed by any person with the Maryland Commission on Judicial Disabilities, an independent statutory body, against any judge for violation of the Maryland Code of Judicial Conduct. The simple form in which complaints are to be made may be downloaded from the website of the commission. All complaints are first investigated by the commission's investigative counsel and brought to a judicial inquiry board, consisting of two judges, two lawyers and three members drawn from the general public who are not lawyers or judges.

The inquiry board investigates each complaint and submits a report, including recommendation, to the commission, which consists of eleven persons appointed by the Governor of Maryland, by and with the advice and consent of the state Senate. They include three sitting judges (one appellate judge, one circuit court judge, one district court judge); three lawyers, each admitted to the Maryland Bar and so engaged for at least seven years; and five public members, *none of whom is a lawyer or active or retired judge*. The commission has the power to investigate complaints against any judge of the Court of Appeals, Court of Special Appeals, Circuit Courts, District Courts, or Orphans' Courts; to conduct hearings concerning such complaints; to issue reprimands to judges; to recommend to the Court of Appeals the removal, censure, or other appropriate disciplining of a judge or, in an appropriate case, retirement.

Anyone can go to the website of the commission to see how many complaints have been filed against judges and the fate of these complaints (http://www.courts.state.md.us/cjd/). The site reveals, for example, that 123 complaints were filed against judges in the year 2010 for transgression of the code. Some 75% of the complaints were against judges of the highest tiers of courts. Some 75% of the complaints came from members of the public and 25% from prison inmates – only 3% came from the Bar. Action was taken against six judges for violation of the code of judicial conduct. All the gory details of actions taken against judges (including their names and details of the charges and findings) are available on-line for the whole world to see. This mechanism is over and above the democratic accountability of the judiciary – the Maryland judges are elected to office.

Why is it that we cannot have such a transparent mechanism of accountability in India? Three reasons are usually cited. First, that revealing the details of wrongdoing by judges and action taken against them will erode the faith and confidence of people in the judiciary. There is no evidence that this is true anywhere in the world. The Maryland mechanism has been in place now for over 45 years. It has not diminished in any manner either the independence of the judiciary or people's respect for or faith and confidence in the judiciary which remains high.

The judiciary in Maryland – and in other parts of America – is not free from the social ills of bias, racism, prejudice and corruption. What gives confidence to people is not the illusion that their judges are angelic, divine beings who are perfect in every way. We know this is not true of any human institution anywhere in the world. What in fact establishes faith and confidence in the judiciary is a credible and transparent mechanism for accountability that reassures people that the few 'bad apples' are weeded out.

Our judges will be the first to admit that while the vast majority of judges are above board, there are undeniably a few bad apples in the judiciary, not unlike other human institutions in our country. What is needed today is a credible and transparent mechanism that will reassure the people that these bad apples are being dealt with effectively and swiftly. Such a mechanism is also necessary to protect the fair name of the vast majority of judges and of our judiciary which is today respected all over the world. A lack of transparency is in fact resulting in an overestimation of levels of corruption among judges rather than shoring up confidence in the judiciary.

The second reason cited against a transparent and independent system of judicial accountability is that it will be abused in the realities of our country where we have to deal with political, caste, communal and regional antagonisms that may not be prevalent in western jurisdictions. It is undoubtedly true that the social context of our country is far more complex than that in many other countries. However, a strong and credible accountability mechanism will be able to weed out motivated and frivolous

complaints that are also common in other jurisdictions. In most countries some 80% to 90% of complaints against judges made to independent statutory bodies are dismissed at the preliminary stage. If such a mechanism is established in India, we may also find that a large proportion of complaints will end up getting dismissed.

The third reason often cited is that we have a far heavier case load and our judge numbers are also much higher. This is not factually true. Let us compare Maryland (population of 53 lakh) with Himachal Pradesh (population of 68 lakh). Himachal Pradesh had some 1.2 lakh of new cases filed in 2009; whereas Maryland had some 20 times that number: 22 lakh new cases. Himachal has some 120 judges; Maryland has some 275 judges. The per judge new case load of Himachal Pradesh judges is about 1,000 cases; that of Maryland judges is some 8,000 cases. If a larger, more busy judicial system like Maryland can handle a transparent system of judicial accountability, surely so can Himachal Pradesh or any other state in India.

Given the absence of adequate standards, institutions and statistics, it is impossible to make any well founded assertion about the nature of corruption in the Indian judicial system. From anecdotal evidence, however, it may safely be concluded that the biggest cause of corruption in the Indian judicial system is found in the Bar. To be sure, the Indian Bar boasts of many legendary figures who are truly world class lawyers, and have contributed immensely to the rule of law in India. However, there is no one who will deny that vast sections of those who are enrolled as advocates are not carrying on the profession consistent with established professional standards.

No Bar amongst major countries in the world today is as poorly regulated – in terms of entry, supervision of conduct and sanctions – as the Indian Bar. Judicial corruption is virtually impossible without the involvement of advocates. Effective ethical regulation of the Bar is therefore essential, if the Indian judicial system is to be made corruption-free. Bar reform has stalled in India in the face of the emergence of the Bar as a powerful group that has a vested interest in injustice – the agitation of the Bar against the efforts to rationalize the power to arrest is a sad example of the perverse role of sections of the Bar in India today.

The police, witnesses, accused, and court staff are all duty holders in the judicial system. They bear equal responsibility with the Bench and the Bar to ensure that the judicial system works with integrity to enforce anti-corruption laws. Their roles and responsibilities in the judicial system are also poorly defined and regulated. Perjury, for example, is rarely punished.

Against this background of the weaknesses of the entire judicial system's regulation of ethical conduct, including the Bench and the Bar, it should come as no surprise that the Indian judicial system has almost entirely failed to discharge its required role in holding corrupt officials accountable. Whereas India is considered one of the countries with the highest prevalence of corruption in the world, it is quite remarkable that the country has one of the lowest numbers of corruption cases filed in the judicial system.

Hardly 4,000 cases were filed under the Prevention of Corruption Act in the entire country in 2009 – including all cases filed by the CBI and anti-corruption and vigilance departments of all the states. The CBI itself hardly files 300 or so cases on bribery and disproportionate assets in a year. Most of these involve petty corruption by holders of petty offices. The low number of cases being filed for

corruption is evidence that cases involving large-scale corruption are not being filed in courts and the kingpins of corruption are going scot-free without being held accountable.

The handful of corruption cases that are filed in court face long delays. A delay of up to 17 or 18 years is not unusual. By the time the appellate stage is concluded, punishment is rare. Instead, the *process* has itself turned into the punishment, which benefits those who have violated the law because they escape formal punishment; but unjustly punishes those who are innocent. For the innocent, eventual acquittal is no compensation for the wreckage caused to their lives by the cruelty of the process. Delays arise from a variety of machinations indulged in by duty holders at all stages – during investigation, prosecution and trial. The poor quality of investigation is a major reason for delays in trials. Overworked and underpaid prosecutors are not given the tools necessary for effective prosecution and in some cases their own role is often believed to be corrupted.

There is also a large agenda of legislative reform needed to strengthen the effectiveness of legal measures against corruption in India. This is beyond the scope of this essay.
It would be quite easy to fix these problems, and to put in place a transparent, accountable and sensible regulatory framework, based on international standards and experience, consisting of ethical standards and institutions that would enforce high standards of ethics and conduct on all the duty holders of the Indian judicial system – Bench, Bar, police, ministerial staff, witnesses and accused – and make the judicial system corruption proof/corruption free (not in the sense that no one would be corrupt in the judicial system, but in the sense that no one would be corrupt in the judicial system and be able to get away with it).

In turn, a corruption-free judicial system that would hold the corrupt accountable on a timely basis would be a 'game changer' in the overall fight against corruption. This reform would, however, diminish the impunity enjoyed by the corrupt in a weakly regulated judicial system that we have today. Powerful vested interests in the Bench, the Bar and the executive are blocking much needed reforms of the judicial system. Only strong public opinion can overcome their resistance. The message must go out very clearly – without the judicial system making itself corruption free, India will never be able to effectively combat corruption. Public opinion needs to demand that the Indian judicial system must be made transparent and accountable to the people of India.

STRENGTHENING THE COURT SYSTEM TO COMBAT CORRUPTION[3]

By: Justice R. K. Abichandani,
Judge, High Court of Gujarat

This article underscores the constitutional responsibility of transparent and accountable governance of the country. In this perspective ideal role of courts is reaffirmed by saying "the courts have an important role to play and are armed with wide powers to ensure that any decision of a public authority that is founded on corrupt practice or is a fraud on exercise of power is set at naught, and the guilty punished." In the succeeding segments author focuses on the need of vigilance over the administration and it is rightly pointed out that, lack of needed expertise (it applies even to in-house system of the High Court) as one of the reasons for ineffective vigilance.

In the next segment author talks about multiple liabilities of the corrupt, though his observations are general in nature relating to 'corrupt officials' but the problems like failure of prosecution to prove the case and lack of decisive evidence etc. are equally relevant to judicial/fact finding inquiries against the Judicial Officers.

Among the other things author concludes by quoting Justice. Mr. ***J.S. Verma*** *in K.Veeraswami v. Union of India, His Lordship rightly opined that, "there is no law providing protection for judges from criminal prosecution. The existing Court system is efficient but it has to derive its strength..."*

I. The Constitutional Perspective

The Solemn Constitutional resolution by the People of India which ensures to all its Citizens Justice, social, economic and political, equality of status and of opportunity has its basis in clean administration for the governance of the Country at all levels without which these would simply be empty platitudes. The Constitutional directives even if followed only broadly by the State, expected to strive to promote welfare of the people, would leave no scope for a corrupt regime. The Constitutional duty of every Citizen to strive towards excellence in all spheres of individual activity is obviously in context of lawful activities that enhance individual and national prestige. The Constitutional Oaths of its functionaries bind them to faithful and conscientious discharge of duties without fear or favour, affection or ill will and to upholding the law. There is therefore, no scope in the Indian Polity for use of corrupt practices, such as bribery or fraud in the governance of the Country if these constitutional values are scrupulously observed, upheld and if need be, enforced. There are built in provisions in our Constitutional System to ensure that those guilty of this gross misconduct are impeached or removed. Collective wisdom is necessarily pure because no Society is

[3] Available at: http://gujarathighcourt.nic.in/Articles/courtsystem.htm, visited on: 20/08/15 at: 16:18 PM

so debased as to collectively declare negative values of avarice and self-aggrandizement which are at the root of corruption.

II. The Effect

There has been a global recognition of the devastating effect of corruption in public life. Those who are vulnerable to the evil effects of corruption are the poor and downtrodden who get exploited and are deprived of the benefits of Social Welfare Laws and Schemes intended for them; but the stream of help dries up before it reaches them.

III. Court's Role

Under the Scheme of checks and balances adopted to ensure that the authorities function within their constitutional limits, the Courts have an important role to pay and are armed with wide powers to ensure that any decision of a public authority that is founded on corrupt practice or is a fraud on exercise of power is set at naught, and the guilty punished. For the Courts, combating corruption is a task of high importance and brooks no casual or lenient approach. There is no room for compunction in dealing with a corrupt official or authority and only a swift decisive and deterrent approach is warranted by the Courts while dealing with the delinquents.

IV. Need for Vigilance

The power of judicial review of quasi-judicial functions of the departmental authorities and service tribunals is often pressed into service at various levels and stages. **The Court system is designed to uphold and implement the law. Therefore, while on one hand it is the duty of the Court to protect violation of individual rights by arbitrary or malafide action of the Public authorities, it is equally or even more important to see that the judicial process is not abused by the crafty and the undeserving. The easiest cover for a delinquent offender, who is detected, is to run to the Court for an order to pre-empt departmental or punitive action against him. Amidst the hush-hush and well oiled illegality of the underworld of the corrupt, rarely the incidents are detected.** When it is a loss to the State exchequer it is by conspiracy of corruption between the beneficiary Citizen and the obliging authority and no one would know about it unless it is detected by some vigilant eye that may occasionally open. When, however, it comes to a conflict of interest generated by adoption of a corrupt practice, it is more likely to come to light. Thus the instances brought before the Court are just a tip of the ice-berg. This by itself merits a vigilant attitude of the Court to ensure that its processes are not abused by securing cover of interim relief against the proceedings, and thwarting the prosecutions under the guise of matter being sub-judice.

V. The System Errors

The system of inquiring into the conduct of Officials and functionaries adopted by our legal system should be allowed to function and the Courts must resist any attempt to halt such proceedings, as it is done in election matters, where, once the election process commences, all disputes are to await adjudication till the election results are announced. This self-restraint requires knowledge of the role of the office that is abused, the impact on the Society of the wrong that is perpetrated and the relevant provisions of law that govern the case. Lack of minimum necessary expertise, though it gets camouflaged under the cover of power, is an area where the Court system needs to be strengthened to prevent system errors that will answer the cases wrongly and protect the guilty when the law intends it otherwise.

VI. Multiple Liabilities of the Corrupt

By virtue of all-pervading principles of natural justice the delinquent has sufficient safeguards during the inquiry proceedings and trials, and, the State has opportunity to place on record the material reflecting the corrupt malpractices alleged against the delinquent. The administrative authorities who are in the relevant field are closer to the ground realities of the set-up in which corruption was practiced, for deciding to take action. There are departmental appeals against the adverse orders and in most cases Tribunals to look into any alleged flaws. The superior Court's main function should be to ensure that they follow the mandatory procedure and make orders in accordance with law. It has not to re-appreciate material for reviewing the departmental decisions like and appellate authority. So long the orders of punishment of the delinquents are made by an authority duly empowered and can be supported on the material considered by the competent authority to be sufficient, there should not be any attempt to substitute the Court's opinion for providing an escape route to the culprit. When not to exercise power of judicial review, is as important for preventing damage to the judicial system as is the need to exercise it to protect the innocent for upholding the system. A corrupt official is basically a criminal with multiple liabilities that he incurs. Any undue indulgence shown in dealing with his liabilities for such misconduct is bound to have impact on his treatment by the Court where he is tried. Often the decision to lodge a criminal complaint is deferred till the outcome of the departmental proceedings is known. Though criminal liability is based on the evidence led during the trial which is an independent proceeding, an efficient Court system is concerned with both, as it will be incongruous to have a person found guilty of corruption and therefore liable to be dismissed to move freely due to failure of his prosecution for the same misconduct which also amounts to an offence. The situation may turn out to be a financially viable one to such delinquent who may lose the job but remains sufficiently secured. Therefore, though the standards of proof may differ, there is a case of a unified approach to gathering data or material that can form the basis of the multiple liabilities arising from such misconduct which is also an offence. Until there is brought about a statutory change which will enable one set of material reflecting on the same conduct being gathered and assessed for multiple liabilities, the Courts should be vigilant of the deleterious effect that an interim interference with the proceedings or its outcome will have on his criminal liability which is of greater significance, because if convicted, the departmental removal would just be a matter of routine.

VII. The Ominous Prerogative

Ascertaining criminal liability for corrupt conduct of a public servant is an elaborate statutory exercise. If properly pursued it can have a salutary effect in curbing corruption. There is no more embarrassing thing for a public servant or a high public dignitary than to face a prosecution for corruption or fraud. The stigma that it carries should serve as an effective deterrent. In the fields where the prosecution can be set in motion only after a green signal of the higher authority or at the behest of public officials, the Courts are more or less mute spectators. Only mandamus in case of failure of duty to consider and take decision on the question may lie, but not a direction to vie sanction because, as held in *Mansukhlal Chauhan v. State of Gujarat* (1997) 7 SCC 622, a sanction issued by an authority on the directions of the High Court would be invalid as it takes away the discretion o f the authority not to grant sanction. Leaving it to public Officials the task of the deciding whether a person violating the law should be prosecuted, such as; for violation of pollution control laws, forest offences, municipal offences, prevention of food adulteration laws etc., has often proved to be counterproductive. The authority to decide whether a person should be prosecuted or not can be an incessant source of corruption. Investing the power to grant sanction for prosecution in an independent body headed by an experienced judicial mind can strengthen the drive against corruption. The requirement to grant sanction for the prosecution of a public servant amounts to conferring a prerogative by which the authority empowered to sanction the prosecution can say it alone is the one

who can decide whether the criminal law should be enforced in these Courts or not. Should the sanctioning authority be allowed to have such prerogative to suspend or dispense the laws? If it does not give consent to the prosecution of the public servant, who during investigation or inquiry appears to be guilty of corruption, it should be made possible for anyone of the public at large, who is adversely affected, to come to the Court and ask that the law be enforced. Thomas Fuller's words uttered more than 300 years ago still send the air "Be your ever so high, the law is above you." The Criminal Justice system will effectively control corruption if the Court is allowed its due role of being the ultimate arbiter for deciding whether prosecution should be launched by the public official empowered to decide and file the complaint.

VIII. Sub-Judice as a Ruse

Often a modus operandi is adopted whereby, under some or the other pretext, a case is filed or got filed in the Court on the ground of some alleged illegality but the real purpose is to thwart the prosecution of the culprit under the pretext of the matter having become sub-judice. In pollution matters, it is not unknown that the proceedings are often resorted to under Article 226 of the Constitution raising some controversy over refusal of statutorily required consent of the Pollution Control Board and whilst the petition remains pending, an excuse is often put up by the Board for not launching the prosecution on the spacious ground of the matter being sub-judice, not-withstanding the fact that the prosecutions are normally not stayed. All this at whose and what cost? If an industrialist can successfully dodge his prosecution in league with an obliging official, by using the court proceeding s as the medium of their game, due to a prolonged pendency of a case before the unsuspecting Court wanting to remove pollution by keeping the matter for months and years before it for monitoring the progress, it is high time to say quits and focus the attention on a more effective course of criminal prosecutions by the Officials empowered to launch them and empowering the Courts to issue mandate on them when they falter or delay rather than leave the matter of setting into motion the criminal law entirely in such raw and crafty hands. It will be a matter of considerable interest and fruitful outcome for a researcher to examine how the factor of pendency of proceedings particularly in the Writ jurisdiction of the High Courts is used by the parties in collusion with the obliging corrupt officials to avoid their prosecutions under the pretext of the matter being sub-judice. The Courts need to become acutely aware of their processes being used as a platform enabling the corrupt officials to thrive on the misuse of their power, and react suitably before it is too late.

IX. Conclusion

We now stand at the threshold of heightened public awareness. Ethics in public service is crucial to success of any democratic set-up. **The strength of the Court system to combat corruption lies in its own stature and image to a large extent as also in its own accountability and respect for the law. This is reflected from the dictum of the majority decision (J.S.Verma, J dissenting) of the Apex Court in *K. Veera Swami V. Union of India* (1991) 3 SCC 655, that, there is no law providing protection for judges from criminal prosecution. The existing Court system is efficient but it has to derive its strength from those who man it and whose adequate extent of knowledge, experience, involvement and determination alone can effectively curb the evil of corruption.**

INDEPENDENCE OF JUDICIARY — SOME LATENT DANGERS[4]

by **Justice J.S. Verma**
Judge, Supreme Court of India

It is significant to hear about the integrity and honesty from a man who was known for it. Hon'ble Justice J.S. Verma known for his integrity, in this work very lucidly talks on important issues like Independence of Judiciary, Judicial Activism, Judicial Restraint and Judicial Accountability. Though, the author is affirmative about judicial activism, in the succeeding segments of this article he did not failed to caution by saying judge shall act in ***"self restraint with constant awareness of the inherent limitations of the judiciary."*** *Author rightly opined that "power must be used for public interest and only for public good." He cautions the judicial fraternity to refrain from political controversies and advised not to have split personality.*

In the concluding segments of the article author opined that the power must be accompanied by accountability and he said ***lest we suffer from self-inflicted mortal wounds.*** *He expressed deep concern over mounting arrears of case and asked the judges to work hard. This article shall be considered as a prologue to next article of the author titled* ***"Judicial Independence: Is it threatened?"***

It gives me great pleasure to participate in this function held to inaugurate a Lecture Series to perpetuate the memory of an illustrious son of Assam, who later shone on the national judicial firmament. I deem it a great privilege and unique honour to be invited to deliver "The First Justice P.K. Goswami Memorial Lecture".

Justice Goswami's tenure as a Judge in the High Court of Assam and the Supreme Court was only of a decade but that coincided with several events of significance to the 'Independence of Judiciary'. Justice Goswami was appointed a Judge of the High Court of Assam in May 1967 and became its Chief Justice in 1970. He was then elevated to the Supreme Court of India in 1973 from where he retired on 1-1-1978. During this period, the three senior most Judges of the Supreme Court were superseded in the appointment of Chief Justice of India in 1973 and there was the period of emergency. On end of the emergency came the Supreme Court decision in *State of Rajasthan* v. *Union of India*[1], wherein the scope of judicial review of the executive act of dissolution of State Assemblies arose for decision. During that period, the independence of judiciary was threatened by the executive in ways which are well known. Justice Goswami was a member of the Bench which decided the *Rajasthan case*[1]. The concluding remarks made by him in a separate opinion

[4]By-Justice P.K. Goswami First Memorial Lecture delivered at Guwahati on Nov. 18, 1995, available at: http://www.ebc-india.com/lawyer/articles/95v6a1.htm visited on 22/8/2015 at: 17:02

warned of a different kind of threat from within, with the potential of eroding the independence of judiciary. Justice Goswami did not hesitate to frankly record in his opinion, thus:

"I part with the records with a cold shudder. The Chief Justice was good enough to tell us that the acting President saw him during the time we were considering judgment after having already announced the order that there was mention of this pending matter during the conversation. I have given this revelation the most anxious thought and even the strongest judicial restraint which a Judge would prefer to exercise, leaves me no option but to place this on record hoping that the majesty of the High Office of the President, who should be beyond the high watermark of any controversy, suffers not in future."

The above remarks of Justice Goswami were made undoubtedly to caution the future Judges and to warn the executive of the potential threat to the independence of judiciary from seemingly innocuous acts. This reflects his strong commitment to the cause of independence of judiciary and his indefatigable zeal for its preservation in the future. Over the years, the need for vigilance has increased to assume considerable significance in the current ethos. The topic chosen for the First Memorial Lecture is intended as a fitting tribute to Justice P.K. Goswami. This is the reason for the choice of this topic.

Justice Goswami and I were born 20 years apart. He came from the generation which was two generations prior to mine. However, I came to be appointed a High Court Judge when Justice Goswami was still in the High Court and got the privilege to sit with his generation of Judges. I have, therefore, the benefit of a similar view from the Bench of the significant events which impelled him to strike a note of caution in a judicial verdict. This lecture is an attempt to emphasise the message given by Justice Goswami, by indicating some lurking latent dangers whose growth must be arrested and steps taken to eradicate them, to ensure continued independence of judiciary. In the present context this is essential since the threat from the outer dangers appears to have been arrested and the likely danger now may come only from within.

The greatest danger earlier came from the decisive role and primacy of executive in the appointment of superior Judges. This increased with its strong assertion after the judicial recognition in *S.P. Gupta* v. *Union of India*[2] (The first Judges' case). It is needless to recall its various manifestations. However, in the recent times the shift towards executive supremacy in this sphere appears to have been controlled in *Supreme Court Advocates-on-record Association* v. *Union of India*[3] (The second Judges' case) whereby the supremacy of executive no longer remains.

Expansion of the sphere of judicial review is another reason for the increase in importance of the role of judiciary. This is in addition to the significant role of the judiciary in the constitutional scheme of separation of powers. Growing awareness of the rights in the people; the concept of public interest litigation; the trend of judicial scrutiny of every significant governmental action; and the readiness even of the executive to seek judicial determination of debatable or controversial issues, at times, may be, to avoid its accountability for the decision, have all resulted in the increasing significance of the role of the judiciary.

The growth of judicial review is the inevitable reaction to ensure proper check on the exercise of public power. This is undoubtedly a recent global phenomenon but, more so, in India. The general perception is that the Indian Judiciary has been most active in expansion of the field of judicial review into non-traditional areas, which earlier were considered beyond judicial purview for want of

judicially manageable standards. In India, the growth of this phenomenon with its ready acceptance is not only by the people but also by the other wings. It is more because of the peculiar needs of the teeming millions in this country and the general acceptance of the need for social justice to every citizen.

The logical corollary of this ready acceptance of the expanded role of the judiciary is that the exercise of power of judicial review must be only for the achievement of public interest. The discharge of the duty and obligation towards the people of India requires that it should have no semblance of assertion of the judicial power over the other wings except when it becomes necessary for upholding the majesty of law and for granting relief to the have-nots against injustice.

Even the British Courts tend to move towards judicial activism in spite of their conservative background and acknowledged sovereignty of British Parliament. In an article by Anthony Lewis - "*Judges in Britain create a flutter*" (*Times of India*, Bombay Edn., dated 7-11-1995), it is said that this significant change is on account of outlook of Judges and the function they perform. The reasons given in the analysis made therein, are: (*1*) the Judges realise that there is a vacuum since Parliament is virtually under the total control of the executive when it was supposed to correct any governmental injustice to individual; (*2*) the modern legislation is loosely drafted and delegates large powers to the Government which tends often to be arbitrary in its exercise; (*3*) the new generation of Judges think of law not as fixed rules but as a set of values designed above all to protect democracy and human rights; and (*4*) the new judicial generation is more outward-looking and is influenced by the courts in Commonwealth countries, for example, India in the rigorous enforcement of individual rights. The article ends as under:

"The politicians, or many of them, will resist judicial review. But my guess is that the British public likes it when Judges stand up for them against the State — and that the public will demand more of the new constitutionalism, not less."

Mark the similarity in India.

It is unnecessary to indicate the extent of expansion of judicial review in the non-traditional areas which, ordinarily, are treated to be the functions of other branches in the scheme of separation of powers. The fact is that the extension even into those areas is because of the people's perception that judicial intervention is the only feasible correctional remedy available. It is primarily this perception of the people which brings the acceptance of judicial activism in India as the pragmatic means of realising the full promise given by the guarantee of Fundamental Rights and the mandate of the Directive Principles in the Constitution of India. This acceptance exists in spite of some inherent dangers from uncontrolled judicial activism voiced at times seeking judicial restraint as an internal check. This warning is timely.

It is self-restraint with constant awareness of the inherent limitations of the judiciary which alone can act as an effective check on a strong judiciary in the role of the final arbiter. The caution needed is even greater when the judicial activism is in a matter of self-interest to the judiciary resulting in grant of a benefit to itself. In all such matters, if the circumstances permit, the option of leaving the matter to any other competent branch must always be kept in view, and examined first.

This realisation for self-restraint led to the note of caution in the *second Judges case*[3] which upheld the primacy of the judiciary in the matters of appointments and transfer of Judges. It was observed:

"O, it is excellent
To have a gaint's strength;

but it is tyrannous
To use it like a giant."
(Shakespeare in *Measure for Measure)*

With the expanded role of the judiciary as a result of judicial activism the need to keep a balance is one of the major imperatives for the proper performance of the Judges' task. Practice of self-restraint constantly is essential. Edmond Burke said:
"All persons possessing a position of power ought to be strongly and awfully impressed with an idea that they act in trust and are to account for their conduct in that trust to the one great Master, Author and Founder of Society."

A similar note of caution is to be found in *Shrilekha Vidyarthi (Km)* v. *State of U.P.*[4]
"...Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest...."

More recently in *Abani Kanta Ray* v. *State of Orissa*[5], the norms of judicial propriety and restraint needed in discharge of judicial functions were indicated as under:
"What we have said above is nothing new and is only a reiteration of the established norms of judicial propriety and restraint expected from everyone discharging judicial functions. Use of intemperate language or making disparaging remarks against anyone unless that be the requirement for deciding the case, is inconsistent with judicial behaviour. Written words in judicial orders form permanent record which make it even more necessary to practise self-restraint in exercise of judicial power while making written orders. It is helpful to recall this *facet* to remind ourselves and avoid pitfalls arising even from provocation at times."

In another recent decision in *State of Assam* v. *P.C. Mishra*[6], the requirement of restraint in exercise of power was emphasised thus:
"It is incumbent for each occupant of every high office to be constantly aware that the power invested in the high office he holds is meant to be exercised in public interest and only for public good, and that it is not meant to be used for any personal benefit or merely to elevate the personal status of the current holder of that office. Constant awareness of the nature of this power and the purpose for which it is meant would prevent situations leading to clash of egos and the resultant fall out is detrimental to public interest."

A similar significant reminder in the present context is contained in *P.K. Ghosh* v. *J.G. Rajput*[7]
"A basic postulate of the rule of law is that 'justice should not only be done but it must also be seen to be done' ... Credibility in the functioning of the justice delivery system and the reasonable perception of the affected parties are relevant considerations to ensure the continuance of public confidence in the credibility and impartiality of the judiciary. This is necessary not only for doing justice but also for ensuring that justice is seen to be done."

Justice H.R. Khanna in a recent article on "*Judicial Activism*"*(The Hindu* dated 28-9-1995) has indicated the duty of a Judge and the source of strength of the law courts. He said:
"A Judge like Epictetus, it has been aptly put, must recognise the impropriety of being emotionally affected by what is not under one's control. The courts, it is also pointed out, have to be much more circumspect in seeing that they do not overstep the limits of their powers because to them is assigned the function of being the guardian of the Constitution. It is a faith and trust reposed by the framers of

the Constitution in the courts and their position in this respect is akin to that of a trustee. When the other agencies or wings of the State overstep their limits, the aggrieved parties can always approach the courts and seek redress against such transgression.

When, however, the courts themselves are guilty of such transgression, to which forum would the aggrieved parties appeal?

The courts have, I submit, to earn reverence through the test of truth...."
Lord Denning, long back in *R.* v. *Metropolitan Police Commr.*[8], administered this caution to the Judges in a contempt matter even after reaching the conclusion that certain facts on which the statement of the contemner was based were incorrect. He said:"...It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. **Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest.** Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

It is in this manner, the Supreme Court of India has understood and indicated the nature of the power to punish for contempt of court over the years. For obvious reasons this is an area of latent danger. The virtue of humility in the Judges, a constant awareness that the investment of this power is meant for use in public interest and to uphold the majesty of rule of law and not in self-interest, and the realisation that Judges are not infallible even if final, would ensure the requisite self-restraint in discharge of all judicial functions.

The results achieved are better, if the objective is clear and there are guidelines to regulate performance of the task. It is, therefore, helpful to bear in mind the qualities and traits expected in a Judge. That would help to regulate the behaviour pattern and to achieve uniformity. The basic traits needed in the Judges at all levels in the hierarchy are the same, but standard at the higher levels must be stricter. It would help to recall the qualities expected in a Judge.

The Allahabad High Court Post-Centenary Silver Jubilee Commemoration Volume at the beginning indicates these traits in a quotation from the ancient texts, as under:
Let the King appoint, as members of the Courts of Justice, honourable men of proven integrity, who are able to bear the burden of administration of Justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends or foes.

If we bear in mind the fact that dispensation of justice is a divine function and it is not given to any human being to sit in judgment over his fellow men, it is easy to appreciate that a Judge must

constantly strive to acquire and possess these virtues to qualify to discharge judicial functions. These traits in the personality of a Judge must be reflected in his entire behaviour. Tudor Kings believed in the divine right of kingship, but without the corresponding accountability. British History bears testimony to the grief which came to the Tudor Kings.

A Judge is always a Judge and he cannot have a split personality with different traits at different times. All actions of a Judge must be judicious in character. A dichotomy in the nature of functions performed by a Judge is impermissible for this purpose.

David Pannik in *Judges*, in his conclusion states:

"The qualities desired of a Judge can be simply stated: **'that he be a good one and that he be thought to be so'**. Such credentials are not easily acquired. The Judge needs to have 'the strength to put an end to injustice' and 'the faculties that are demanded of the historian and the philosopher and the prophet'.

... Because the judiciary has such a central role in the Government of society, we should (in the words of Justice Oliver Wendell Holmes) 'wash ... with cynical acid' this aspect of public life. Unless and until we treat Judges as fallible human beings whose official conduct is subject to the same critical analysis as that of other organs of Government, Judges will remain members of a priesthood who have great powers over the rest of the community, but who are otherwise isolated from them and misunderstood by them, to their mutual disadvantage."

It is interesting to note that a younger nation like Tanzania has a "Code of Conduct for Judiciary Officers"; and the violation of any of the rules in the Code constitutes judicial misconduct or misbehaviour. Omitting the details, some significant extracts from the rules are:

RULE l

A Judicial Officer should avoid impropriety and the appearance of impropriety in all his activities.

RULE 2

B. ADMINISTRATIVE DUTIES

4. In the exercise of his administrative duties, a Judicial Officer should avoid nepotism and favouritism.

C. DISQUALIFICATION

1. A Judicial Officer should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to the instances where:

(*a)* he has a personal bias or prejudice concerning a party or personal knowledge of facts in dispute;

(*b*) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practised law served during such association as a lawyer concerning the matter or the Judicial Officer or such lawyer has been a material witness in the matter.

RULE 4

A Judicial Officer should regulate his extrajudicial activities to minimise the risk of conflict with his Judicial Duties

(*Commonwealth Law Bulletin*, Vol. 19, No. 1, January 1993, pages 330-33)

This awareness for the independence of judiciary in a younger nation is worth mention. The modern trend is to provide for judicial accountability in some form. It is best done as an internal measure to conform to independence of judiciary.

The existence of power must be accompanied by accountability. The accountability of the Judges is to the people in whom the ultimate sovereignty vests. It is, therefore, imperative to retain public confidence which is the real source of strength of the judiciary. Erosion of credibility in the public

mind resulting from any internal danger is the greatest latent threat to the independence of judiciary. Eternal vigilance to guard against any latent internal danger is necessary, lest we suffer from self-inflicted mortal wounds.

It is legitimate for the people of India to expect from us a behavioural pattern satisfying at least that standard which we set down for anyone else to follow. This is because we have been placed by them on the highest pedestal. We must justify that position in the society.

Some recent trends have been disturbing. Many matters involving allegations of judicial misbehaviour have come to the Supreme Court for judicial determination. The merit of the allegations made, and the points raised are not of importance, in this context. The significance lies in the fact that such controversies have arisen. One question relates to the applicability of the Prevention of Corruption Act to the superior Judges. The view that there is need for codified rules and norms to regulate the behaviour of Judges with the provision of sanction for its enforcement is itself sufficient to caution us, and to commend self introspection. The felt need for some mechanism of internal check against possible aberrations is voiced so often that it cannot be ignored. The expansion of judicial power emphasises greater need for the internal check. In a recent decision in C. *Ravichandran Iyer* v.*Justice A.M. Bhattacharjee*[9], the Supreme Court has reiterated the high standard of moral and ethical behaviour expected from a Judge, and the desirability of a suitable 'in-house procedure' to maintain discipline among Judges by self-regulation.

Another latent danger to guard against is the consequence of mounting arrears in the Law Courts. **Unless corrective measures are taken expeditiously by each one of us, the malady would progressively degenerate the Justice Delivery System and erode our credibility.** The malady has already given rise to resort to extra-legal remedies by many, and frustration in others with a feeling that the promise of justice to all is a mirage on account of law's delays. We must act fast lest we tend to become irrelevant. If that happens, there would be no Rule of Law and without Rule of Law, Democracy cannot survive.

Some of the remedial measures which can be taken with the available infrastructure and require only the zeal to perform our duty with true devotion, are:
— Full utilisation of the court working hours.
— Avoid absenteeism except for an unavoidable good cause. Provision of vacations is for this reason.
— Curb frivolous litigation by proper check at entry and quick disposal. Remember, delay breeds frivolous litigation.
— Identify and eliminate artificial arrears.
— Encourage ADR.

Failure to do so may be construed as lack of devotion to duty. A standard higher than that applied to control the subordinate judiciary under Article 235 is expected to be followed by the superior Judges.
The facts must be faced and a proper solution found. Exhibition of the ostrich syndrome towards reality is not a solution but escapism. The absence of any codified rules or norms to regulate judicial behaviour at the higher levels has been on account of the view that those entrusted with the task of regulating the conduct and behaviour of others do not need to be told of the requirement from them. However, if we fail in living up to that expectation, it should not be surprising if in the near future there is move by an outside agency to step in and provide a solution to the felt need. If the people reach that conclusion, some other solution will have to be found under the constitutional framework. In that event, the blame would lie squarely on us. The need for the hour, therefore, is to realise this

clear and present danger as an imminent threat to the independence of judiciary from within. A danger from within is destructive like a termite which eats into the vitals. In my view, there is no time to lose and we must act promptly.

Observance by us of the norms and guidelines indicated for the members of the Judiciary by the ancient texts and in the judicial verdicts is a sure way to prevent any threat from the lurking latent dangers from within. It would also satisfy the legitimate expectation of the people of our accountability which must accompany the investment of any public power. In addition, this would also provide the justification for the superior role assigned to the judiciary and acquired by judicial activism, which is the sanction for the standards laid down by us for the others to follow.

Responsibility for proper Administration of Justice is to be shared by the Bench and the Bar. Both belong to the legal fraternity and Bar is the source of supply for the Bench. Requirements from members of the legal fraternity are the same. However, the requirements are higher for a Judge. Expectation of the standard of behaviour from members of the Bar is voiced quite often. To complete the process it is necessary that the higher standard of values required in the Judges is also voiced to indicate that we are not oblivious to it. This need is greater at a time when the public perception is growing that the judiciary is acquiring greater power with no accountability at the higher level. This impression must be dispelled.

It is in the fitness of things that a Judge, while in office and himself accountable by the same yardstick gives this reminder. It is in this spirit, in all humility, as the longest serving sitting Judge, I consider it my duty and obligation to remind ourselves of what is the expectation from us of the people, to whom we are accountable. An appropriate occasion to remind ourselves of this obligation is the Inaugural Lecture in the memory of Justice Goswami, who first recorded judicially a warning to be vigilant against the lurking latent internal dangers. I am sure, this is a fitting tribute to the memory of Justice P.K. Goswami.

Endnotes

1. (1977) 3 SCC 592: (1978) 1 SCR 1 Return to Text
2. 1981 Supp SCC 87: (1982) 2 SCR 365 Return to Text
3. (1993) 4 SCC 441 Return to Text
4. (1991)1 SCC 212 Return to Text
5. 1995 Supp (4) SCC 169 Return to Text
6. 1995 Supp (4) SCC 139 Return to Text
7. (1995) 6 SCC 744 Return to Text
8. (1968) 2 All ER 319 Return to Text
9. (1995) 5 SCC 457

"JUDICIAL INDEPENDENCE: IS IT THREATENED?"[5]

By

Hon'ble. Mr. Justice J.S.Verma, Former Chief Justice of India.

"The place of justice is a hallowed place, and therefore not only the Bench, but also the foot space and precincts and purpose thereof ought to be preserved without scandal and corruption". On Judicature" by **Francis Bacon**

Hon'ble Mr. Justice J.S. Verma in the first segment of the work made remarkable observation by saying highest standard of professional conduct and ethics in both Bar and Bench is the greatest assurance of judicial independence. He opined that every organ including judiciary is accountable to the sovereign- ***the people****. Author admits the inadequacy of existing mechanism of ensuring judicial accountability, and he observed that the High Courts are having constitutional authority to control and guardian the grassroots judiciary, in exercise of its authority it must lead by an example.*

In the succeeding segment author underscores the absence of codified rules and need of self regulation and he puts- ***"self regulation is dignified while outside imposition is demeaning."****Author regrets on recent developments, wherein the apex court judges refused to disclose the assets, on the ground of absence of law requiring such disclosure, he submits that the perception that law alone and not morality binds the judiciary is in conflict with the judicial tradition and is disturbing. In concluding segment interalia author cautioned the judiciary and advised it to be* aware of *subtle executive influences by the way of post-retirement benefits.*

In the year 1995 I delivered the First P.K.Goswami Memorial Lecture at Guwahati with the title "The Independence of The Judiciary—Some Latent Dangers". In a way it was a sequel to my apprehension over the years expressed judicially in my separate opinion in the *K. Veeraswami case*,[6] followed by the events leading to the V. Ramaswami cases that I had to hear and decide. Fifteen years later I am anguished that some of my apprehensions threaten to come true! Hence, the choice of this topic for the lecture to pay homage to the memory of a doyen of the Madras Bar, S.Govind Swaminadhan who was a true professional practicing the highest standards of professional conduct and ethics in the Bar, which is the greatest assurance for judicial independence. In my vocabulary, the word 'Bar' denotes the entire legal profession—the practicing lawyers as well as the judges on the Bench.

[5] First S. Govind Swaminadhan Memorial Lecture at the Madras High Court Bar in Chennai on 29 January 2010. Available at: http://www.tnsja.tn.nic.in/article/Judicial%20Independence%20JSVJ.pdf visited on: 22/08/2015 at: 17:31

[6] 1991(3) SCC 655

Another reason for this choice goes back to the time of my entry to the Bar in 1955 when the first book to read and digest given to me by my senior, G.P.Singh (later Chief Justice of the M.P.High Court) was a compilation of lectures delivered by a senior member of the Madras Bar, K.V.Krishnaswami Iyer to the junior members on professional conduct and ethics. The high tradition of professional conduct and ethics of the Madras Bar coupled with my baptism in the Bar with this lesson indicated the obvious choice of the topic for beginning the Lecture series in the memory of S.Govind Swaminadhan at this venue. It is not merely contextual but also of great constitutional significance at a time when prompt measures are needed for protecting judicial independence from lurking dangers.

II

Judicial Independence & Accountability

The independence of the judiciary is a necessary concomitant of the power of judicial review under a democratic Constitution. The foundation for judicial review without a specific provision under the American Constitution was laid by Marshall, C.J. in 1803 in *Marbury v. Madison*; even though much earlier in 1608 it was Lord Coke whose opinion in Dr. Bonham's case germinated that concept. In the Indian Constitution, judicial review is expressly provided inter alia in Articles 13, 32, 136, 141, 142, 226 and 227. It is also recognized as a basic feature forming an indestructible part of the basic structure of the Constitution pursuant to the decision in *Keshavananda Bharti*, AIR 1973 SC 1461. The directive principle of state policy in Article 50mandates separation of judiciary from the executive to maintain its independence, as essential for its function as the watchdog under the Constitution. However, like every organ of the State and every public functionary in a democracy the judiciary as an institution and every judge as a public functionary is accountable to the political sovereign—the People. The only difference is in the form or nature of the mechanism needed to enforce their accountability. In short, judicial accountability is a facet of the independence of the judiciary; and the mechanism to enforce judicial accountability must also preserve the independence of the judiciary.

The rule of law which is the bedrock of democracy will be adversely affected if the independence of the judiciary is compromised by the erosion of the integrity of the judiciary. Such erosion can be from within as well as from without. Safeguards to protect the judicial independence are in our Constitution in addition to the several international instruments, which can be read into the constitutional guarantees by virtue of the canons of construction evolved in *Vishakha*, AIR 1997 SC 3011.

In addition to the UDHR and the ICCPR, the UN has set forth a set of standards known as the `Basic Principles on the Independence of the Judiciary'. Also The Beijing Principles on the Independence of the Judiciary, 1997' adopted at Manila by the Chief Justices of the Asia Pacific Region; and The Bangalore Principles of Judicial Conduct, 2002' are two such documents needing particular mention. **The essential values stated in the Bangalore Principles are: judicial independence, both individual and institutional, as a prerequisite to the rule of law; impartiality, not only to the decision itself but also to the process; integrity; propriety, and the appearance of propriety; equality of treatment to all; competence and diligence. It concludes with the need for effective measures to be adopted to provide mechanisms to implement these principles.**

To protect the judiciary from dangers within, the framers of Indian Constitution considered it sufficient to provide for removal of a judge of a High Court or the Supreme Court in the extreme case of proved misbehaviour or incapacity under Articles 217 and 124 respectively; and to vest the control over the subordinate judiciary in the respective High Court under Article 235. In this manner

the Constitution provides for enforcing judicial accountability preserving the independence of the judiciary.

III
Mechanism for Judicial Accountability

A serious debate is now raging about the inadequacy of the existing mechanism for enforcing the judicial accountability of any erring judge in a High Court or in the Supreme Court. There is now a general consensus that some recent incidents involving a few in the higher judiciary has exposed the inadequacy of the existing provisions to deal with the situation; and it calls for an effective mechanism to enforce the judicial accountability of the higher judiciary, in case of need.

There can be no doubt that the public perception in this behalf cannot be ignored. Public confidence in the judiciary is its real strength that has also legitimized judicial activism' through Public Interest Litigation; and converted the judiciary's image from the 'least dangerous branch' without the 'purse or the sword' (borrowing from Alexander Hamilton in the 78th Federalist) to a strong arm of the State. The recent clamour for effective judicial accountability justified by a few recent incidents must be properly channelized to ensure that an effective mechanism for accountability of the higher judiciary is developed without eroding the independence of the judiciary. It must be borne in mind that the number of erring superior judges is miniscule which must not embarrass the vast majority of correct judges. The threat to the independence of the judiciary must be averted by a sensible balancing act.

Once the integrity and accountability of the higher judiciary is assured, the subordinate judiciary can be easily managed by virtue of Articles 50 and 235. High Courts are pivotal in the administration of justice. Once they justify people's confidence, the subordinate courts would not lag behind. The best way to exercise control over the subordinate courts is for the High Courts to lead by example. It is well known that "An ounce of practice is worth more than a ton of precept". All the precept in the form of circulars and guidelines to the subordinate judiciary from the higher judiciary is ineffective unless it is identified with the practice of the preachers. That does not appear to be the current perception in all cases.

IV
Areas of Concern

Focus on some important areas is needed. A few of these were identified in my above 1995 lecture, separate opinion in the K.Veeraswami case, and the majority opinion in the Second Judges case. A brief mention of these in the present context is helpful.
In the 1995 lecture, I pointed out the latent dangers to judicial independence from within and concluded thus:

"The existence of power must be accompanied by accountability...Erosion of credibility in the public mind resulting from any internal danger is the greatest latent threat to the independence of the judiciary. Eternal vigilance to guard against any latent internal danger is necessary, lest we suffer from self-inflicted mortal wounds...The absence of any codified rules or norms to regulate judicial behaviour at the higher levels has been on account of the view that those entrusted with the task of regulating the conduct and behaviour of others do not need to be told of the requirement from them. However, if we fail in living up to that expectation, it should not be surprising if in the near future there is move by an outside agency to step in and provide a solution to the felt need... The need of the hour, therefore, is to realize this clear and present danger as an imminent threat to the independence of the judiciary from

within...In my view there is no time to lose and we must act promptly...Observance by us of the norms and guidelines indicated for the members of the judiciary by the ancient texts and the judicial verdicts is a sure way to prevent any threat from the lurking latent dangers from within. It would also satisfy the legitimate expectation of the people of our accountability which must accompany the investment of any public power".

Earlier in the *K.Veeraswami* case, 1991 (3) SCC 655 my dissent recognized the felt need for suitable legislation, the existing provision being inadequate, to ensure accountability of the higher judiciary protecting the judicial independence.

Therein, I had said:
"If there is now a felt need to provide for such a situation, the remedy lies in suitable legislation for the purpose of preserving the independence of judiciary free from likely executive influence while providing a proper and adequate machinery for investigation into allegations of corruption against such constitutional functionaries and for their trial and punishment ... The social sanction of their own community was visualized as sufficient safeguard with impeachment and removal from office under Article 124sanction of the community has been waning and inadequate of late. If so, the time for legal sanction being provided may have been reached".

Having been convinced that the majority opinion in the *K.Veeraswami case* was not workable (as proved by later events), I added a warning in one *para* at the end of my draft dissent, which Iomitted at the time of its pronouncement because of its strong language. The apprehension therein of a later intrusion by the executive to prescribe for us having now come true, it may help to recall that sentiment with the hope that some prestige may be salvaged even now in enactment of the impending legislation to cover the field. **I believe that self regulation is dignified while outside imposition is demeaning.** The omitted draft Para from that opinion was:

"With no pretensions of a 'prophet with honour' to borrow the title from Alan Barth's compilation of opinions of some great dissenters, and no desire to be a prophet of doom, I deem it fit to end on a note of caution. My view is not shared by the majority. I hope they are right. But, if it be not so, let not posterity accuse us that the control over the judiciary denied to the executive by the Constitution and the Parliament, and which the executive could not wrest through the Parliament was conferred on it by judicial craftsmanship itself I do hope that in spite of the present clamour for the majority view, in calmer times, when present pressures, passions and fears subside, and the potential threat of the yet unknown and unexpected power in the executive without the requisite statutory safeguards is fully realized, there will be time enough to effectively check any intrusion into the independence of judiciary by this means. Undoubtedly, there is erosion of values in all spheres but even now the higher judiciary retains comparatively the greatest credibility in public eye, as it did in earlier times. Is it, therefore, correct and wise to vest the executive, which does not enjoy even equal, much less greater credibility, with this extra power not envisaged by the Constitution and the Parliament? The answer at present by the majority is in the affirmative, which would be the law. It is the future, which will unfold the true canvas'.

The need to regulate this area by internal discipline to prevent outside intrusion prompted resolutions to this effect in the Chief Justice's conferences, but the general reluctance from within kept the matter in abeyance till the three resolutions were adopted unanimously by the Supreme Court on May 7, 1997: Restatement of Values in Judicial Life; Declaration of Assets by the Supreme Court and High Court judges; and 'In-house Procedure' for inquiry into allegations against these judges.

These resolutions were later adopted in the Chief Justice's Conference in 1999. The Bangalore Principles, 2002 also affirmed the Restatement of Values. **These resolutions provided the framework for the needed legislation to cover the field without any scope for executive intrusion in enactment of the legislation.** Before demitting the office of the CJI, I also wrote a letter on December 1, 1997 to the Prime Minister to this effect in a bid to ensure judicial accountability preserving the independence of the judiciary. After my retirement, **I** have reiterated it in a letter of April 7, 2005 to the present Prime Minister.

V

Self-regulation

It saddens me to find that the judiciary appears to have lost the initiative and the political executive who also controls the Parliament in our constitutional scheme is now to determine the contents of the impending legislation. What troubles me even more is the reported initial assertion of the CJI, *K. G. Balakrishnan* that the superior judges need not declare their assets unless bound to do so by a law, in spite of the unanimous resolution of the Supreme Court on May 7, 1997 since that has only moral authority; and later the judicial challenge to applicability of the RTI Actin the High Court and then to itself! I am distressed at the comments made publicly and heard privately about the higher judiciary in this context. However, the subsequent dilution of that stand is welcome news. The perception that law alone and not morality binds the judiciary is in conflict with the judicial tradition and is disturbing. It ignores Jeffry Jowell's wise enunciation that '**law is seen as institutionalized morality**'; and David Pannick's conclusion in his book--`Judges': "The qualities desired of a Judge can be simply stated: that he be a good one and that he be thoughts be so".

However, the recent response of the Delhi High Court (in L.P.A. No. 501 of 2009 decided on 12 January 2010) led by Chief Justice A.P.Shah in rejecting the tenuous stand of the Chief Justice of India, K.G.Balakrishnan that the office of CJI and the Supreme Court are above the law (RTI Act) applicable to all public functionaries in our republican democracy is to be hailed as a welcome blow for transparency and accountability, which are acknowledged principles of standards in public life. The decision first by a single judge, S.Ravindra Bhat, affirmed on appeal by the full bench of the Delhi High Court is a glaring proof of judicial independence. The observations of A.P.Shah, C.J. speaking for the full bench that **"Judicial independence is not the personal privilege of the individual judge, but a responsibility cast on him", and "Democracy expects openness... don't wait for Parliament to compel judges to disclose assets and undermine judicial independence", provide strong fillip to judicial independence.**

Chief Justice A.P.Shah has articulated the true concept of judicial independence reiterating the modern view. He has echoed the words of Lord Woolf, C.J. in an article wherein he said, **"The independence of the judiciary is therefore not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public".** It is time the Chief Justice of India, takes the lead in this direction provided admirably by the High Court to bring quietus to the unsavory controversy threatening judicial independence.

Indira Gandhi's case,[7] enunciated certain propositions: accountability is an integral part of a democratic polity; it implies the people's right to know the manner of working of the government; accountability improves the quality of governance; secrecy, on the other hand, promotes nepotism and arbitrariness; and, therefore, article 19(1)(a), which implies open government, is premised on the

[7]AIR 1975 SC 2299

'right to know'. This view has been reiterated in later decisions: S P Gupta, AIR 1982 SC 149; Secretary, Ministry of IB, AIR 1995 SC 1236.
It is reasonable to assume that the Supreme Court will practice what it has preached and made the law of the land. It is useful to recall Lord Acton's summary of the imperative of the people's `right to know'. He said: "Everything secret degenerates, even the administration of justice; nothing is safe that does not show it can bear discussion and publicity".

Let me hope that the Supreme Court led by the Chief Justice of India will now accept the verdict in good grace and not appeal to itself to re-examine its obvious merit of the Delhi High Court judgment! Conflict of interest in the further appeal to itself is obvious, since the doctrine of necessity is not attracted. Otherwise, we are bound to go down in the public estimation which would rightly conclude that we do not practice what we preach.

VI

Role of the Bar

The Bar has a significant role in such a situation. I wish the Attorney General, G.E.Vahanvati who appears for the Supreme Court draws inspiration from some of his illustrious predecessors to advise the CJI against a further appeal by the Supreme Court now to itself. Govind Swaminadhan as Advocate General of Tamil Nadu boldly contradicted Chief Justice A.N.Ray at the hearing of the review of *Kashavananda Bharti* decision when the CJI attempted to justify the review saying it was at the behest of the former. Lal Narayan Sinha as the Solicitor General refused to argue the Union Government's untenable plea in the Habeas Corpus matter during the Emergency (1975--'77). M.C.Setalvad, C.K.Daftary, S.V.Gupte and H.M.Seervai to name a few, were similar leaders of the Bar who did not hesitate to guide correctly the Chief Justices when ever need arose to preserve the dignity, credibility and the independence of the judiciary. M.C.Setalvad and Sir Alladi Krishnaswami Aiyer had no hesitation in giving an opinion to the President of India, Dr. Rajendra Prasad, which was not to his liking. Leaders of the Bar must not abdicate their role to preserve judicial independence with judicial accountability.

VII

Appointments

Another issue relevant in this context is of the appointment of judges in the Supreme Court and the High Courts. Chief Justice of India, K.G.Balakrishnan asserts that the collegium headed by him is strictly following the decision in the Second Judges case by which they are bound. The general perception voiced eloquently by the executive is that the executive has no part in making these appointments for which the judicial collegium alone is responsible and answerable. In this manner the judiciary is held responsible for the aberrations in these appointments in the recent years. It is true that the veto power granted to the executive by the First Judge's case, AIR 1982 SC 149 is taken away by the Second Judge's case, AIR 1994 SC 268; but it is not correct that the executive has been denuded of all power in adjudging the suitability of the candidates for appointment. However, greater responsibility does lie in the judicial collegium because of its role under the existing system. A brief reference to the Second Judge's case is necessary.

The significance of every single appointment to the Supreme Court or a High Court was emphasized in the majority opinion in *K.Veeraswami case*. It said:

"A single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system... a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof".

In my separate opinion I had also emphasized the need for strict scrutiny at the entry point that will avoid the need for later removal of a bad appointment. I had said:

"The collective wisdom of the constitutional functionaries involved in the process of appointing a superior judge is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful person gains entry... even if sometime a good appointment does not go through. This is not dificult to achieve".

A brief reference to the *Second Judge's case*, AIR 1994 SC 268 is apposite. The majority opinion held:

"The process of appointment of judges of the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment... There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India...If the non-appointment in a rare case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment... non-appointment for reasons of doubtful antecedents relating to personal character and conduct, would also be permissible".

The clear language of the decision leaves no room for any doubt that the executive has a participatory role in these appointments; the opinion of the executive is weightier in the area of antecedents and personal character and conduct of the candidate; the power of non-appointment on this ground is expressly with the executive, notwithstanding the recommendation of the CJI; and that doubtful antecedents etc. are alone sufficient for non-appointment by the executive. The decision also holds that the opinion of the judicial collegium, if not unanimous does not bind the executive to make the appointment.

Some reported instances in the recent past of the executive failing to perform its duty by exercise of this power even when the recommendation of the judicial collegium was not unanimous and the then President of India had returned it for reconsideration, are not only inexplicable but also a misapplication of the decision, which the CJI, Balakrishnan rightly says is binding during its validity. Such instances only prove the prophecy of Dr. Rajendra Prasad that the Constitution will be as good as the people who work it. Have any system you like, its worth and efficacy will depend on the worth of the people who work it! It is, therefore, the working of the system that must be monitored to ensure transparency and accountability.

The Second Judge's case affirmed by the Third Judge's case in the Presidential Reference, merely formalizes the procedure developed and followed till executive supremacy in the matter of appointments was given by the First Judge's case (1982); and that practiced even later by Chief Justices who did not succumb to executive pressure. A few earlier observations to this effect are significant to prove the point.

Granville Austin in his book— 'Working A Democratic Constitution: The Indian Experience' (1999), has dealt with the issue of judicial independence. Some portions therein summarise the experience of the first fifty years. He says: "The CJI during the Nehru period had virtually a veto over appointment decisions, a result of the conventions and practices of the time and the Chief Justice's strength of character". He quotes Mahajan, C.J. saying "Nehru has always acted in accordance with the advice of the CJI", except in rare circumstances, despite efforts by State politicians with 'considerable pull'

to influence him. The Law Commission chaired by M.C.Setalvad in its 14th report recommended that appointments to the Supreme Court and the High Courts be made solely on the basis of merit sans any other consideration; and on the recommendation of the Chief Justice of the High Court with concurrence of the CJI.

The recent aberrations are in the application of the Second Judge's case in making the appointments, and not because of it. This is what I had pointed out in my letter of 5 December 2005 to CJI, Y.K.Sabharwal with copy to the two senior most judges, who included the present CJI, K.G.Balakrishnan.

VIII
Post-retirement Behaviour

Post-retirement conduct of the superior judges, particularly those of the Supreme Court is also relevant in this context to require mention.

In addition to the system providing for the appointment of persons of proven integrity as guardian of the constitutional values, there is the need for constitutional safeguards to insulate them also from possible executive influence through temptations in subtle ways to preserve judicial independence. One such method to penetrate the resolve of even a few of the best is the temptation of lucrative post-retiral benefits given by the executive to a favoured few. The obverse of the constitutional guarantee of security of tenure and conditions of service is the obligation of such constitutional functionaries to the observance of a code of post-retiral conduct eschewing any such temptation. To the extent possible, the needed constitutional prohibitions should also be enacted, to enable the development of healthy conventions. The environment of eroding ethical values calls for this preventive measure.

Some instances of post-retirement activity of judges of Supreme Court (including the CJI) are attracting public disapproval, even if voiced privately. Chamber practice of giving written opinions by name to be used by litigants/parties before court/tribunal or any authority; arbitrations for high fees; doing arbitrations even while heading Commissions/Tribunals availing the salary, perquisites and benefits of a sitting Judge/CJI are some activities inviting adverse comments and seen as eroding judicial independence.
This too is a threat to judicial independence, which must be averted.

IX
Conclusion

The Constitution needs to provide for systems with checks and balances to eliminate abuse and misuse of public power. The caution administered by Dr. Rajendra Prasad at the concluding session of the Constituent Assembly is worth recalling. He then said:
"Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it... a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them".

This is the crux of the matter.
The expectation from the judiciary is indeed very high in view of the nature of its role in the Constitution. The independence of the judiciary is meant to empower it as the guardian of the

rule of law. It is not merely for its honour, but essentially to serve the public interest and to preserve the rule of law. Judicial accountability is a facet of the independence of the judiciary in the republican democracy. There are, therefore, recognized norms of judicial behaviour expected from the judges.

In the words of Addison, **'to be perfectly just is an attribute of the divine nature, to be so to the utmost of our abilities is the glory of man'.** This is an apt description of the nature of judicial function.

How to ensure this result, and to achieve the true purpose of judicial independence? It has been answered in the texts and by the recognized judicial conventions restated generally in the above 1997 resolutions.

The Allahabad High Court Post-Centenary Silver Jubilee Commemoration Volume reminds us with a quote from the ancient texts:

"Let the king appoint, as members of the courts of justice, honourable men of proved integrity, who are able to bear the burden of administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends and foes".

Recently David Pannick in his book—`Judges' concludes:

"The qualities desired of a judge can be simply stated: 'that he be a good judge and that he be thought to be so' ...Such credentials are not easily acquired. The judge needs to have 'the strength to put an end to injustice' and 'the faculties that are demanded of the historian and the philosopher and the prophet'...Because the judiciary has a central role in the government of society, we should (in the words of Justice Oliver Wendell Holmes) 'wash... with cynical acid' this aspect of public life".

The stated principles on the independence of the judiciary are meant to cover these aspects. The appointment process and the mechanism for ensuring judicial independence with judicial accountability at all levels are significant to thwart the impending threats to judicial independence. Sincere commitment and resolve of the entire Bar (including the Bench) towards this end is the need of the hour.

This would be our true homage to the memory of S.Govind Swaminadhan, a doyen of the Madras Bar who practiced these norms and has been a role model for the legal profession!

DEMAND FOR EXTERNAL VIGILANCE: RECENT DEVELOPMENTS

(News item published in *The Telegraph*)[8]

Ineffectiveness of Internal Vigilance methodology adopted in India is severely opposed by some quarters of public life. Many openly asserting that to keep corruption in judiciary under control, external vigilance are necessary (*Emphasis added*). Very recently it was reported that, over a lakh advocates across the state (Bihar), including at Patna High Court, abstained from duty on Wednesday over their demand to allow state vigilance in subordinate judiciary to curb "prevailing corruption. "Because of the daylong protest, over 10,000 Patna High Court lawyers did not attend court on Wednesday, paralysing services there altogether. The situation was similar in district, sub-divisional courts and tribunals across the state.

Talking to The Telegraph, Bihar State Bar Council chairman Akhouri Mangla Charan Shrivastava said: "The agitation was called to press for the demand to allow state vigilance department to probe subordinate judiciary and curb corruption, which is increasing by the day. The state vigilance should be allowed in sub-ordinate courts - an arrangement which was in place till 1977 - to check corruption. But this arrangement was discontinued following a high court order."

Srivastava rued that no remedy is currently available to check corrupt officers in sub-ordinate courts. "Our strike was very effective," he said. However, there appears to be mixed feelings among lawyers as far as allowing the vigilance department to probe corruption cases in lower courts is concerned.
Patna High Court senior advocate Y.V. Giri said: "I don't think that by allowing the state vigilance department to probe cases, corruption in the subordinate judiciary can be checked. This will only amount to interference by the police in the judicial system and affect the independence of the judiciary."

Giri, however, clarified that it was not as if he was supporting corruption, but the high court should evolve a mechanism or establish a wing for the purpose of checking corruption, which would act by being under the control of the high court.
Another senior advocate, Y.C. Verma, avers the same line.
He said: "Personally, I am opposed to introduction of any outer agency in matter of courts. The high court should evolve an internal mechanism to check corruption in the lower judiciary."He also agreed that corruption in lower courts was on a massive scale and the high court administration was not taking steps to curb it.

Verma said a year ago a meeting was convened by the state bar council on the issue of corruption in subordinate courts, following which they submitted numerous letters to the high court administration.
But nothing happened thereafter.
However, there are some who did not believe that allowing vigilance in courts would affect its autonomy.
Advocate Dinesh Kumar said: "Of course, the vigilance department should be allowed to probe corruption cases. In what way would it affect the independence of the court? Is independence of the judiciary more important than the independence of a common man?"
He also wondered why the courts were running away from investigation if they were, indeed, truthful.

[8] Available at: http://www.telegraphindia.com/1150716/jsp/bihar/story_31780.jsp#.VdXVDLKqqko, dated: July 16, 2015 visited on: 20/08/2015 at: 18:56 PM

Council chairman Srivastava also believes that by allowing the vigilance department to probe corruption cases, the independence of the judiciary would not get affected. The high court can make rules and act like a monitoring body, he said. Besides, he said, despite several requests made by them, the high court administration did not act, forcing them to resort to agitation.

Officiating secretary of the bar council, Ashok Kumar, said the vigilance department should be allowed in subordinate courts to deal with cases of corruption, which have tarnished the image of the judiciary. He said if the demand was not met, the council would take a decision to intensify their agitation in support of the demand in future.

COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS REPORT[9]

VOLUME I

9.9 ACCOUNTABILITY

9.9.1 Judicial credibility is enhanced when it is transparent and accountable. Sturdy independence is the basic virtue of the Judiciary. The Judiciary is independent in the sense that it is not answerable to any one. This does not give it license to function arbitrarily. It has to function in accordance with the Constitution and the relevant laws. The Judiciary is as much subject to rule of law as anyone else. It has to discharge the judicial functions assigned to it in accordance with the mandate of the Constitution. In that sense it is accountable to fulfil the constitutional mandate.

9.9.2 The High Court is given power of control over subordinate courts by Article 235 of the Constitution. By and large this power if properly exercised is sufficient to ensure accountability of the subordinate courts. What is needed is greater vigilance and effective exercise of this power.

9.9.3 So far as High Courts are concerned no similar power of control has been conferred on any one and not even the Supreme Court. The High Courts in that sense are independent though their judgments can be reviewed by the Supreme Court. Under our Constitution, a Judge of a High Court or of the Supreme Court of India can be removed from his office by the President only for 'proved misbehaviour' or 'incapacity' and only in the manner provided for in Article 124(4); that is by an affirmative vote of at least half the total membership of each House of Parliament and a majority vote of two thirds of the members of each House present and voting on the motion for the removal of the Judge.

9.9.4 It is well known that impeachment motion against Justice Ramaswami failed even though the Committee on enquiry had held that serious charges of misconduct were proved warranting his removal. This indicates that impeachment provisions cannot be easily pressed into service to discipline the earring Judge. The recent incidents alleging serious aberrations in the conduct of Judges of some of the High Courts have shaken the confidence of the people in the judiciary. Common people feel very bad that if the Judges are guilty of serious misconduct nothing can be done about it. The problem is serious and needs urgent attention 140 at the highest level. It is imperative that the judiciary itself takes the initiative to set its house in order and come forward with credible solutions without undermining the independence of the judiciary. Constitution of a National Judicial Commission and amending Article 124 to make impeachment less difficult are some of the alternatives which are being discussed at the national level.

9.9.5 The Committee however feels that the aberrations in the conduct of Judges can be checked or even corrected if the problem is noticed at the earliest and efforts made to correct them. In the High Court the Chief Justice is regarded as only first among the equals. Except constituting benches and assigning work he does not exercise any authority over his colleagues. This has considerably eroded discipline which is so necessary for any institution. Some Judges do not attend the court punctually; reserved judgments are not rendered for long time, sometimes for years; many cases are kept as part-heard for long period; complaints are received of some lawyers receiving favourable orders, there are

[9] Available at: http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf visited on: 11/09/2015 at: 16:54

complaints that some Judges act vindictively against some lawyers; there are complaints that lawyers are snubbed or insulted; sometimes complaints are also received about corruption and immoral conduct of Judges etc. The Chief Justices' have no power to look into these problems and feel helpless. If the Chief Justice has the power to look into these complaints and takes immediate corrective action the problem can well be nipped in the bud. There is therefore urgent need to confer power on the Chief Justice to look into such grievances and take suitable corrective measures short of impeachment or pending impeachment process such as:- i) Advising the Judge suitably. ii) Disabling the Judge from hearing particular class of cases or cases in which a particular lawyer appears. iii) Withdraw the judicial work from the Judge for a specified period. iv) Censure the Judge. v) Advise the Judge to seek transfer vi) Advise the Judge to seek voluntary retirement.

9.9.6 There are other measures that can be taken to ensure accountability so far as proper discharge of judicial functions is concerned.

Quality of the Judiciary and Integrity of judges in Ancient India[10]

The foremost duty of a judge was integrity which included impartiality and a total absence of bias or attachment. The concept of integrity was given a very wide meaning and the judicial code of integrity was very strict. Says Brihaspati: **"A judge should decide cases without any consideration of personal gain or any kind of personal bias; and his decision should be in accordance with the procedure prescribed by the texts. A judge who performs his judicial duties in this manner achieves the same spiritual merit as a person performing a Yajna."**[11]

The strictest precautions were taken to ensure the impartiality of judges. A trial had to be in open court and judges were forbidden to talk to the parties privately while the suit was pending because it was recognised that a private hearing may lead to partiality (pakshapat). Shukra-nitisara says: **"Five causes destroy impartiality and lead to judges taking sides in disputes. There are attachment, greed, fear, enmity, and hearing a party in private."**[12]

Another safeguard of judicial integrity was that suits could not be heard by a single judge, even if he was the king. Our ancients realized that when two minds confer, there is less chance of corruption or error, and they provided that the King must sit with his counselors when deciding cases, and judges must sit in benches of uneven numbers. Shukra-nitisara enjoined that "Persons entrusted with judicial duties should be learned in the Vedas, wise in worldly experience and should function in groups of three, five, or seven." [13] Kautilya also enjoined that suits should be heard by three judges (dharmasthstrayah). Our present judicial system, created by the British, does not follow this excellent safeguard. Today every suit is heard by a single Munsif or civil Judge or District Judge for reasons of economy. But the state in ancient India was more interested in the quality of justice than economy.

Integrity

Every Smriti emphasizes the supreme importance of judicial integrity. Shukra-nitisara says: "The judges appointed by the king should be well versed in procedure, wise, of good character and temperament, soft in speech, impartial to friend or foe, truthful, learned in law, active (not lazy), free from anger, greed, or desire (for personal gain), and truthful."[14]

Punishment for corruption

Corruption was regarded as a heinous offence and all the authorities are unanimous in prescribing the severest punishment on a dishonest judge. Brihaspati says: **"A judge should be banished from the realm if he takes bribes and thereby perpetrates injustice and betrays the confidence reposed in him by a trusting public."**[15] A corrupt judge, a false witness, and the murderer of a Brahmin are in the same class of criminals.[16] Vishnu says: **"The state should confiscate the entire property of a**

[10]By Mr. Justice S. S. Dhavan High Court, Allahabad**,** *the Indian Judicial System: A Historical Survey*, available at: www.allahabadhighcourt.in/.../TheIndianJudicialSystem_SSDhavan.doc, visited on: 06/09/2015 at: 00:55AM

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judge who is corrupt."[17] Judicial misconduct included conversing with litigants in private during the pendency of a trial. Brihaspati says: **"A judge or chief justice (Praadvivaka) who privately converses with a party before the case has been decided (anirnite), is to be punished like a corrupt judge."**[18]

KAUTILYA ON CORRUPTION IN JUDICIARY AND NEED FOR 'VIGILANCE'[19]

Kautilya was also not unaware of corruption in the judicial administration. He prescribed the imposition of varying degrees of fines on judges trying to proceed with a trial without evidence, or unjustly maintaining silence, or threatening, defaming or abusing the complainants, arbitrarily dismissing responses provided to questions raised by the judge himself, unnecessarily delaying the trial or giving unjust punishments. This shows that there were incidents of judicial pronouncements being biased, favouring one party to the detriment of others. In an atmosphere of corruption prevailing in the judicial administration as well, Kautilya perhaps wanted to ensure that the litigants are encouraged and given voice to air their legitimate grievances. He expected judges to be more receptive to the complaints and be fair in delivering justice.

Kautilya prescribed reliance on an elaborate espionage network for detecting financial misappropriation and judicial impropriety. Spies were recruited for their honesty and good conduct. They were to keep a watch even over the activities of accountants and clerks for reporting cases of fabrication of accounts (avastara). On successful detection of embezzlement cases, Kautilya advocated hefty fines to be imposed apart from the confiscation of ill-earned hordes. If a functionary was charged and proved even of a single offence, he was made answerable for all other associated offences related to the case. Since taxes paid by the people are utilised for their welfare, any loss of revenue affects the welfare of the society at large. This is precisely the reason why Kautilya explicitly argued that the fines imposed should be "in proportion to the value of work done, the number of days taken, the amount of capital spent and the amount of daily wages paid".

The threat of fines being imposed and subsequent public embarrassment do deter judicial officials, to some extent, from resorting to corrupt practices. But Kautilya was proactive in laying down traps to catch public functionaries with loose morals and inclination to resort to bribery or seek undue favour. The strategy he prescribed was for secret agents to take a judge into confidence through informal channels and ask him to pronounce judgments favouring their party in return for a payment. If the deal was fixed, the judge was treated as accepting the bribe and prosecuted accordingly.

Interestingly, Kautilya also dealt with the concept of whistleblowers. Any informant *(suchaka)* who provided details about financial wrongdoing was entitled an award of one-sixth of the amount in question. If the informant happened to be a government servant *(bhritaka)*, he was to be given only one twelfth of the total amount. The former's share was more because exposing corruption while being outside the system was more challenging. But in the case of *bhritakas*, striving for a corruption free administration was considered more of a duty that was ideally expected of them.

Kautilya also warned at the same time about providing wrong information or not being able to prove the accusations. He advocated either monetary or corporal punishment for such informants so that the

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[19] R. Shamasastry, Kautilya Arthasastra, 2005

tool could not be misused for settling personal scores and harassing genuine officials. If an informant himself were to backtrack on the assertions he made against the accused, Kautilya suggested the death penalty for him. This provision was not only draconian, but would have effectively discouraged whistleblowers. While such provisions would certainly make people think twice before levelling accusations, the threat of capital punishment was too harsh to help people root out the corrupt.

In an atmosphere of all round corruption, honesty becomes a virtue and not a desired duty. Kautilya argued for advertising the cases of increase in revenue due to the honest and dedicated efforts of the superintendents by giving rewards and promotions. Bestowing public honour creates a sense of pride and boosts the motivation and morale of honest officials. They act as role models for ideal youngsters who wish to join the administration and serve the state.

Kautilya also proposed a number of measures to avoid cases of corruption arising at all. Several positions in each department were to be made temporary. Permanency for such positions was to be reserved as an award granted by the king to those who help augment revenue rather than eating up hard earned resources. Kautilya also favoured the periodic transfer of government servants from one place to another. This was done with the intention of not giving them enough time to pick holes in the system and manipulate it to their advantage.

Kautilya wrote that "dispensing with (the service of too many) government servants...[is] conducive to financial prosperity". This is not only because of the reduction in expenditure on salary but rightsizing the bureaucracy also results in faster decision making and the transaction of government business without unnecessary delay and red tape. This effectively reduces the scope for bribery in particular and corruption in general.

It is interesting to note that the superintendents could not undertake any new initiative (except remedial measures against imminent danger) without the knowledge of the king. Kautilya, therefore, laid emphasis on some kind of an accountability mechanism. Apart from using the services of spies for unearthing cases of fraud, **Kautilya also talked about an intra-departmental, self-scrutinising mechanism under the headship of chief officer *(adhikarna)* to detect and deter imminent cases of corruption.**

Session-2
Verification of character and antecedents of the Judicial Officers

Verification of Antecedents of Selected Candidate: Important case laws

K.Vijaya Lakshmiv.Govt. of A.P.Tr.Sec.Home & Anr.[20]

Bench: A.K. Patnaik, H.L. Gokhale

CASE SUMMARY

Background

Appellant, a practicing advocate selected as judicial officer, but she was denied of Order of appointment and posting on the ground that, her antecedents are not clear as per the police verification report. Initially, it is her husband's antecedent is doubted on the ground that he is having connection with banned organization, later, name of the appellant was also brought into and on that basis she was deprived of her Order of Appointment and Posting, the same was challenged before High Court. The Division Bench of the High Court relied upon judgment of SC in *K. Ashok Reddy v. Govt. of India* reported in 1994 (2) SCC 303 to state that judicial review is not available in matters where the State was exercising the prerogative power, and applied it in the present case since the appointment of the candidate concerned was to be made to a sensitive post of a judge.

Questions before the Court

The facts and circumstance of this case raised following issues before SC,

1. Whether a person can be debarred from public employment because of his political/associational affinities?
2. Whether entertaining the cases of criminal group or prohibited organization, or being sympathizer can it be considered to be negative aspect of his character and antecedent?

Held

SC of India referring to the epoch-making decision of US Supreme Court in *Lerner v. Casey (infra)*, held that, there is no material on record to show that the appellant is the member of banned organization and though husband of the Appellant appeared for some activists of banned organization, it is difficult to infer that the appellant had links/associations with a banned organizations.

UNITED STATES SUPREME COURT

***LERNER v. CASEY*, (1958) No. 165**[21]

CASE SUMMARY

Background

Subway conductor of the New York City Transit has been in the course of investigation, called up on by New York Security Risk Law, to answer- whether he was then a member of the Communist Party. Conductor refused to answer the question on the ground of constitutional protection against self-incrimination. After following due procedure, he was removed from the post on the ground that, "reasonable grounds exist for belief that, because of his doubtful trust and reliability."

Important Questions

From the perspective of assessment of antecedents and its relevance- in this case the important issue involved was- whether inference about "doubtful trust and reliability" was drawn on the basis of possible affiliation/affinities of the appellant with Communist Party. If so, how far it is relevant?

Held

Majority on different counts held that- appellant is in no position to claim that the state law deprives him of procedural due process. As regards to questions raised above, Douglas, J concluded that-

[20] 2013-(005)-SCC-0489-SC

[21] Available at: http://caselaw.findlaw.com/us-supreme-court/357/468.html visited on:08/09/2015 at: 20:00

"government has no business penalizing a citizen merely for his beliefs or associations...Many join associations, societies, and fraternities with less than full endorsement of all their aims." Differing with majority Bedlock, J. Held the order of the authority bad on three grounds and he observed that, a doubt as to his 'trustworthiness and reliability' is inferred by the authority on the basis of his refusal to answer the question as to Communist party membership.

Dissenting view: By BELDOCK, J.

In my opinion, appellant's suspension and discharge were illegal for three reasons: (1) the Security Risk Law is inapplicable to employees of the New York City Transit Authority because its employees are not in the service of the State or of any civil division thereof; (2) even if the Security Risk Law is applicable to employees of the Transit Authority, it is inapplicable to appellant because he did not hold a security position therein or a sensitive position affected with the security or defense of the nation or the State, and (3) neither suspension nor discharge is authorized under the Security Risk Law where the assertion of the constitutional privilege against self incrimination is the only evidence of doubtful trust and reliability endangering the security or defense of the nation and the State.

The order should be reversed and the appellant should be reinstated.

Delhi Administration v. Sushil Kumar[22]

BENCH:

K. RAMASWAMY, S.P. KURDUKAR

CASE SUMMARY

Background

In this case respondent had cleared all the tests/interview and was provisionally selected subject to verification of character and antecedents by the local Police but on verification, it revealed that there was criminal case pending against the respondent so his selection was cancelled. Tribunal directed the authorities to reconsider the case on the ground that he had already been acquitted of the offence punishable under Section 304 IPC, under Section 324 read with Section 34 IPC, in the meantime, therefore, he cannot be denied right of appointment to the post under the State.

Held

It is seen that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the criminal offences, the same has nothing to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences. The consideration relevant to the case is of the antecedents of the candidate. Appointing authority, therefore, has rightly focused this aspect and found it not desirable to appoint him to the service.

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[22] (1996) 11 SCC 605

CENTRAL ADMINISTRATIVE TRIBUNAL

Ajit Kumar S/O Shri Balwant Singh v. Govt. of N.C.T.D[23].

Bench: Meera Chhibber, Member (J)

CASE SUMMARY

Background

Brief facts submitted by the applicant are that he applied for the post of Constable (Executive) in Delhi Police in the year 2005 and was allowed to join services on 25.03.2006 after he was duly selected. He was shocked to receive order dated 13.11.2006 whereby his services were terminated without giving any reasons and the allegation levelled against him was that he had concealed the fact of his involvement in a criminal case at the time of seeking employment.

Contention on behalf of Applicant

The applicant has submitted that he had voluntarily informed about the criminal case at the time of filling up of the attestation form and he also informed that he had already been acquitted in the criminal case vide Judgment dated 12.11.2005 and once he was acquitted in the criminal case, it cannot be said that there was anything pending against him. In any case, he ought to have been given show cause notice before taking any action against him.

Contention of the Respondents

Respondents have submitted that the applicant was selected provisionally as temporary Constable (Exe) and was also allowed to join provisionally after obtaining an undertaking form him, which was subject to verification of Employment Exchange registration card, educational certificates, caste certificate, character and antecedents, medical fitness and final checking of documents etc. On verification of character and antecedents of the applicant, it came to be known that he was involved in a criminal case FIR No.04 dated 11.01.2004 under Section 323/506/34 IPC P.S. Sahlawas, Haryana. However, he was acquitted of the charge by the Court of Judicial Magistrate, 1st Class, Jhajjar, Haryana on 8.11.2005 as the star witnesses of the case of prosecution did not support the case and they were declared hostile. This fact was not disclosed by the applicant in the application form, therefore, it is definitely a case of concealing material facts regarding his involvement in the criminal case deliberately by mentioning "NO" against column No. 15 in spite of clear warning given at the top of the application form that furnishing of any false information will be treated as a disqualification.

Held

Tribunal held that, [I]t is thus clear that as on 1.7.2005 when applicant filled up the application form criminal case was very much pending, therefore, there can be no two opinions that he gave wrong reply to question No.15 in the application form. This wrong reply was given in spite of clear warning on the top of the application form as mentioned above. Applicant also gave declaration that all the entries in the application are correct, which further compounds the wrong. It is not the case of applicant that he was not aware of this criminal case. This answer was definitely given with the idea to have better prospect of gaining entry in Delhi Police. Since on said date criminal case was still pending, it was open to the authorities not to enroll him as a Constable because case could have been decided either way.

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[23] MANU/CA/0634/2007

CENTRAL ADMINISTRATIVE TRIBUNAL

Narender Kumar v. Govt. of NCT of Delhi[24]

CASE SUMMARY

Background

The first informant had not specifically mentioned the name of the applicant in his statement on the basis of which the FIR was recorded and his identity came to be known later, he was one of the accused arrayed at the time when the challan was presented. The applicant along with his co-accused was acquitted on 8.5.2006. The incident leading to registration of the criminal case against the applicant had taken place on 31.8.2004. At the time when the applicant thus filled his form on 13.5.2005 the criminal case had progressed for about a year or so. IN this case the contention of the learned Counsel for the applicant that the applicant was not aware that the lapse on his part in not giving correct answers to the relevant questions in the Forms.

Held

In totality of the facts and circumstances of the case, we hold that it is not a case of inadvertent mistake or omission on the part of the applicant so as not to disclose his involvement in a criminal case at the time he filled the application form. We further hold that such a disclosure after selection of the applicant at a time when only character and antecedents of the applicant were to be verified would be immaterial and would provide no solace or benefit to the applicant. There is no merit whatsoever in the application and the same deserves to be dismissed.

Other relevant Judicial Decisions

B. **Moral Turpitude explained**

Hon'ble Punjab-Haryana High Court ***Durga Singh v. The State of Punjab***,[25] court tried to describe moral turpitude as under- [A]fter all the term "moral turpitude" is a rather vague one and it may have different meanings in different contexts. The term has generally been taken so mean to be a conduct contrary to justice, honesty, modesty or good morals and contrary to what a man owes to a fellow-man or to society in general. It has never been held that gravity of punishment is to be considered in determining whether the misconduct involves moral turpitude or not. Even if the words "involving moral turpitude" are held to be implied in "conviction on a criminal charge."

C. **Consequences of false attestation: *Kendriya Vidyalaya Sangathan Case***[26] it needs to be noted that this was a case, where a candidate was required to fill up an attestation form for the purpose ofverification of his character and antecedent. It was categorically stated, in the form, that a candidate, who suppresses material information and/or gives false information, cannot claim right to continue in service. The purpose of seeking information was to find out the nature or gravity of the offence or the result of the criminal case. The candidate did not furnish all the information and merely because of the fact that criminal case had been subsequently withdrawn and that offences were not serious in nature, the Court directed him to be appointed. The Supreme Court, in Patna High Court LPA No.818 of 2014 dt.21-01-2015 *Kendriya Vidyalaya Sangathan* (supra), pointed out that since the appointment was to the post of a Teacher, a candidate's character and antecedent for such an appointment will have a great bearing. The Supreme Court also pointed out, in this regard, that the High Court was not right in taking note of the fact that the case was withdrawn by the State Government and/or that the case

[24] 2014-(CR1)-GJX-1547-DEL

[25] AIR 1957 PH 97

[26] *Kendriya Vidyalaya Sangathan & ...v. Ram Ratan Yadava* (2003) 3 SCC 437

was not of serious nature. The Supreme Court further pointed out in *Kendriya VidyalayaSangathan* (*supra*), that in the attestation form, the candidate had certified that the information, given by him was correct and complete to the best of his knowledge and belief, but the information furnished was false. In these facts situation, the Supreme Court, in *Kendriya Vidyalaya Sangathan* (supra), held that the false declaration, made by the candidate, was good enough ground to reject his candidature.

D. **Whether private individual can seek writ remedy against the Judicial Officer having doubtful character and antecedents, and also for non-disclosure of criminal record.** This important question came before Hon'ble Kerala High Court in,

Powrasamithi v. Rajan Thattil[27]

CASE SUMMARY

Background

Petitioner filed a PIL based on the news paper report in *Malayalam daily*, there were news items published against the conduct of the first respondent not benefitting the status of a Judicial Officer and that he had been guilty of misconduct and also of wilful suppression of his antecedents relating to disputes inter se himself and his wife leading to dissolution of marriage and sufferance of a decree for maintenance, apart from facing criminal prosecution. On the ground of said wilful suppression and questionable antecedents, the petitioner claims that the first respondent rendered himself unfit to hold the post of a judicial officer and that his appointment itself was void.

Questions involved

1. Whether PIL is maintainable against the judicial officer for his alleged non-disclosure

Court Answered: PIL cannot be maintained when it involves the service conditions. Independence of judiciary is the basic structure of the Constitution and for free and fearless Judiciary, no intervention with it other than by the specified authority and that too by following due procedure either stated in the statute made or evolved through judicial precedents is permissible.

2. Whether PIL in the instant case if allowed infringes the Independence of Judiciary

Court Answered: Court tough in indirect way affirmed that independence of judiciary may impinge by the intervention of the *other* in the judicial administration and it opined that, "He is under the supervision and control of the High Court under Article 235 of the Indian Constitution., The Munsiff-Magistrate are appointed by the Government, but those appointments are only made on the basis of the approved list prepared by the High Court and communicated to the Government. The High Court conducts both written and oral tests and the Government has got no role to play either in conducting the test or selection of the above judicial officers. In fact, the Government is left with no choice in the appointment of the above judicial officers excepting to enquire into their character and antecedents when the approved list of selects in the cadre of Munsiff-Magistrates and District Judges are sent. The Government cannot enquire into the merits of the candidates. Even with regard to the antecedents, the Government can point out the same to the High Court and when the High Court re-examines the same and sends the select list, the same has got to be honoured. Thus, it is clear High Court's opinion is final so far as eligibility of the candidates for selection-is concerned and the Government is only the formal authority to issue appointment orders. Even if the Government is the appointing authority of Munsiff-Magistrates and District Judges, the common rule, which is applicable to the Government servants that appointing authority alone can take disciplinary action, is not applicable to the judicial

[27] 2005 (1) KLT 927

officers of the State. The disciplinary control exclusively vests in the High Court because of the constitutional provision contained under Article 235 of the Constitution. But, in major penalties like removal, dismissal, termination etc., Government has to pass such orders, but, by such act, Government does not become the disciplinary authority for the State Judicial Officers. The power to initiate disciplinary proceedings and enquire into the same and take decision vests solely in the High Court by virtue of Article 235 of the Indian Constitution and for major penalties mentioned above, the High Court has to send recommendation for imposition of any of the major penalties when the High Court comes to the conclusion of the guilt of the State Judicial Officer and Government has got no choice but to accept the above recommendation and impose the said penalty."

3. Can the writ of *quo-warranto,* certiorari and *mandamus* be issued?

Court Answered: A writ of *quo-warranto* is issued to a person who is appointed without any authority. As already stated above, the first respondent has been appointed pursuant to the notification issued and after conducting written and oral tests and after approval of the said list and issuance of appointment orders by the Government. From the date of his appointment, it is the High Court which holds jurisdiction over him, and, as he has been appointed in accordance with law, he is entitled to function until terminated in accordance with Article 235 of the Constitution of India and not otherwise. There being no error apparent on the fact of the record, for the same reason as above, writ of certiorari cannot be issued, and, for the same reasoning, no writ of mandamus can be issued.

E. **High Courts control over District and Grassroots Judiciary: observations in *Shamsher Singh***

In *Shamsher Singh v. State of Punjab*[28], a Constitution bench of this Court was concerned with a matter where the Punjab and Haryana High Court had handed over the work of conducting an enquiry against a judicial officer to the Vigilance Department of the Punjab Government. This Court called it as an act of 'self-abnegation'.

Para 78 of this judgment read as follows:-

"78. The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Articles 235 by asking the Government to enquire through the Director of Vigilance."

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[28] AIR 1974 SC 2192

Session-3
Preparation of ‘Annual Confidential Report’: Issues and concerns

ASSESSMENT AND NOTE ON ANNUAL CONFIDENTIAL REPORT: ISSUES AND CONCERNS

I. Setting the Context

By and large responsibility of **"Assessment of ACRs"** quite often shouldered on Registrar (Vigilance), it may be either expressly provided by the respective High Court's Rules or this duty may come as delegated one. It is quite evident from existing plethora of cases that ACRs have been bone of contention in majority of the disciplinary and plenary actions against the Judicial and Administrative Officers of the Court. Majority of the cases circumscribe around the contentions like- ACRs of many years are written in one go- written without inspection, written carelessly, written out of malice, written on the basis of previous years' ACRs, adverse remarks were not communicated, representation made by the Judicial Officers are not duly considered etc. Further, in spite of numerous Apex courts observations and directions on the issue, very little has been done to improve the method, manner and mode of writing the ACRs as well as approach of assessing ACRs also remained far from satisfactory.

As consequences of institutional failure in rightly appraising the ACRs, it had calamitous impact over the efficiency and transparency of the system. Non-objective writing of ACRs has not only discouraged hardworking Judicial Officers but also allowed corrupt, dishonest and indolent officers to creep into the highest and responsible positions within the system. The affirmative changes in the ACR management elevates the more honest, capable and qualified upward in the ladder, this upward movement of the deserved is in itself a great encouragement to the rest.

Recognizing the importance of ACR, National Judicial Academy in its various programmes, may it be of **'High Court Justices', Registrar (Administration), Registrar (Judicial), Registrar (Vigilance) and Registrar (Inspection)**, endeavoured to provide a decent forum for fruitful discussion covering several issues relating to ACRs, so as to construct general consensus in all the stakeholders to make ACR mechanism more objective and transparent.

In this connection thought provoking and illuminating observations of Hon'ble Apex courts is reproduced so as to make discussion more *focused* and *solution* oriented.

"While on the one hand, this essential requisite for proper functioning of judicial system is to be ensured, on the other hand, one is not to lose sight of the fact that the judicial system or individual judicial officer may be prone to uncalled for, malicious and motivated criticism and allegations by unsocial and mischievous elements in the society which may include disgruntled and dissatisfied litigants and their counsel. By the very nature of its functioning when two litigating parties having disputes come before the Court, one party is bound to lose the case and there may be instances when the losing party takes up cudgels against the concerned judicial officer. Instances are not lacking when such persons indulge in mudslinging and send anonymous or pseudonymous complaints full of concocted, false and malicious allegations. While on one hand purity in the judicial system is to be maintained, on the other hand one has to sniff out all such mudslinging and false complaints to enable the judicial officer to discharge his duties without any fear or favour. No doubt it is a delicate and difficult task to achieve. A judicial officer cannot be dubbed as officer 'lacking in integrity' lightly. At the same time, for ensuring purity in the stream of justice, care has to be taken that those judicial officers who lack integrity and are indulging in dubious activities are dealt with appropriately lest impression is given that nobody would be able to harm them and they may continue to indulge in such nebulous activities undeterred, thereby affecting the very edifice of judicial system and shaking the

faith of public in judiciary by such maligned activities. Musing over these considerations and keeping in view the aforesaid principles in mind that one has to examine in a particular case as to whether the concerned judicial officer is rightly branded as a person of 'doubtful integrity'."

"Suffice is to observe that the well organised and accepted practice of making annual entries in the confidential records of subordinate official by superiors has a public policy and purposive requirement. It is one of the recognised and time tested modes of exercising administrative and disciplinary control by a superior authority over its subordinates. The very power to make such entries as have potential for shaping the future career of a subordinate officer casts an obligation on the High Courts to keep a watch and vigil over the performance of the members of subordinate judiciary. An assessment of quality and quantity of performance and progress of the judicial officers should be an ongoing process continued round the year and then to make a record in an objective manner of the impressions formulated by such assessment. An annual entry is not an instrument to be wielded like a teacher's cane or to be cracked like a whip. The High Court has to act and guide the subordinate officers like a guardian or elder in the judicial family. The entry in the confidential rolls should not be a reflection of personal whims, fancies or prejudices, likes or dislikes of a superior. The entry must reflect the result of an objective assessment coupled with and effort at guiding the judicial officers to secure an improvement in this performance where need be; and expressing and appreciation with an idea of toning up and maintaining the imitable qualities by affectionately patting on the back of meritorious and deserving. An entry consisting of a few words, or a sentence or two, is supposed to reflect the sum total of the impressions formulated by the inspecting Judge who had the opportunity of forming those impressions in his mind by having an opportunity of watching the judicial officer round the period under review. In the very nature of things the process is complex and the formulation of impressions is a result of multiple factors simultaneously playing in the mind. The perceptions may differ. In the very nature of things there is a difficulty nearing impossibility in subjecting the entries in confidential rolls to judicial review. Entries either way have serious implications on the service career. Hence the need for fairness, justness and objectivity in performing the inspections and making the entries in the confidential rolls."

"Rules where they are, else the executive instructions, require that entries in confidential records are made within a specified time soon following the end of the period under review, generally within three months from the end of the year. Delay, in carrying out inspections or making entries frustrates the very purpose sought to be achieved. The mental impressions may fade away or get embellished, not to be restored. Events of succeeding year may cast their shadow on assessment of previous years. Recording of entries for more than one period in one go must be avoided as it is pregnant with the risk of causing such harm as may never be remedied or granting undeserved benefits. We trust and hope the High **Courts would have regard to what we have said and streamline the procedure and practice of inspections** and recording of entries in confidential rolls so as to achieve regularity, promptness and objectivity inspiring confidence of subordinate judiciary controlled by them. We can only emphasise upon the High **Courts the need for vigilantly carrying out the annual inspections** at regular interval and making timely entries in the service records followed by prompt communications to the judicial officers so as to afford them a right of representation in the event of the entry being adverse. We leave the matter at that."

-Quoted by **Hon'ble Delhi High Court in *High Court of Delhi v. Sh. Purshottam Das Gupta,* 2001-(034)-LIC-1170-DEL***see also,* (In *Bishwanath Prasad Singh v. State of Bihar*, reported as (2001) 1 JT (SC) 161)

“There is no manner of doubt that the authority which is entrusted with a duty of writing ACR does not have right to tarnish the reputation of a judicial officer without any basis and without any 'material' on record, but at the same time other equally important interest is also to be safeguarded i.e. ensuring that the corruption does not creep in judicial services and all possible attempts must be made to remove such a virus so that it should not spread and become infectious. When even verbal repeated complaints are received against a judicial officer or on enquiries, discreet or otherwise, the general impression created in the minds of those making inquiries or the Full Court is that concerned judicial officer does not carry good reputation, such discreet inquiry and or verbal repeated complaints would constitute material on the basis of which ACR indicating that the integrity of the officer is doubtful can be recorded. While undertaking judicial review, the Court in an appropriate case may still quash the decision of the Full Court on administrative side if it is found that there is no basis or material on which the ACR of the judicial officer was recorded, but while undertaking this exercise of judicial review and trying to find out whether there is any material on record or not, it is the duty of the Court to keep in mind the nature of function being discharged by the judicial officer, the delicate nature of the exercise to be performed by the High Court on administrative side while recording the ACR and the mechanism/system adopted in recording such ACR.”

-Hon’ble SC in *Rajendra Singh Verma (Dead) Through Lrs. v. Lt. Governor of NCT of Delhi*

“To dunk an officer into the puddle of "doubtful integrity" it is not enough that the doubt fringes, on a more hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label "doubtful integrity.”

***-Hon’ble SC in M. S. Bindra v. UOI* reported in (1990) 7 SCC 310 (Para 13)**

Since late this Court is watching the spectre of either judicial officers or the High Courts coming to this Court when there is an order prematurely retiring a judicial officer. Under Article 235 of the Constitution the High Court exercises complete control over subordinate courts which include District Courts. Inspection of the subordinate courts is one of the most important functions which the High Court performs for control over the subordinate courts. The object of such inspection is for the purpose of assessment of the work performed by the Subordinate Judge, his capability, integrity and competency. Since Judges are human beings and also prone to all the human failings inspection provides an opportunity for pointing out mistakes so that they are avoided in future and deficiencies, if any, in the working of the subordinate court, remedied. Inspection should act as a catalyst in inspiring Subordinate Judges to give the best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the courts while working under great discomfort and hardship. A satisfactory judicial system depends largely on the satisfactory functioning of courts at the grass-roots level. Remarks recorded by the Inspecting Judge are normally endorsed by the Full Court and become part of the annual confidential reports and are foundations on which the career of a judicial officer is made or marred. Inspection of a subordinate court is thus of vital importance. It has to be both effective and productive. It can be so only if it is well regulated and is workman-like. Inspection of subordinate courts is not a one-day or an hour or a few minutes' affair. It has to go on all the year round by monitoring the work of the court by the Inspecting Judge. A **casual inspection can hardly be beneficial to a judicial system. It does more harm than good.**

It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the concerned authority but such satisfaction must be based on a valid material. It is permissible for the Courts to ascertain whether a valid material exists or otherwise, on which the subjective satisfaction of the administrative authority is based.

***-Honble SC in High Court of Punjab & Haryana v. Ishwar Chand Jain*, (1999) 4 SCC 579**

Important Case Laws on ACRs

SUPREME COURT OF INDIA

Rajendra Singh Verma (Dead) Through Lrs. v. Lt. Governor of NCT of Delhi & Anr.[29]

JUDGE(S)

H L Gokhale, J M Panchal

CASE SUMMARY

Background

SC of India tagged three petitions of compulsory retirement of three judicial officers of Delhi. First case was of Mr. Verma, he was compulsorily retired on the basis of previous years ACRs. But, Mr. Verma challenged the same *inter alia* on the following grounds,

(1)ACRs for the years 1997, 1998 and 1999 were not recorded as and when they fell due and they were written in on go and the same has been considered without proper communication, thus it is illegal.

(2) Lack of proper communication of ACR deprived the petitioner of his right to make meaningful representation against ACRs.

(3) Before taking decision to retire him prematurely from service opportunity of being heard was not given to him.

Mr. Gupta's Case

Mr. Gupta, Additional Senior Civil Judge Delhi, on the basis of his ACR remarks he asked to retire prematurely in public interest. The same was challenged by him on the following ground of improper appreciation of ACRs.

Mr. M.S. Rohilla's Case

Petitioner was appointed as Civil/Sub. Judge and was promoted to the Higher Judicial Services as Additional District and Sessions Judge in 1989. One anonymous compliant was received against him and, after looking the same he was reverted to the Original Post. He challenged the reversion, mean while on the basis of his previous years ACR report he was made to take premature retirement in Public interest.

Decision of the HC

In all three cases, though on different grounds HC refuses to interfere with decision of the High Court on administrative side; consequently all three cases were appealed to SC.

Decision of the SC

As regards to Mr. Verma case SC observed that- **"the ACRs for several years should not be recorded at one go and communicated therefore... delay in carrying out inspections or making entries frustrates the very purpose sought to be achieved. The mental impressions may fade away or get embellished..."** But, SC held that- looking into the facts of the case- it is difficult to

[29] 2011-(010)-SCC-0001-SC

uphold the contention raised on behalf of Mr. Verma that writing of ACRs for three years at one go and communication of the same at one go suffer from arbitrariness, unreasonableness and constitute malice in law. Accordingly the Hon'ble refused to interfere with the Decision of the HC.
SC in relation to Mr. Rohilla held that- the argument that the decision of retiring him compulsorily emanates from malafide, arbitrariness and perversity, has no substance, and the same was retreated in Mr. Gupta's case.

Compulsory Retirement: Relevance of ACR

1. **In *State of U.P. and Another v. Bihari Lal*[30]**

This Court has consistently taken the view that an order of compulsory retirement is not a punishment and does not have adverse consequence and, therefore, the principles of natural justice are not attracted. What is relevant to notice is that this Court has held that an un-communicated adverse A.C.R. on record can be taken into consideration and an order of compulsory retirement cannot be set aside only for the reason that such un-communicated adverse entry was taken into consideration. If that be so, the fact that the adverse A.C.R. was communicated but none of the appellants had an opportunity to represent against the same, before the same was taken into consideration for passing order of compulsory retirement, cannot at all vitiate the order of compulsory retirement.

2. ***Telegraphs Board v. C. S. N. Murthy***[31]

In this case Hon'ble SC has laid down firm proposition of law that an order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it, uncommunicated adverse remarks were also taken into consideration.

3. An interesting case came before SC in ***Union of India v. Col. J. N. Sinha and Another,***[32]

Facts: The respondent was compulsorily retired by the Government of India under Fundamental Rule 56(j). The said order was challenged by the respondent amongst other things on the ground that the lack of opportunity to show cause amounted to denial of natural justice. The said plea was accepted by the High Court and High Court had issued a writ of certiorari quashing the said order. In appeal this Court held that a Government Servant serving under the Union of India holds his office at the pleasure of the President, but this 'pleasure' doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Article 311.

SC held: That the rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights, and the Court cannot ignore the mandate of the Legislature or a statutory authority. After holding that the compulsory retirement involves no civil consequences and that a Government servant does not lose any of the rights acquired by him before retirement, it was held that Fundamental Rule 56(j) holds the balance between the rights of the individual Government servant and the interests of the public. **According to this Court, while a minimum service is guaranteed to the Government servant, the government is given power to energize its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. Thus the plea of breach of principles of natural justice was not accepted by this Court in the said case.**

[30](1994) Supp (3) SCC 593
[31](1992) 2 SCC 317
[32]1970 (2) SCC 458

Relevance of uncommunicated remarks in ACR

The issue relating to relevance of uncommunicared ACR came before SC in ***Baikuntha Nath Das and Another v. Chief District Medical Officer, Baripada and Another***[33]

Facts: The appellants in the appeals were compulsorily retired by the Government of Orissa in exercise of the power conferred upon it by the first Proviso to sub-rule (a) of Rule 71 of the Orissa Service Code. The appellant Mr. Baikuntha Nath Das was appointed as a Pharmacist by the Civil Surgeon, Mayurbhanj on March 15, 1951. By an order dated February 13, 1976 the Government of Orissa had retired him compulsorily. The said Order was challenged by him in the High Court of Orissa by way of a Writ Petition. His case was that the order was based on no material and that it was the result of ill-will and malice, the Chief District Medical Officer bore towards him. According to him he was transferred by the said officer from place to place and was also placed under suspension at one stage, but his entire service had been spotless and that at no time were any adverse entries in his confidential character rolls communicated to him. In the counter-affidavit filed on behalf of the Government it was submitted that the decision to retire him compulsorily was taken by the Review Committee and not by the Chief Medical Officer and it was stated that besides the remarks made in the confidential character rolls, other material was also taken into consideration by the Review Committee and that it had arrived at its decision bona fide and in public interest which decision was accepted and approved by the Government. In the Counter the allegation of mala fide was denied.

Observations and Findings of the High Court

The High Court had looked into the proceedings of the Review Committee and the confidential character rolls of the appellant and dismissed the writ petition holding that an order of compulsory retirement after putting in the prescribed qualifying period of service does not amount to punishment. The High Court had observed that the order in question was passed by the State Government and not by the Chief Medical Officer and did not suffer from vice of malice. It was further held by the High Court that it was true that the confidential character roll of the appellant contained several remarks adverse to him which were, no doubt, not communicated to him.

Decision of the SC

A study of the decision rendered by the three Judge Bench of this Court makes it evident that not less than twenty reported decisions of this Court were taken into consideration and thereafter the Court has overruled the decision in *Baidyanath Mahapatra v. State of Orissa,*[34]**which took the view that uncommunicated adverse remarks cannot be taken into consideration while passing an order of compulsory retirement against a Government servant.**

In *Baikuntha Nath Das case*, after referring to decision of SC in ***Brij Mohan Singh Chopra v. State of Punjab***,[35] where a three Judge Bench of Supreme Court has specifically affirmed the decision rendered in ***Union of India v. M. E. Reddy***,[36] SC Court has laid down following firm proposition of law stated in paragraph 34 of the reported decision:

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

[33](1992) 2 SCC 299
[34](1989) 4 SCC 664
[35](1987) 2 SCC 188
[36](1980) 2 SCC 15

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.
(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed **(a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary** - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.
(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.
(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference**.**
Interference is permissible only on the grounds mentioned in (iii) above."

Assessment of ACRs: Extent of Judicial Review

This important aspect is well explained in ***Syed T.A. Naqshbandi v. State of J&K***[37] by SC and it opined that, "[N]either the High Court nor this Court, in exercise of its powers of judicial review, could or would at any rate substitute themselves in the place of the Committee/Full Court of the High Court concerned, to make an independent reassessment of the same, as if sitting on an appeal. On a careful consideration of the entire materials brought to our notice by learned counsel on either side, we are satisfied that the evaluation made by the Committee/Full Court forming their unanimous opinion is neither so arbitrary or capricious nor can be said to be so irrational as to shock the conscience of the Court to warrant or justify any interference. In cases of such assessment, evaluation and formulation of opinions, a vast range of multiple factors play a vital and important role and no one factor should be allowed to be overblown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. In the very nature of things it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some monstrous thing which ought not to have taken place has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court."

Evaluation of ACRs:

Very recently in, ***High Court of Judicature, Patna, Through R.G. v. Shyam Deo Singh***[38]SC viewed that, "[T]he evaluation of the service record of a judicial officer for the purpose of formation of an opinion as to his/her potential for continued useful service is required to be made by the High Court which obviously means the Full Court on the administrative side. In all High Courts such evaluation,

[37]((2003) 9 SCC 592)
[38]Available at: judis.nic.in/**supremecourt**/imgs1.aspx?filename=41350 visited on: 08/09/2015

in the first instance, is made by a committee of senior Judges. The decision of the Committee is placed before the Full Court to decide whether the recommendation of the Committee should be accepted or not. The ultimate decision is always preceded by an elaborate consideration of the matter by Hon'ble Judges of the High Court who are familiar with the qualities and attributes of the judicial officer under consideration."

Washed Off theory:

Time and again very interesting questions have arised on ACRs- one among them is- in spite of adverse remarks in confidential remarks, if a judicial officer is promoted, can that stigma will still supplements his file throughout his carrier or with promotion it is washed off? This question yet again came before SC in, ***Rajasthan State Road Transport Corp. v. Babu Lal Jangir***[39], Court reviewed the Para 34 of *Baikunth Nath Das (Supra)* which said that adverse remarks prior to promotion lose their sting. Following ***Baikunth Nath Das (Supra)***, the Bench (succeeding cases) felt that uncommunicated adverse remarks could be relied upon and in that case these entries related to the period after an earlier promotion could *also be relied*. That ground alone was sufficient for the case. There is a further observation that an adverse entry prior to earning of promotion or crossing of efficiency bar or picking up higher rank is not wiped out and can be taken into consideration while considering the overall performance of the employee during the whole tenure of service.

Court also looked into the *Gurdas Singh*[40]and held that needs to be explained in the context of the Bench accepting the three Judge Bench ruling in *Baikunth Nath Das*. *Firstly*, this last observation in Gurdas Singh's case does not go against the general principle laid down in *Baikunth Nath Das* to the effect that though adverse remarks prior to an earlier promotion can be taken into account, they would have lost their 'sting'. *Secondly*, there is a special fact in Gurdas Singh's case, namely, that the adverse remarks prior to the earlier promotion related to his "dishonesty". In a case relating to compulsory retirement therefore, the sting in adverse remarks relating to dishonesty prior to an earlier promotion cannot be said to be absolutely wiped out. The fact also remains that in *Gurdas Singh's* case there were other adverse remarks also even after the earlier promotion, regarding dishonesty though they were not communicated. We do not think that Gurdas Singh is an authority to say that adverse remarks before a promotion however remote could be given full weight in all situations irrespective of whether they related to dishonesty or otherwise. **As pointed in the three Judge Bench case in Baikunth Nath Das, which was followed in Gurdas Singh they can be kept in mind but not given the normal weight which could have otherwise been given to them but their strength is substantially weakened unless of course they related to dishonesty."**

The washed off theory is summed up by the Court in the following manner : "In view of the above, the law can be summarised to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have **universal application**. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record"

[39] 2014-(101)-AIR-0142-SC

[40] The facts there were that there were adverse remarks from 1978 prior to 1984 when the officer was promoted and there were also adverse remarks for the period 18.6.84 to 31.3.85. The compulsory retirement order was passed on 3.9.87. The said order was quashed by the Civil Court on the ground that his record prior to his promotion i.e. prior to 1984 could not have been considered and two adverse entries after 1984 were not communicated and could not be relied upon.

Session-4
Conducting discrete inquiry against Judicial Officers: Issues and concerns
And
Session-5
Conducting inquiry against Staff of Judiciary: Issues and concerns

SC observations on Inquiry against Judicial Officers

“Judicial service is not an ordinary government service and the Judges are not employees as such. Judges hold the public office; their function is one of the essential functions of the State. In discharge of their functions and duties, the Judges represent the State. The office that a Judge holds is an **office of public trust**. A Judge must be a person of impeccable integrity and unimpeachable independence. He must be honest to the core with high moral values. When a litigant enters the courtroom, he must feel secured that the Judge before whom his matter has come, would deliver justice impartially and uninfluenced by any consideration. The standard of conduct expected of a Judge is much higher than an ordinary man. This is no excuse that since the standards in the society have fallen, the Judges who are drawn from the society cannot be expected to have high standards and ethical firmness required of a Judge. A Judge, like a **Caesar's wife, must be above suspicion**. The credibility of the judicial system is dependent upon the Judges who man it. For a democracy to thrive and the rule of law to survive, justice system and the judicial process have to be strong and every Judge must discharge his judicial functions with **integrity, impartiality and intellectual honesty**."

***-Hon’ble SC in R.C. Chandel v. High Court of M.P.*, (2012) 8 SCC 58,**

Landmark Judicial Decisions on 'Inquiry'

R.C. Sood v. High Court of Judicature at Rajasthan and Ors.[41]

Bench:

A.S. Anand, S.P. Bharucha, B.N. Kirpal

Judgment: Kirpal,J

Case Summary

Background

The petitioner was Registrar of the High Court, during his tenure High Court invited application to fill the vacancies. There was an error in the publication of the advertisement in mentioning the relevant date as 1st January, 1995 instead of 1st January 1994, as inquiry was initiated and committee of two judges committee found that- in the draft for publication the date was correctly mentioned, but before the matter was sent to press for publication interpolations were made changing the year from '1994' to '1995'. In this connection inquiry was initiated and the petitioner was suspended, but SC suspended the same in the reported case as *R.C. Sood v. State of Rajasthan.*

But, unfortunately on the basis of second set of facts- raising out of compliant by one named Vijay Singh- departmental inquiry was initiated against the petitioner on the same issues.

Submissions on behalf of Petitioner

1. The enquiry could not have been reopened by the full court as there were no attenuing circumstances by way of fresh evidence or material warranting second fresh look
2. That the petitioner was victimised on the malafide reasons and repeated disciplinary inquiries by the High Court clearly establishes the Lack of Bonafides on the part of High Court.

Held

After detailed scrutiny into the matter SC came to the conclusion that, "we have no manner of doubt that there was a complete lack of bonafides on the part of the High Court when it decided on 5th January, 1995 to institute disciplinary proceedings against the petitioner. On this ground alone the petitioner is entitles to succeed.

Anowar Hussain v. Ajoy Kumar Mukherjee and Ors.[42]

Bench: K S Shah, R Bachawat

CASE SUMMARY

Background

Charging the respondent Ajoy Kumar Mukherjee, with an offence in connection with the riots, he was arrested by Police Sub-Divisional Officer in pursuant to an authority given by the Circle Inspector of Police. The same was challenged by the Judge and a decree for Rs. 5,000 was awarded in his favour and the same was confirmed by the High Court of Assam. In this backdrop an appeal was prepared by appellant. The appellant was at the material time Sub-Divisional Officer and also held the Office of Sub-Divisional Magistrate.

Question involved

- **The question raised was that in ordering the arrest of the respondent the appellant acted in discharge of his judicial duties, and be was on that account protected by the Judicial Officers' Protection Act, 1850**

Court Held

[41] Retrieved from: http://www.ejurix.com/Welcome.aspx visited on: 26/08/2015 at: 15: 33

[42] AIR 1965 SC 1651

"We are of the view that the Subordinate Judge and the majority of the judges of the High Court were right in holding that the appellant had not the protection of the Judicial Officers Protection Act.... the High Court came to the conclusion that the appellant had 'acted recklessly and maliciously and that conclusion is based upon appreciation of evidence."Thus the plea of appellant was turned and petition was dismissed with cost.

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8. **Relevant Case Laws on Inquiry against Judicial Officers**

IN THE SUPREME COURT OF INDIA

Registrar General & Anr v. Jayshree Chamanlal Buddhbhatti[43]

CASE SUMMARY

Background

Petitioner, a judicial officer on probation, complained to District Judge against the conduct of Court Staff. Complaints were repeatedly addressed to the concerned District Judge but without any response from the District Judge. Meanwhile two complaints were made against the petitioner from the Bar, alleging illicit relation with other Judge. Judicial Inquiry was placed against the Petitioner, Registrar (Vigilance) (erstwhile District Judge to whom repeated complaints against the staff were made) conducted inquiry and on the basis of Inquiry Report Petitioner's probationary period was terminated.

Contention of the Petitioner

(1) The petitioner submitted that since the High Court had decided to terminate the petitioner s services on the basis of the inquiry report submitted by the Registrar (Vigilance), the constitutional protection available to the petitioner under Article 311(2)of the Constitution as well as the principles of natural justice had been violated.

(2) It was contended that the order of termination of the period of the probation of the petitioner was not a simple termination, but under the garb of simple termination, the petitioner was sought to be removed for the alleged misconduct. Referring to the impugned order, it was submitted that though the same states that the performance of the petitioner during the period of probation was not found to be good and satisfactory and that she is not suitable for the post she holds, there is nothing on record to show that the performance of the petitioner was not found satisfactory**.**

(3) It was further submitted that the impugned order states that it was on the strength of material relating to the period of probation that the aforesaid opinion was based. The material against the petitioner, interalia was the report of the Registrar (Vigilance); that if such material pertaining to alleged misconduct was taken into consideration, the petitioner was entitled to a departmental inquiry in respect of the alleged misconduct.

Contentions of the Respondents

It was submitted that when an appointment is made on probation, it presupposes that the conduct, performance, ability and capacity of the employee concerned have to be watched and examined during the period of probation. He or she is to be confirmed after the expiry of the probation only when his or her service during the period of probation is found to be satisfactory and he or she is found to be suitable for the post. It was submitted that sufficiency or reliability of the material against the petitioner need not be gone into in a writ petition under Article 226 of the Constitution of India. The mere fact that the concerned employee was under a cloud is sufficient to discontinue her services during the period of probation. It was contended that there are many factors which enter into consideration for confirming a person who is on probation. A particular attitude or tendency displayed

[43] 2014(1) AJR 118

by an employee can well be considered in the decision of the appointing Authority while judging his or her suitability or fitness for confirmation.

Held

The inquiry was not held to find out whether the petitioner was suitable for further retention in service or for confirmation. In this situation, the order of termination is definitely punitive in character as it is founded on the allegations of misconduct. The findings arrived at by the Registrar (Vigilance) upon conducting a preliminary inquiry against the petitioner pursuant to complaints of misconduct received against the petitioner, could not have been used for terminating the petitioner s probation without a proper departmental inquiry. Such findings must, in law, be arrived at only in a regular departmental inquiry.

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9. **In cases where termination is resulting by way of Punishment: Proper Inquiry is the mandate**

In the circumstances where, the impugned order amounts to termination of service by way of punishment and in absence of any enquiry held in accordance with Article 311 of the Constitution, cannot be sustained and as such is liable to be struck down. As held by the Constitutional Bench of the Apex Court in the case of ***Shamser Singh v. State of Punjab***[44] and Haryana the form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an inquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provisions of Article 311 of the Constitution. In such a case the simplicity of the form of the order will not give any sanctity.

In ***Shamser Singh*** it was further held that, "Para-63. No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. In *Gopi Kishore Prasad v. Union of India* it was said that if the Government proceeded

[44] AIR 1974 SC 2192

against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

Stand taken by the Hon'ble SC in *Shamsher Singh* is retreated in the case of ***Anoop Jaiswal v. Government of India,***[45] the Supreme Court has held that where the form of the order is merely a camouflage for an order of dismissal for misconduct, it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee. Even though the order of discharge may be non-committal, it cannot stand alone. Where the report/recommendation of the superior authority is the basis or foundation for the order that should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident, it would not have been passed, then it is inevitable that the order of discharge should fall to the ground where the aggrieved officer is not afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution. It is wrong to assume that it is only when there is a full scale departmental inquiry any termination made thereafter will attract the operation of Article 311(2).

In the same way in ***Chandra Prakash Shahi v. State of U.P***,[46] the Supreme Court extensively reviewed the case-law to determine whether termination is simpliciter or punitive in character and, whether misconduct on the part of an employee is the motive or foundation for terminating his services. The Court held that the important principles which are deducible on the concept of motive and foundation, concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of probation on account of general unsuitability for the post in question. If for determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his services, the order will not be punitive in nature. **But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of the allegations of misconduct against him. In this situation, the order would be founded on misconduct and it will not be a mere matter of motive.**

It was further held that Motive is the moving power which impels action for a definite result, or to put it differently, motive is that which incites or stimulates a person to do an act. An order terminating services of an employee is an act done by the employer. What is that factor that impelled the employer to take the decision? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed, thereafter, the order, having regard to other

[45](1984) 2 SCC 369
[46] (2000) 5 SCC 152

circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry.

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3. Can Inquiry be initiated against the authority exercising Quasi-Judicial functions?

Three Judge-Bench Judgment reported as ***Union of India v. K.K. Dhawan***[47], the Court laid down certain tests for the proposition that the disciplinary proceedings against the government servant even with regard to exercise of quasi-judicial powers can be initiated. It was held as under:-

"28. Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules.

Thus, we conclude that the disciplinary action can be taken in the following cases:

(i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

(ii) if there is *prima facie* material to show recklessness or misconduct in the discharge of his duty;

(iii) if he has acted in a manner which is unbecoming of a Government servant;

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great".

29. The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated."

4. Whether the prolonged delay vitiates the Inquiry

The above stated question came before SC in ***Government of Andhra Pradesh and others v. V. Appala Swamy***,[48] apex Court has held as follows:

12. So far as the question of delay in concluding the departmental proceedings as against a delinquent officer is concerned, in our opinion, no hard-and-fast rule can be laid down therefore. Each case must be determined on its own facts. The principles upon which a proceeding can be directed to be quashed on the ground of delay are:

(1) where by reason of the delay, the employer condoned the lapses on the part of the employee;

(2) where the delay caused prejudice to the employee. Such a case of prejudice, however, is to be made out by the employee before the inquiry officer.

[47] (1993)2 SCC 56

[48] 2007(6) ALT24 (SC)

Therefore, "[N]o rigid, inflexible or invariable test can be applied as to when the proceedings should be allowed to be continued and when they should be ordered to be dropped. In such cases there is neither lower limit nor upper limit. If on the facts and in the circumstances of the case, the Court is satisfied that there was gross, inordinate and unexplained delay in initiating departmental proceedings and continuation of such proceedings would seriously prejudice the employee and would result in miscarriage of justice, it may quash them. We may, however, hasten to add that it is an exception to the general rule that once the proceedings are initiated, they must be taken to the logical end. It, therefore, cannot be laid down as a proposition of law or a rule of universal application that if there is delay in initiation of proceedings for a particular period, they must necessarily be quashed."[49]

5. Removal of Probationer: Is regular inquiry mandatory?

There is no clear precedent on the issue, as result of varied view of High Courts and even of SC, there is clear confusion, the same was recorded by Hon'ble SC in ***Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Another***[50] as "[T]hus some Courts have upheld an order of termination of a probationer's services on the ground that the enquiry held prior to the termination was preliminary and yet other Courts have struck down as illegal a similarly worded termination order because an inquiry had been held. Courts continue to struggle with semantically indistinguishable concepts like 'motive' and 'foundation'; and terminations founded on a probationer's misconduct have been held to be illegal while terminations motivated by the probationer's misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents."

In the above case *Pavanedra Narayan Verma v. Sanjay Gandhi P.G.I. of Medical Sciences and Another (supra),* the Apex Court has observed that the judicial endeavour has been to strike a right balance between the apparent lack of any right in a probationer to continue to remain in service and the right recognised in him to challenge an order of dismissal if such dismissal has been made by way of punishment. The dividing line though fine is clear; if misconduct has acted as the foundation for the termination, interference must be made, if it is the motive, the order of discharge must be sustained. To determine the said question, the veil must be lifted and the lifting of the veil would depend on the prima facie case that has been established to justify such judicial action. Upon lifting the veil, if any misconduct is revealed and consequences thereto were primarily responsible for the discharge, than misconduct must be deemed to be foundation of the action. If, however, notwithstanding the allegations of misconduct, an employer does not pursue the same or if after an initial attempt, the pursuit is abandoned and the discharge/ termination is made on account of unsatisfactory performance of duties, the misconduct must be understood to be the motive and not the foundation for the discharge and the order must be sustained.

Parshotam Lal Dhingra v. Union of India[51]**:** ***Magna Carta*** **of Indian Civil Servants**

In this landmark case question of observance of principles of Natural Justice in relation to termination of probationer came before SC and Hon'ble Court opined that, "[I]n the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way Of punishment for misconduct, negligence, inefficiency or any other

[49] *In U.P. State Sugar Corporation Ltd. and Others v. Kamal Swaroop Tondon* - (2008) 2 SCC 41
[50] AIR 2002 SC 23
[51] 1958 AIR 36

disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the Post and his service 'may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service. The question for our consideration is whether the protections of Art. 311 are available to each of these several categories of Government servants. A number of decisions bearing on the question of construction of Arts. 310 and 311 have been cited before us which indicates that there is some difference of opinion between the Judges of the different High Courts and in some cases amongst the Judges of the same High Court. Thus it has been held in some cases that Arts. 310 and 311 do not make any distinction between Government servants who are employed in permanent posts and those who are employed in temporary posts.

“Further a certain amount of confusion arises because of the indiscriminate use of the words "temporary", Cc provisional ", "officiating " and " on probation ". We, therefore, consider it right to examine and ascertain for ourselves the scope and effect of the relevant provisions of the Constitution. Article 311 does not, in terms, say that the protections of that article extend only to persons who are permanent members of the services or who hold permanent civil posts. To limit the operation of the protective provisions of this article to these classes of persons will be to add qualifying words to the article which will be contrary to sound principles 'of interpretation of a Constitution or a statute. In the next place, el. (2) of Art. 311 refers to "such person as aforesaid" and this reference takes us back to cl. (1) of that article which speaks of a " person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State". These persons also come within Art. 310(1) which, besides them, also includes persons who are members of a defence service or who hold any post connected with defence. Article 310 also is not, in terms' confined to persons who are permanent members of the specified services or who hold permanent posts connected with the services therein mentioned. To hold that that article covers only those persons who are permanent members of the specified services or who hold posts connected with the services therein mentioned will be to say that persons, who are not permanent members of those services or who do not hold permanent posts therein, do not hold their respective offices during the pleasure of the President or the Governor, as the case may be-a proposition which obviously cannot stand scrutiny.

The matter, however, does not rest here. Coming to Art. 311, it is obvious that if that article is limited to persons who are permanent members of the services or who hold permanent civil posts, then the constitutional protection given by cls. (1) and (2) will not extend to persons who officiate in a permanent post or in a temporary post and consequently such persons will be liable to be dismissed or removed by an authority subordinate to that by which they were appointed or be liable to be dismissed, removed or reduced in rank without being given any opportunity to defend themselves. The latter classes of servants require the constitutional protections as much as the other classes do and there is nothing in the language of Art. 311 to indicate that the Constitution makers intended to make any distinction between the two classes. There is no apparent reason for such distinction. It is said that persons who are merely officiating in the posts cannot be said to " hold " the post, for they only perform the duties of those posts. The word "hold" is also used in Arts. 58 and 66 of the Constitution. There is no reason to think that our Constitution makers intended that the disqualification referred to in cl. (2) of the former and cl. (4) of the latter should extend only to persons who substantively held

permanent posts and not to those who held temporary posts and that persons officiating in permanent or temporary posts would be eligible for election as President or Vice- President of India. There could be no rational basis for any such distinction. In our judgment, just as Art. 310, in terms, makes no distinction between permanent and temporary members of the services or between persons holding permanent or temporary posts in the matter of their tenure being dependent upon the pleasure of the President or the Governor, so does Art. 311, in our view, make no distinction between the two classes, both of which are, therefore, within its protections and the decisions holding the contrary view cannot be supported as correct."

Conclusion

"The termination of service is founded on the right flowing from contract or the service rules then *prima facie*, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with." (Krishna Iyer, J., quoted in *Pavanedra Narayan Verma* (Supra)

6. Disciplinary/Departmental/Fact finding Inquiry: Scope of Judicial Review

While discussing about the disciplinary/fact finding inquiry, very fundamental question creeps in is, if the inquiry conducted by the employer is challenged before the Courts, what is the scope of judicial review? Can the court substitutes its own judgement on the basis of facts and circumstances of the case? Or Court shall limit itself to the illegality, procedural impropriety and irrelationality. In this regard following observations are highly relevant.

1. Lord Fraser observed that :
   "Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

2. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review. (*Tata Cellular v. Union of India*)[52]

3. "The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four comers of the matters which they

[52]1996 AIR 11

ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them.'
(R. v. Tower Hamlets London Borough Council, quoted in *TATA Cellular)*

4. Wednesbury principle.- A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

Conclusion

It is important to note that English Courts are conservative as to the scope of judicial review, where as in Indian context Judicial Review is highly regarded and broadly construed, thus in India, if the circumstance demands writ courts may go into the facts without restricting itself to the Wednesbury Principle or other subjective criterion.

7. Fact Finding Inquiry: Observance of Principles of Natural Justice[53]

Natural justice is a branch of public law. It is a formidable weapon which can be wielded to secure justice to citizens. Rules of natural justice are `basic values' which a man has cherished throughout the ages. Principles of natural justice control all actions of public authorities by applying rules relating to reasonableness, good faith and justice, equity and good conscience. Natural justice is a part of law which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness. The underlying object of rules of natural justice is to ensure fundamental liberties and rights of subjects. They thus serve public interest. The golden rule which stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice.

The traditional English Law recognised the following two principles of natural justice:
"(a) "*Nemo debet esse judex in propria causa:*
No man shall be a judge in his own cause, or no man can act as both at the one and the same time - a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias; and
(b) *Audi alteram partem:* Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority."
However, over the years, the Courts throughout the world have discovered new facets of the rules of natural justice and applied them to judicial, quasi- judicial and even administrative actions/decisions. At the same time, the Courts have repeatedly emphasized that the rules of natural justice are flexible and their application depends upon the facts of a given case and the statutory provisions, if any, applicable, nature of the right which may be affected and the consequences which may follow due to violation of the rules of natural justice.

In *Russel v. Duke of Norfolk[54]*, Tucker, L.J. observed:

[53] Extract taken from *Justice P.D. Dinakaran v. Hon'Ble Judges Inquiry Committee*, (2011)15 SCC 402 106
[54](1949) 1 All ER 108

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

In *Union of India v. P.K. Roy*,[55] Ramaswami, J.
Observed:
"The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

In *Suresh Koshy George v. University of Kerala*[56], K.S. Hegde, J. observed:
".....The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

In A.K. Kraipak v. Union of India[57] The question which came up for consideration by the Constitution Bench was whether Naqishbund who was a candidate seeking selection for appointment to the All India Forest Service was disqualified from being a member of the selection board. One of the issues considered by the Court was whether the rules of natural justice were applicable to purely administrative action. After noticing some precedents on the subject, the Court held:

"The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. **The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously.** The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi- judicial power."

In ***State of Orissa v. Dr.(Miss) Binapani Dei***[58] Hon'ble SC observed:
"The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice

[55] AIR 1968 SC 850
[56] AIR 1969 SC 198
[57] (1969) 2 SCC 262
[58] (1967) 2 SCR 625

has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (*Nemo debet esse judex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*) . **Very soon thereafter a third rule was envisaged and that is that quasi- judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.** But in the course of years many more subsidiary rules came to be added to the rules of natural justice.

Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi- judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi- judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. University of Kerala* the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

Further in landmark Case of ***Maneka Gandhi v. Union of India***[59] Hon'ble SC held that, "The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that **"natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances".**

The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

[59]1978 AIR 597

On the basis of above quoted reasoning and observations it oblivious to conclude that, as far as fact finding inquiry is concerned principles of natural justice shall be observed.

Session-6
Role of Registrar (Vigilance/Intelligence) as Appellate Authority under RTI Act, 2005

SESSION-6:
ROLE OF REGISTRAR (VIGILANCE/INTELLIGENCE) AS APPELLATE AUTHORITY UNDER RTI ACT, 2005

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1. Judiciary on importance of RTI

Hon'ble SC in ***Sahara India Real Estate Corpn. Ltd. v. SEBI*** [60] held that, the "Freedom of expression is one of the most cherished values of a free democratic society. It is in-dispensable to the operation of a democratic society whose basic postulate is that the Government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the **right to receive information** and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values."

Very recently in ***State of Karnataka v. Associated Management of English Medium Primary & Secondary Schools***[61], while dealing with the freedom under Article 19(1)(a), the Constitution Bench opined :-

> "36. The word "freedom" in Article 19 of the Constitution means absence of control by the State and Article 19(1) provides that the State will not impose controls on the citizen in the matters mentioned in sub-clauses (a), (b), (c), (d), (e) and (g) of Article 19(1) except those specified in clauses (2) to (6) of Article 19 of the Constitution. In all matters specified in clause (1) of Article 19, the citizen has therefore the liberty to choose, subject only to restrictions in clauses (2) to (6) of Article 19. One of the reasons for giving this liberty to the citizens is contained in the famous essay "On Liberty" by John Stuart Mill. He writes:
>
> ".... Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow : without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."
>
> According to Mill, therefore, each individual must in certain matters be left alone to frame the plan of his life to suit his own character and to do as he likes without any impediment and even if he decides to act foolishly in such matters, society or on its behalf the State should not interfere with the choice of the individual. Harold J. Laski, who was not prepared to accept Mill's attempts to define the limits of State interference, was also of the opinion that in some

[60]((2012) 10 SCC 603) available at: http://www.ejurix.com/Welcome.aspx visited on 06/09/2015 at: 15:37
[61]((2014) 9 SCC 485

matters the individual must have the freedom of choice. To quote a passage from A Grammar of Politics by Harold J. Laski :

"..... My freedoms are avenues of choice through which I may, as I deem fit, construct for myself my own course of conduct. And the freedoms I must possess to enjoy a general liberty are those which, in their sum, will constitute the path through which my best self is capable of attainment. That is not to say it will be attained. It is to say only that I alone can make that best self, and that without those freedoms I have not the means of manufacture at my disposal."

In the same manner very recently in ***Namit Sharma v. Union of India***[62] SC held that, the value of any freedom is determined by the extent to which the citizens are able to enjoy such freedom. Ours is a constitutional democracy and it is axiomatic that citizens have the right to know about the affairs of the Government which, having been elected by them, seeks to formulate some policies of governance aimed at their welfare. However, like any other freedom, this freedom also has limitations. It is a settled proposition that the Right to Freedom of Speech and Expression enshrined under Article 19(1)(a) of the Constitution of India (for 2 short 'the Constitution') encompasses the right to impart and receive information. The Right to Information has been stated to be one of the important facets of proper governance. With the passage of time, this concept has not only developed in the field of law, but also has attained new dimensions in its application. This court while highlighting the need for the society and its entitlement to know has observed that public interest is better served by effective application of the right to information. This freedom has been accepted in one form or the other in various parts of the world.

The Right to Information was harnessed as a tool for promoting development; strengthening the democratic governance and effective delivery of socio-economic services. Acquisition of information and knowledge and its application have intense and pervasive impact on the process of taking informed decision, resulting in overall productivity gains. It is also said that information and knowledge are critical for realising all human aspirations such as improvement in the quality of life. Sharing of information, for instance, about the new techniques of farming, health care facilities, hazards of environmental degradation, opportunities for learning and earning, legal remedies for combating gender bias etc., have overtime, made significant contributions to the well being of poor people. It is also felt that this right and the laws relating thereto empower every citizen to take charge of his life and make proper choices on the basis of freely available information for effective participation in economic and political activities.[63]

Justice V.R. Krishna Iyer in his book ***"Freedom of Information"*** expressed the view: "The right to information is a right incidental to the constitutionally guaranteed right to freedom of speech and expression. The international movement to include it in the legal system gained prominence in 1946 with the General Assembly of the United Nations declaring freedom of information to be a fundamental human right and a touchstone for all other liberties. It culminated in the United Nations Conference on Freedom of Information held in Geneva in 1948. Article 19 of the Universal Declaration of Human Rights says: "Everyone has the right to freedom of information and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." It may be a coincidence that Article 19 of the Indian Constitution also provides every citizen the right to freedom of speech and expression. However, the word 'information' is conspicuously absent. But, as the highest Court has

[62] Available at: http://supremecourtofindia.nic.in/outtoday/wc21012.pdf
[63] *Namit Sharama v. Union of India*, Para-22

explicated, the right of information is integral to freedom of expression. “India was a member of the Commission on Human Rights appointed by the Economic and Social Council of the United Nations which drafted the 1948 Declaration. As such it would have been eminently fit and proper if the right to information was included in the rights 23 enumerated under Article 19 of our Constitution. Article 55 of the U.N. Charter stipulates that the United Nations ‘shall promote respect for, and observance of, human rights and fundamental freedoms’ and according to Article 56 ‘all members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

Despite the absence of any express mention of the word ‘information’ in our Constitution under Article 19(1)(a), this right has stood incorporated therein by the interpretative process by this Court laying the unequivocal statement of law by this Court that there was a definite right to information of the citizens of this country. Before the Supreme Court spelt out with clarity the right to information as a right inbuilt in the constitutional framework, there existed no provision giving this right in absolute terms or otherwise. Of course, one finds glimpses of the right to information of the citizens and obligations of the State to disclose such information in various other laws, for example, Sections 74 to 78 of the Indian Evidence Act, 1872 give right to a person to know about the contents of the public documents and the public officer is required to provide copies of such public documents to 24 any person, who has the right to inspect them. Under Section 25(6) of the Water (Prevention and Control of Pollution) Act, 1974, every State is required to maintain a register of information on water pollution and it is further provided that so much of the register as relates to any outlet or effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises, as the case may be. **Dr. J.N. Barowalia in ‘Commentary on the Right to Information Act**’ (2006) has noted that the Report of the National Commission for Review of Working of Constitution under the Chairmanship of Justice M.N.Venkatachaliah, as he then was, recognised the right to information wherein it is provided that major assumption behind a new style of governance is the citizen’s access to information. Much of the common man’s distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision-making processes. He remains ignorant and unaware of the process which virtually affects his interest. Government procedures and regulations shrouded in the veil of secrecy do not allow the litigants to know how their cases are being handled. They shy away from questioning the officers handling their cases 25 because of the latter’s snobbish attitude. Right to information should be guaranteed and needs to be given real substance. In this regard, the Government must assume a major responsibility and mobilize skills to ensure flow of information to citizens. The traditional insistence on secrecy should be discarded.

2. Recent Judgements on RTI wherein the Information is sought from the High Court

MADRAS HIGH COURT

Public Information Officer, Registrar(Administration), High Court, Madras v. Central Information Commission, Represented by its Registrar, New Delhi and another[64]

Bench: K. Ravichandrabaabu, N. Paul Vasantha kumar

CASE SUMMARY

Background

The respondent (No.2) have made several applications under RTI seeking various information's varying from details of action taken on his compliant to qualification to the Post Registrar General and details of Selection Committee for the appointment of Registrar General. Some of the information as claimed by the second respondent was provided and some of the information's were not disclosed. In the mean time second respondent moved to the Registrar General of High Court complaining non-furnishing of information and the said appeal was dismissed by the Registrar General. Not satisfied with the Registrar General's action, second respondent moved to Central Information Commission (Respondent-1), the said commission after hearing both parties- directed the petitioner (High Court) to prepare a tabular statement listing all the complaints and representations received from the second respondent insofar as those 47 complaints received from respondent no.2 and directed to provide desired information.

Against the order of Central Information Commission this petition was filed on following grounds *interalia,*

i. The very attitude of the second respondent in sending 53 applications to the High Court seeking information on various issues shows that his aim is to derail the administration by misusing the RTI Act provisions.

ii. The information relating to selection of Registrar General is not a matter to be discussed in public domain especially through RTI.

Held

Court held that, **the first respondent-Commission itself has deprecated the practice of the second respondent herein in overloading the Registry of this Court by making several queries or complaints one after another and following the same under the RTI Act. Having found that the action of the second respondent in sending numerous complaints and representations and then following the same with the RTI applications; that it cannot be the way to redress his grievance; that he cannot overload a public authority and divert its resources disproportionately while seeking information and that the dispensation of information should not occupy the majority of time and resource of any public authority, as it would be against the larger public interest, the first respondent-Commission clearly erred in passing the impugned order in this Writ Petition, directing the petitioner to furnish the details to the second respondent as well as sending a tabular statement listing all the complaints and representations received from the second respondent.** (Petition is allowed)

[64] Available at: judis.nic.in/judis_chennai/Judge_Result_Disp.asp?MyChk=204644 visited on:08/09/2015 at: 15:57

Post-decisional developments

In this case initial judgement of the court made it clear that RTI applicants must give reasons for seeking information as it gave relief to its Registry from disclosing file notings on a complaint against a chief metropolitan magistrate. It was reported in the media that-

A division bench comprising justices N. Paul Vasanthakumar and K. Ravichandrababu said an applicant must disclose the object for which information is sought and also satisfy that such object has a legal backing, a decision which may have far reaching implications on getting information under the RTI Act and which was decried by legal experts and activists.

"If information (sic) are to be furnished to a person, who does not have any reason or object behind seeking such information, in our considered view, the intention of the Legislature is not to the effect that such information are to be given like pamphlets to any person unmindful of the object behind seeking such information," the bench said.

However, the Legislature while passing the RTI Act has specially incorporated Section 6(2) which says an applicant making request for information "shall not" be required to give any reason for requesting the information.

"We should not be mistaken as if we are saying something against the intention of the Legislature. What we want to emphasise is that a Legislation, more particularly, the one on hand, must achieve the object, *viz*, concrete and effective functioning of the public authority with transparency and accountability by providing the information which are under the control of such public authorities," it said.

However, Madras High Court recalled its order by saying The general observations made in paragraphs 20 and 21 of the said order is an error apparent on the fact of the record, contrary to the statutory provisions. The said error has been noticed by us after pronouncing the order on September 17, and in order to rectify the error in paragraphs 20 and 21, yesterday (Sept 22) we directed the registry to post this matter today (Sept 23) under '*suo motu* review'," the two-page order said.

The court also noted that an information-seeking individual was not required to give any reason for seeking the details and their earlier order was contrary to the statutory provision.[65]

THE HIGH COURT OF JUDICATURE AT MADRAS

The Registrar General v. K. Elango[66]

Judges

Honourable Mr. Justice Elipe Dharma Rao and

Honourable Mr. Justice M.Venugopal

CASE SUMMARY

Background

The Respondent-1/Petitioner approached the Public Information officer of the High Court of Madras to find out the mechanism and structure the High Court has to take action against the corrupt employees and the Presiding Officers of the Subordinate Judiciary. He has sought the following information by raising queries to be furnished to him. They are as follows:

[65] *The Registrar (Administration), High Court, Madras. .. Petitioner v. The Central Information Commission* available at: http://judis.nic.in/judis_chennai/Judge_Result_Disp.asp?MyChk=204644 visited on : 26/08/2015 at: 17:39

[66] 2013 (5) MLJ 134

"1.How may Subordinate Judges are there in service in the state of Tamil Nadu. The district-wise list may be furnished to me as per the hierarchy?
2. How many employees are serving in the judicial department in the whole of Tamil Nadu (including the Government servants on deputation)?
3. How many judicial officers, police officers and staffs are working in the Vigilance Department of the registry of Madras High Court?
4. Does your vigilance department is having any branches in the district so as to receive the complaint from the general public against the judicial officer and court staffs?
5.Does your registry is having any tie up or coordination with the office of Vigilance and Anti-corruption, Rajaannamalai Puram, Chennai 28 to trap the judicial officers or court staffs on the basis of the complaints from the affected persons?
6. Does your registry is having special team for trapping the corrupt judicial officers and court staffs?
7.Between 2001 to 2010 how many complaints have been received by your Registry and Vigilance Department, kindly give complaint wise break up figure (that is how many complaints against DJ, ADDLJ, SJ, DMC, FTC Judges, Magistrates and Court staffs)?
8. How many complaints ended in dismissal, suspension, issuance of memo and dropping of the case and conviction between the said 2001 to 2010?
9. Between 2001 to 2010 how many complaints against High Court staffs have been received relating to bribe and the fate of those complaints?"

Contention of the Petitioner (High Court)

According to the Learned Counsel for the Petitioner/Registrar General, High Court of Madras, the impugned order dated 10.01.2012 in Case No.10447/Enquiry/A/11 passed by the Tamil Nadu Information Commission, Chennai is legally void and therefore, it is liable to be set aside.

The Learned Counsel for the Petitioner urges before this Court that the impugned order has been passed in violation of the provisions of the Right to Information Act, 2005 and as such, it is *void ab initio.*

The Learned Counsel for the Petitioner contends that the Tamil Nadu Information Commission, Chennai, while passing the impugned order dated 10.01.2012, has failed to appreciate an important fact that the information sought for by the 1st Respondent/Petitioner is infringing the internal administration of Hon'ble High Court of Madras.

Yet another submission of the Learned Counsel for the Petitioner is that if the request of the 1st Respondent/Petitioner is acceded to by the High Court of Madras, then, it will set a bad precedent for others.

Respondents Contentions

Per contra, the 1st Respondent/Petitioner contends that he approached the Public Information Officer of the High Court, Madras to find out the mechanism and structure the High Court has to take action against the corrupt employees and the Presiding Officers of the Subordinate Judiciary and sought certain information, by means of queries, as referred in Para 3 of the Affidavit filed by the Writ Petitioner.

According to the 1st Respondent/Petitioner, the information sought for by him are all matters defined under Section 2(f) of the Right to Information Act, 2005. As a matter of fact, those information do not come within Section 8 of the Right to Information Act, 2005.

The 1st Respondent/Petitioner lodged an Appeal dated 20.12.2010 before the Appellate Authority (Writ Petitioner). But the Appellate Authority had not furnished information sought for by him vide his letter dated 01.11.2010. As such, he was perforced to prefer Second Appeal to the Information

Commissioner on 18.03.2011. The 2nd Respondent/Tamil Nadu Information Commission, through its direction dated 23.03.2011, has transmitted the petition dated 16.03.2011 of the 1st Respondent for taking appropriate action. Also, the 2nd Respondent/Information Commission has sought the remarks of the Writ Petitioner/Registrar General by 27.04.2011 for the said petition. The Registrar (Administration)/Public Information Officer of the Petitioner/High Court sent a reply dated 27.04.2011 to the Registrar of the 2nd Respondent/Information Commission stating that the remarks called for in the matter would be furnished shortly. However, the Writ Petitioner (Appellate Authority), on 29.04.2011, sent a letter to the Information Commission (marking a copy to him) denying the information. However, the Tamil Nadu Information Commission, Chennai passed an order on 10.01.2012 directing the Petitioner/Appellant to furnish the informations to the 1st Respondent/ Petitioner.

The Learned Senior Counsel appearing for the 2nd Respondent/Tamil Nadu Information Commission submits that the 1st Respondent/Petitioner, as a citizen, has a statutory right, to obtain the informations sought for by him, through his Letter dated 01.11.2010 addressed to the Public Information Officer of the Writ Petitioner/High Court. Further, Section 4 of the Act speaks of 'Obligations of the Public Authority'. As such, the informations sought for by the 1st Respondent/ Applicant through his Letter dated 01.11.2010 do squarely come within the purview of Section 4 of the Act.

The Learned Senior Counsel for the 2nd Respondent urges before this Court that Section 22 of the Right to Information Act enjoins that the provisions of the Act have an overriding effect on the Official Secrets Act, 1923 (19 of 1923) and any other law for the time being in force etc. Viewed in that perspective, it is contended that the informations sought for by the 1st Respondent/Petitioner, by his Letter dated 01.11.2010, can be supplied by the Petitioner/High Court, because of the reason that he has sought for statistical particulars and names of individuals concerned. In short, the Learned Senior Counsel for the 2nd Respondent contends that the impugned order dated 10.01.2012 passed by the Tamil Nadu Information Commission does not suffer from any impropriety or illegality, in the eye of law.

It transpires that the 1st Respondent/Petitioner has filed an Appeal under Section 19 of the Right to Information Act, 2005 on 20.12.2010 before the Appellate Authority (Writ Petitioner). Since the Public Information Officer of the High Court had not furnished him the required information sought for by him through his letter dated 01.11.2010. In the Appeal filed by the 1st Respondent/Petitioner before the Appellate Authority (Writ Petitioner) dated 20.12.2010, he had sought for the information earlier sought for by him as per his Application dated 01.11.2010. Inasmuch as the 1st Respondent/ Petitioner was not furnished with the requisite informations sought for by him, by the Writ Petitioner/Appellate Authority, he filed Second Appeal before the Tamil Nadu State Information Commission, Chennai praying for issuance of a direction to the Writ Petitioner/Appellate Authority to furnish the informations, as sought for by him, in his letter dated 01.11.2010 with cost and penalty to be imposed.

Observation of the Court

It is to be borne in mind that under the Right to Information Act, 2005 as an authority has a rudimentary function to perform either to furnish the information or deny the information. As a matter of fact, there is no specific Article in the Constitution of India which provides for the citizens right to know. However, Article 19(1)(a) provides for freedom of thought and expression which indirectly includes right to obtain information. Further, Article 21 guarantees right to life and personal liberty to

citizens. Undoubtedly, Right to Life is incomplete if basic human right viz., 'Right to Know' is not included within its umbrage.

Right to information is seen in Article 19(1)(a), 14 and 21 of the Constitution. It is not out of place for this Court to point out that Sections 1 and 2 of the Right to Information Act, 2005 deal with title, commencement and definitions of important terms employed under the Act. Sections 6 and 7 specified procedure for submitting the requisition for obtaining information and disposal of applications. Section 8 deals with cases of exemption from disclosure of information, when such disclosure affects prejudicial the sovereignty and integrity of India etc. Section 9 deals with Grounds for rejection of applications. Section 18 deals with the Powers and Functions of the Central Information Commission or the State Information Commission as the case may be.

For denying the information as per Section 8(e) of the Right to Information Act, 2005, the following paramount factors may be taken into consideration.
(a)Whether supplying/furnishing information on public records would impede the investigation/apprehension/prosecution;
(b)Whether the information is such that can be refused/denied to Parliament or State Legislature;
(c)Whether public interest in disclosure earns the protected interest;
(d) Section 22 of the Right to Information Act has an overriding effect and as such, the legal procedure enshrined for quasi judicial proceedings gets overridden by the Right to Information Act.

Held

On a careful consideration of respective contentions and on going through the contents of the application dated 01.11.2010 filed by the 1st Respondent/Applicant, this Court is of the considered view that the information sought for by him in Serial Nos.1 to 9 pertaining to the internal delicate functioning/administration of the High Court besides the same relate to invasion of privacy of respective individuals if the informations so asked for are furnished and more so, the informations sought for have no relationship to any public activity or interest. Moreover, the informations sought for by the 1st Respondent/ Applicant, through his application dated 01.11.2010 addressed to the Public Information Officer of the High Court, Chennai, are not to a fuller extent open to public domain. Added further, if the informations sought for by the 1st Respondent/Applicant, through his letter dated 01.11.2010 addressed to the Public Information Officer of High Court, are divulged, then, it will open floodgates/Pandora Box compelling the Petitioner/High Court to supply the informations sought for by the concerned Requisitionists as a matter of routine, without any rhyme or reasons/restrictions as the case may be. Therefore, some self restrictions are to be imposed in regard to the supply of informations in this regard. As a matter of fact, the Notings, Jottings, Administrative Letters, Intricate Internal Discussions, Deliberations etc. of the Petitioner/High Court cannot be brought under Section 2(j) of the Right to Information Act, 2005, in our considered opinion of this Court. Also that, if the informations relating to Serial Nos.1 to 9 mentioned in the application of the 1st Respondent/Applicant dated 01.11.2010 are directed to be furnished or supplied with, then, certainly, it will impede and hinder the regular, smooth and proper functioning of the Institution viz., High Court (an independent authority under the Constitution of India, free from Executive or Legislature), as opined by this Court. As such, a Saner Counsel/Balancing Act is to be adopted in matters relating to the application of the Right to Information Act, 2005, so that an adequate freedom and inbuilt safeguard can be provided to the Hon'ble Chief Justice of High Court [competent authority and public authority as per Section 2(e)(iii) and 2(h)(a) of the Act 22 of 2005] in exercising his discretionary powers either to supply the information or to deny the information, as prayed for by the Applicants/Requisitionists concerned.

Apart from the above, if the informations requested by the 1st Respondent/Applicant, based on his letter dated 01.11.2010, are supplied with, then, it will have an adverse impact on the regular and normal, serene functioning of the High Court's Office on the Administrative side. Therefore, we come to an irresistible conclusion that the 1st Respondent/Applicant is not entitled to be supplied with the informations/details sought for by him, in his Application dated 01.11.2010 addressed to the Public Information Officer of the High Court, Madras under the provisions of the Right to Information Act. Even on the ground of (i) maintaining confidentiality; (ii) based on the reason that the private or personal information is exempted from disclosure under Section 8(1)(j) of the Act, 2005; and (iii) also under Section 8(1)(e) of the Act in lieu of fiduciary relationship maintained by the High Court, the request of the 1st Respondent/Applicant, through his Letter dated 01.11.2010/Appeal dated 20.12.2010 under Section 19 of the Act to the Writ Petitioner/Appellate Authority, cannot be acceded to by this Court. Further, we are of the considered view that the 1st Respondent/Applicant has no locus *standi* to seek for the details sought for by him, as stated supra, in a wholesale, omnibus and mechanical fashion in the subject matter in issue, (either as a matter of right/routine under the Right to Information Act) because of the simple reason that he has no enforceable legal right. Also, we opine that the 1st Respondent/Applicant's requests, through his Application dated 01.11.2010 and his Appeal dated 20.12.2010, suffer from want of bonafides (notwithstanding the candid fact that Section 6 of the Right to Information Act does not either overtly or covertly refers to the 'concept of Locus').
To put it differently, if the informations sought for by the 1st Respondent/Applicant, through his letter dated 01.11.2010/Appeal dated 20.12.2010, are divulged or furnished by the Office of the High Court (on administrative side), then, the secrecy and privacy of the internal working process may get jeopardised, besides the furnishing of said informations would result in invasion of unwarranted and uncalled for privacy of individuals concerned. Even the disclosure of informations pertaining to departmental enquiries in respect of Disciplinary Actions initiated against the Judicial Officers/Officials of the Subordinate Court or the High Court will affect the facile, smooth and independent running of the administration of the High Court, under the Constitution of India. Moreover, as per Section 2(e) of the read with Section 28 of the Right to Information Act, the Hon'ble Chief Justice of this Court is empowered to frame rules to carry out the provisions of the Act. In this regard, we point out that 'Madras High Court Right to Information (Regulation of Fee and Cost) Rules, 2007' have been framed [vide R.O.C.No.2636-A/06/F1 SRO C-3/2008] in Tamil Nadu Gazette, No.20, dated 21.05.2008, Pt.III, S.2. Also, a Notification, in Roc.No.976 A/2008/RTI dated 18.11.2008, has been issued by this Court to the said Rules, by bringing certain amendments in regard to the Name and Designation of the Officers mentioned therein, the same has come into force from 18.11.2008.

62.In the upshot of quantitative and qualitative discussions mentioned supra, we hold that the view taken by the 2nd Respondent/ Tamil Nadu Information Commission, Chennai, in Appeal Case No.10447/Enquiry/A/11 dated 10.01.2012 that 'the appellant has asked only for statistical details and not names of individuals', is per se not correct. As such, the conclusion arrived at by the 2nd Respondent/ Information Commission, in allowing the Appeal and directing the Petitioner/High Court (Public Authority) to furnish the details within 15 days from the date of receipt of copy of this order, is not sustainable, in the eye of law. Therefore, to prevent an aberration of Justice and to promote substantial cause of Justice, this Court interferes with the order dated 10.01.2012 in Case No.10447/Enquiry/A/11 passed by the 2nd Respondent/Tamil Nadu Information Commission, Chennai and sets aside the same, to secure the ends of Justice. Resultantly, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.
Sgl To

1. The Registrar General, High Court of Madras, Chennai 600 104.
2. The Registrar, The Tamil Nadu Information Commission, No.2, Sir Thyegaraya Salai, Teynampet Chennai 600 018

B. S. Mathur v. Public Information Officer of Delhi High Court[67]

JUDGE

S Muralidhar

CASE SUMMARY

Background

Very interesting and important case on RTI came before Delhi High Court and factual matrix of the case is as follows-

The Petitioner was a Member of the Delhi Higher Judicial Service. Pursuant to a Resolution dated 26th August 2008 of the Full Court, a Committee of five Judges of the High Court heard the Petitioner on 29th May 2008 and decided that it was desirable to place him under suspension pending disciplinary action. While disposing of his writ petition challenging the order of suspension, the Supreme Court by an order dated 13th August 2008 directed that the inquiry against the Petitioner may be completed within a period of five months. On 3rd November 2008, a memorandum was issued to the Petitioner furnishing him the articles of charges, statement of imputation of misconduct, list of witnesses and documents along with the documents. The Petitioner's statement of defence was considered by the Full Court at a meeting held on 27th November 2008. A learned Judge of the High Court was appointed as the Inquiry Officer.

On 19th August 2008, the Petitioner filed an application No. 143 of 2008 under the RTI Act seeking the following information:

(i) Copy of directions of Committee of Hon'ble Inspecting Judges allowing Registrar (Vig.) to scrutinise personal file of applicant containing intimations supplied under the Conduct Rules.

(ii) Copy of the report of the Registrar (Vig.) dated 06.02.2008 in compliance of (i) above.

(iii) Copy of the minutes of the meeting of the committee of the Hon'ble Inspecting Judges dated 14.2.2008.

(iv) Copy of the minutes of the meeting of the committee of the Hon'ble Inspecting Judges held on 03.04.2008.

(v) Copy of the minutes of the meeting of the committee of the Hon'ble Inspecting Judges dated 14.05.2008.

(vi) Copy of the minutes of the meeting of the Administrative Committee held on 19.5.2008.

(vii) Copies of the comments and/or material supplied/placed before the committee of the Hon'ble Inspecting Judges.

(viii) Copies of the comments and/or material supplied/placed before the Hon'ble Full Court prior to its meeting dated 26.5.2008.

(ix) Copies of the Agenda and the minutes of the Hon'ble Full Court held on 26.5.2008.

(x) Copy of the minutes/decision of the Committee headed by the Hon'ble Chief Justice in connection with the reply of letters dated 20.2.2008, held on 29.5.2008.

(xi) Subject and date wise list of all the intimations submitted by the applicant to the Hon'ble High Court from time to time since the date of his joining service till date.

(xii) Copy of the minutes/decision of the Committee of the Hon'ble Inspecting Judges held post intimation dated 1.6.2007 by the applicant.

[67] [180(2011)DLT303]

On 16th September 2008, the Public Information Officer ('PIO') of the High Court of Delhi informed the Petitioner that the information sought by him could not be supplied as "the same is exempt under Section 8(1)(h) of the RTI Act read with Rule 5(b) of the Delhi High Court (Right to Information) Rules, 2006" (hereinafter 'the Rules').
Aggrieved by the above decision, the Petitioner filed Appeal No. 203 of 2009 before the CIC on 16th December 2008.

After completion of the inquiry the Inquiry Officer submitted a report on 18th November 2009. With the inquiry being over, on 23rd January 2010 the Petitioner filed another RTI Application No. 35 of 2010 seeking the following information:
i. Copy of directions of Committee of Hon'ble Inspecting Judges allowing Registrar (Vig.) to scrutinize personal file of applicant containing intimations supplied under the Conduct Rules.
ii. Copy of report of the Registrar (Vig.) dated 6.2.2008 in compliance of (i) above.
iii. Copy of the minutes of the meeting of the Committee of the Hon'ble the Inspecting Judges dated 14.2.2008.
iv. Copy of the minutes of the meeting of the Committee of the Hon'ble Inspecting Judges dated 3.4.2008.
v. Copy of the minutes of the meeting of the Committee of the Hon'ble Inspecting Judges dated 14.5.2008.
vi. Copy of the minutes of the Administrative Committee held on 19.5.2008.
vii. Copies of comments and/or material supplied/placed before the Committee of the Hon'ble Inspecting Judges to its meeting dated 26.5.2008.
viii. Copies of comments and/or material supplied/placed before the Committee of the Hon'ble Inspecting Judges to its meeting dated 26.5.2008.
ix. Copy of the agenda and minutes of the Full Court meeting held on 26.05.08.
x. Copy of the minutes/decision of the Committee headed by the Hon'ble Chief Justice in connection with the reply of letters dated 20.2.2008, held on 29.5.2008.
xi. Copy of the minutes/decision of the Committee of the Hon'ble Inspecting Judges held post intimation dated 1.6.2007 by the applicant.
xii. Copy of the decision of the Committee of the Hon'ble Judges headed by Hon'ble Chief Justice on representation/review petition filed by the applicant on 28.6.2008.
xiii. Copy of the minutes/decision of the meeting of the Committee above (xii) which was communicated to the applicant vide communication No. 1222/DHC/Gaz/VI.E.2(a)/2008 dated 3.7.2008.
xiv. Copy of the agenda for Full Court meeting dated 29.9.2008.
xv. Copy of the minutes of the meeting regarding the decision taken by the Full Court on 29.9.2008 qua applicant.
xvi. Copies of agenda and the minutes of the Full Court meeting dated 1.9.2008.
xvii. Copy of the minutes of the Administrative Committee held on 4.9.2008.
xviii. Copies of the agenda and minutes of the Full Court meeting held on 5.9.2008.
The Petitioner also filed Application No. 36 of 2010 in which he sought the following information:
i. Copy of agenda for the Full Court meeting dated 27.09.2008 with respect to the applicant.
ii. Copy of the minutes of the Full Court meeting dated 27.09.2008.
iii. Details of the number and names of the Judges (who) actually participated in the discussion for and against the agenda.
iv. Details of the number and names of the Judges who participated in the discussion and approved the finalization of Article of Charges subsequently issued against the applicant.
v. Copy of the minutes of the Full Court meeting dated 27.11.2008.

vi. Copy of the agenda laid before the Full Court meeting held on 27.11.2008.
vii. Detail as to how many inquiries have been initiated against the applicant. If more than one, then furnish the detail about the pending inquiry preliminary or otherwise, if any.
viii. Copy of the agenda and minutes of the Full Court meeting held on 18.08.2009.
ix. Copy of the agenda and minutes of the Full Court meeting held on 18.11.2009.
x. Copy of the agenda and minutes of the Full Court meeting held on 15.12.2009.
xi. Copy of the agenda and minutes of the Full Court meeting held on 15.01.2010.
xii. Copy of the criteria/policy of the Hon'ble High Court adopted for appointment of District & Sessions Judge and District Judges in the year 2007.
xiii. Copy of the criteria/policy of the Hon'ble High Court adopted for appointment of District & Sessions Judge and District Judges in the year 2008.
xiv. Copy of the criteria/policy of the Hon'ble High Court adopted for appointment of District & Sessions Judges and District Judges and District Judges in the year 2009.
The same was rejected by the PIO of the High Court, aggrieved by the PIO's orders Petitioner filed Appeal before the Appellate Authority of the High Court.
The Appellate Authority partly allowed Appeal by directing the Full Court Agenda to be supplied to the Petitioner. However, the decision of the PIO declining information at serial No. (vii) of Application No. 36/2010 was upheld.... The Appellate Authority held that the matter was sub judice before the CIC and any decision taken in the appeal might conflict with the decision to be taken by the CIC.

Aggrieved by the orders dated 28th April 2010, the Petitioner filed Appeal Nos. 314-15 of 2010 before the CIC. The CIC heard the Petitioner's Appeal Nos. 203 of 2009 and 314-15 of 2010 together. **Meanwhile, on 14th July 2010 the Full Court of the High Court accepted the inquiry report dated 18th November 2009 and imposed a penalty of withholding two increments without cumulative effect on the Petitioner. On 11th August 2010, the Full Court decided not to extend the superannuation of the Petitioner beyond 58 years by invoking Rule 26B of the Delhi Higher Judicial Service Rules, 1971 ('DHJS Rules').**

On 6th September 2010, the CIC dismissed the Petitioner's three appeals by a common order. The CIC noted that at the hearing on 30th August 2010, the Joint Registrar ('JR') of the High Court submitted that there were two investigations. The second investigation was initiated "even before the closure of the first with wider ramification, which is still under process and regarding which information could not be disclosed under Section 8(1)(h)". It was stated that "this investigation file is with the Vigilance Division of the Delhi High Court to which even the Registry does not have access." There after matter came before High Court.

Question involved
(i) Whether the disclosure of the information sought by the Petitioner to the extent not supplied to him yet would "impede the investigation" in terms of Section 8(1)(h) RTI Act?

Observation of the Court
The scheme of the RTI Act, its objects and reasons indicate that disclosure of information is the rule and non-disclosure the exception. A public authority which seeks to withhold information available with it has to show that the information sought is of the nature specified in Section 8 RTI Act. As regards Section 8(1)(h) RTI Act, which is the only provision invoked by the Respondent to deny the Petitioner the information sought by him, it will have to be shown by the public authority that the information sought "would impede the process of investigation." The mere reproducing of the

wording of the statute would not be sufficient when recourse is had to Section 8(1)(h) RTI Act. The burden is on the public authority to show in what manner the disclosure of such information would 'impede' the investigation. Even if one went by the interpretation placed by this Court in W.P. (C) No. 7930 of 2009 [Additional Commissioner of Police (Crime) v. CIC, decision dated 30th November 2009] that the word "impede" would "mean anything which would hamper and interfere with the procedure followed in the investigation and have the effect to hold back the progress of investigation", it has still to be demonstrated by the public authority that the information if disclosed would indeed "hamper" or "interfere" with the investigation, which in this case is the second enquiry.

The stand of the Respondent that the documents sought by the Petitioner "are so much interconnected" and would have a "bearing" on the second enquiry does not satisfy the requirement of showing that the information if disclosed would "hamper" or "interfere with" the process of the second inquiry or "hold back" the progress of the second inquiry. Again, the stand in the chart appended to the affidavit dated 25th March 2011 on behalf of the Respondent is only that the information sought is either "intricately connected" or "connected" with the second inquiry or has a "bearing" on the second inquiry. This does not, for the reasons explained, satisfy the requirement of Section 8(1)(h) RTI Act.

The reliance placed by the Respondent on the conclusion of the CIC in the impugned order that the disclosure of the information would impede the process of investigation "in the peculiar facts and circumstances" begs the question for more than one reason. First, there is a marked change in the circumstances since the impugned order of the CIC. The second enquiry has, by a decision of the Chief Justice of 3rd March 2011, been kept in abeyance which was not the position when the appeals were heard by the CIC. Secondly, it is difficult to appreciate how disclosure of information sought by the Petitioner could hamper the second inquiry when such second inquiry is itself kept in abeyance. The mere pendency of an investigation or inquiry is by itself not a sufficient justification for withholding information. It must be shown that the disclosure of the information sought would "impede" or even on a lesser threshold "hamper" or "interfere with" the investigation. This burden the Respondent has failed to discharge.

It was submitted by Mr. Bansal that this Court could direct that if within a certain time frame the second enquiry is not revived, then the information sought should be disclosed. This submission overlooks the limited scope of the present writ petition arising as it does out of the orders of the CIC under the RTI Act. It is not within the scope of the powers of this Court in the context of the present petition to fix any time limit within which the Respondent should take a decision to recommence the second enquiry which was kept in abeyance by the order dated 3rd March 2011 of the Chief Justice.

Held

No grounds have been made out by the Respondent under Section 8(1)(h) of the RTI Act to justify exemption from disclosure of the information sought by the Petitioner.

The writ petitions are accordingly allowed and the impugned order dated 6th September 2010 of the CIC is hereby set aside. Information to the extent not already provided in relation to the three RTI applications should be provided to the Petitioner by the Respondent within a period of four weeks from today. While providing the information it will be open to the Respondent to apply Section 10 RTI Act where required.

Some of the important cases on RTI relating to 'Vigilance and Inquiry'

1. Vigilance report findings can be disclosed [Sec. 8(1) (h) of the RTI Act]

In the case of "***P.P.K. Rana v. CPIO, Delhi Police and AA, Delhi Police***"[68], the applicant had asked for a report of the vigilance enquiry, which was instituted against her, as an employee of a public authority.

The public authority informed her that the information asked could not be provided as per the provision of Section 8(l)(h) of the RTI Act, according to which information which would impede the process of investigation cannot be provided.

The Commission held that Sec. 8(1) (h) of the Act does not prohibit the sharing of information in the form of the concluding part of the Vigilance report, and only the "gist"(the confidential part) could be kept confidential. The CIC ordered that the concluding part of the vigilance report be disclosed to the appellant.

2. No disclosure in case of pending departmental enquiry [Sec. 8(1) (h) of the RTI Act]

In the case of "***Sarvesh Kaushal v. F.C.I, and others***"[69] **,** the appellant had applied for documents relating to the departmental enquiry launched against him in a corruption case. The CIC, rejecting the appeal, held that the departmental enquiry, which was in progress against him, was a pending investigation under law, and the same attracted the provisions of Sec. 8(1) (h). Therefore, there is no question of disclosing any information relating to his prosecution, the CIC noted.

3. Public authority to disclose information if public interest outweighs the harm to the protected interests [Sec. 8(1) (h) of the RTI Act]

In the case of "***S.R. Goyal v. PIO, Services Department, Delhi***"[70]**,** the appellant had sought a copy of the letter received by the public authority regarding his suspension, from the CBI, which was investigating the case.

The public authority replied that the information requested by the applicant was exempted from disclosure by virtue of Sees. 8(1) (g) and 8(l)(h) of the RTI Act.

The Commission, rejecting the appeal of the applicant, held that the exemptions from disclosing information, under Sec. 8(1) (h) of the RTI Act as well as under the relevant provisions of the Official Secrets Act, would apply. The Commission further said that if the public authority, decides that public interest in the disclosure would outweigh the harm to the protected interests, it can disclose the information, which was not the position in this case.

4. Contents of a departmental enquiry can be disclosed, if no bar from the Court [Sec. 8(1) (b) and Sec. 8(1) (h) of the RTI Act]

In the case of "***N.B.S. Martian v. Dept. of Post***"[71], the appellant, a retired employee sought some information from the public authority about the denial of promotion to him while he was in service. The matter was pending in a judicial body (Central Administrative Commission). The public authority refused to provide him the information asked by him on the ground that since the matter is pending in a judicial forum, the information cannot be provided to the applicant.

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[68] Appeal No. CIC/AT/A/2006/00322,dated 11/12/2006

[69] Appeal No. 243/ICPB/2006 and 244/ICPB/2006, dated 27/12/2006.

[70] Appeal No. CIC/WB/A/20060523, dated 26/3/2007

[71] Appeal No. 267/ICPB/2006, dated 10/1/2007

The Commission held that if a matter is sub-judice the same is not prohibited from disclosure as per the law in Sec. 8(1) (b); which prohibits the disclosure of any information which has been banned from disclosure by a court of law. As it is applicable only in cases where there is an express order from the court that information sought should not be disclosed, which was not the position in the present case, therefore such information should be supplied to the appellant. However, the Commission upheld the decision of the public authority, for not disclosing the Confidential Report (CR) of the appellant, and held that Sec. 8(1) (h) permits such a prohibition.

5. No disclosure of third-party confidential information [Sec. 8(1) (j) of the RTI Act]

In the case of "***A.P. Singh v. Punjab National Bank***"[72] **,** the appellant had sought information regarding the bank account of another person with whom the applicant had no professional or business relationship. This information was refused to the applicant by the public authority.

The CIC held that a bank is under duty to maintain the secrecy of accounts of its customers, who are also third party. The CIC further held in this case that since the applicant had not established any bona fide public interest in having access to the information sought nor did he have any association or business relationship with the company (bank), his appeal cannot be accepted in terms of the law as provided in Sec. 8(1) (j) of the Act.

6. Frivolous applications not to be entertained [Sec. 8 of the RTI Act]

In the case of *"**S.K. Lai v. Ministry of Railways***"[73] , the appellant had filed five applications to the railway authorities asking for "all the records" regarding the various services and categories of staff in the railways. The public authority, however, did not provide him with the information requested.

The Central Information Commission observed that though the RTI Act allows citizens to seek any information other than the 10 categories exempted under Sec. 8, it does not mean that the public authorities are required to entertain to all sorts of frivolous applications. The CIC held that asking for "all the records" regarding various services and categories of staff in the railways," only amounts to making a mockery of the Act."

While dismissing the appeal, the CIC recorded its appreciation of the efforts made by the Railways to provide the applicant with the information sought.

7. Report of departmental enquiry can be disclosed with conditions [Sees. 8(1) and 2(j) of the RTI Act]

In the case of "***Nahar Singh v. Deputy Commissioner of Police & PIO, Delhi Police***"[74],

The applicant had asked for a report of the departmental enquiry, which was instituted against him. The public authority refused to provide him the information requested saying it was barred from disclosure as per the provisions of Sec. 8(1) & (2) of the RTI Act.

The CIC held that the report of lower public officers to their seniors can be shared with an employee, and is not barred for disclosure under any of the exemptions provided in Sec. 8(1) of the RTI Act. The CIC further ruled that the information held in the nature of a report is clearly "information" in terms of Sec. 2 (j) of the Act. The Commission further held that the public authority can protect the interests of witnesses or other persons whose names appear in the report

[72] Appeal No.12/IC(A)/ 2006, dated 14/3/2006
[73]Appeal No. CIC/OK/A/2006/00268-272, dated 29/12/2006
[74]Appeal No. CIC/AT/C/2006/00452, dated 28/12/2006

by not providing them to the appellant, and ordered the concerned public authority to provide the applicant with the relevant information.

8. Reasons for rejection of requests for information must be clearly provided [Sec. 8(1) of the RTI Act]

In the case of *"**Dhananjay Tripathi v. Banaras Hindu University***"[75] , the applicant had applied for information relating to the treatment and subsequent death of a student in the university hospital due to alleged negligence of the doctors attending him.

The appellant was, however, denied the information by the PIO of the university saying that the information sought could not be provided under Sec.8(1)(g) of the RTI Act, without providing any further reasons as to how the information sought could not be provided under the RTI Act.

The Commission held that quoting the provisions of Sec. 8(1) of the RTI Act to deny the information without giving any justification or grounds as to how these provisions are applicable is simply not acceptable, and clearly amount to malafide denial of legitimate information.

The public authority must provide reasons for rejecting the particular application. The Commission further held that not providing the reasons of how the application for information was rejected according to a particular provision of the Act would attract penalties under Sec. 20(1) of the Act.

9. Disciplinary action against Appellate Authority [Sec. 20(2) of the RTI Act]

In the case of "***Dr. Anand Akhila v. Council of Scientific and Industrial Research***"[76] , the applicant had asked for certain information from the PIO of the CSIR (public authority).The information was refused by the PIO stating that it was exempted under the RTI Act, and was informed about the appellate authority with which he could file the first appeal.

The Appellate Authority, however, without filing a formal appeal by the applicant/appellant, sent a letter to the applicant that the information asked by the applicant could not be supplied.

The CIC recommended disciplinary action against an Appellate Officer by extending the meaning of Sec. 20(2) of the RTI Act. The Commission held that though an appellate authority is not covered under the penal provisions of the Act but in this case, it clearly failed to uphold the Act in the public interest.

It was observed that this decision might be sent to the public authority to consider disciplinary action against the Appellate Authority, under their service rules.

10. Judgment of Delhi High Court on Judges Assets Matter

In "***The CPIO, Supreme Court of India v. Subash Chandra Agrawal and Another***"[77] case the facts of the case are that the Respondent had, on 10.11.2007 required the Central Public Information Officer, Supreme Court of India ("the CPIO") nominated under the Right to Information Act to furnish a copy of the resolution dated 7.5.1997 of the Full Court of the Supreme Court, ("the 1997 resolution") which requires every judge to make a declaration of all assets. He further sought for information relating to declaration of assets etc, furnished by the respective Chief Justices of States. By order dated 30th November, 2007, the CPIO informed the applicant that a copy of the resolution dated 7.5.1997 would be furnished on remitting the

[75]Decision No. CIC/OK/A/00163, dated 7/7/2006.
[76]CIC/EB/C/2006/00040,dated 24/4/2006
[77]W.P(C) 288/2009

requisite charges. He was also told that information relating to declaration of assets by the judges was not held by or under the control of the Registry of the Supreme Court and, therefore, it could not be furnished.

11. Information on an ongoing investigation can be given in special circumstances [Sec. 8(1) (h) of the RTI Act]

In the case of *"**Mangto Ram v. Addl. Commissioner & PIO, Delhi Police***"[78] **,** the appellant had filed an application with the police authorities.

The applicant wanted information on the ongoing investigation into the death of his daughter under mysterious circumstances.

The CIC examining the case held that this case was an exception to the general rule laid down in Sec. 8(1) (h) of the Act, which prohibits the disclosure of information, as the supply of information to the victim's family would not put any obstacles or impede the process of investigation. The Commission further noted that, "Far from impeding the investigation, taking the appellant into confidence will give a positive direction to the investigation and enable the authorities to swiftly reach the truth."

The Commission ordered the police to provide the status of the investigation to the appellant within three weeks.

12. No disclosure in case of pending trial [Sec. 8(1) (h) of the RTI Act]

In the case of "***Ashok Agarwal, Jt. Commissioner of Income Tax v. Department of Revenue***"[79] **,** the applicant asked for certified copies of files relating to the prosecution proceedings against him, under Sec. 6 of the RTI Act, 2005.

The Commission said that since the matter is sub-juice (in trial before a court of law), there is a due process of law under which the appellant may obtain the documents to defend himself in his case before the trial court.

The Commission rejected his appeal to obtain the documents from the public authority, and held that since the matter is under investigation, the exemption under Sec. 8(1) (h) would apply.

13. Self- disclosure by public authorities (Sec. 4 of RTI Act, 2005)

The RTI Act not only requires governments to provide information upon request, it also imposes a duty on public authorities to actively disclose, disseminate and publish information, as widely as possible. The RTI 2005 also requires all public authorities covered under the law to publish *suo motu* or proactively a wide range of information on their own, even if no one has specifically requested it. Section 4 of the Right to Information Act, 2005, requires all the public authorities to routinely publish 17 categories of information. This provision clearly specifies that all public authorities must make constant efforts to provide as much information *suo motu* to the public, at regular intervals, through various means including the Internet, so that the public have minimum need to use this Act to obtain information. In addition, self-disclosure by the public authorities should be disseminated with considerations about the local language, cost-effectiveness and the most effective means of communication, so that it

[78]Appeal No. CIC/AT/A/2006/00355, dated 26/12/2006
[79]Appeal No. 01/IC(A)/2006, dated 16/02/2006.

reaches large sections of citizens. This ensures that citizens always have access to authentic, useful and relevant information.

14. Person seeking information not to give reasons

In "***Surupsingh Hrya Naik v. State of Maharashtra***,"[80]

The Court held that a consideration of provisions of the Right to Information Act, 2005 would indicate that ordinarily the information sought for by a person must be made available and such person need not give reasons for the information he seeks.

2. Further, in respect of information relating to a third party, the concerned Public Information Officer must give notice to the third party and if such third party makes submissions then to consider the said submissions.

3. The test always in such matter is between private rights of a citizen and the right of third party to be informed. The third person need not give any reason for his information. Considering that it can be said that the object of the Act, leans in favour of making available the records in the custody or control of the public authorities.

[80] A.I.R 2007 Born 121

Session-7
“Inspection of Courts”
and
Session-8
Follow-up action on
‘Inspection/Inquiry Reports’

1. **Some of the thought evoking observations on power of supervision and Inspection**

Edmund Burke:
"All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust, and that they are to account for their conduct in that trust to the one great Master, Author and Founder of Society".
-Quoted by Hon'ble SC in *All India Judges' Association v. Union of India,* 1992 AIR 165

"..... There is imperative need for total and absolute administrative need for total and absolute administrative independence of the High Court. But the Chief Justice or any other Administrative Judge is not an absolute ruler. Not he is a free wheeler. He must operate in the clean world of law, not in the neighbourhood of sordid atmosphere. He has duty to ensure that in carrying out the administrative functions, he is actuated by same principles and values as those of the Court he is serving. He cannot depart from and indeed must remain committed to the constitutional ethos and traditions of his calling. We need hardly say that those who are expected to oversee the conduct of others must necessarily maintain a higher standard of ethical land intellectual rectitude. The public expectations do not seem to be less exacting."

- **Honble SC in *H. C. Puttaswamy* (1991 Lab IC 235 (SC)) (Para 11)**

"The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the Judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. ..... But it is necessary to remind ourselves that the concept of independency of the judiciary is not limited only to independency from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices."
- Hon'ble SC in *Supreme Court Advocates on Record Association v. U.O.I.,* reported as (1993) 4 SCC 441

"The object of such inspection is for the purpose of assessment of the work performed by the Subordinate Judge, his capability, integrity and competency. Since Judges are human beings and also prone to all the human failings, inspection provides an opportunity for pointing out mistakes so that they are avoided in future and deficiencies, if any, in the working of the subordinate Court, remedied. Inspection should act as a catalyst in inspiring Subordinate Judges to give best results. They should feel a sense of achievement. They need encouragement. They work under great stress and man the courts while working under great discomfort and hardships. A satisfactory judicial system depends largely on the satisfactory functioning of courts at grass roots level. Remarks recorded by the inspecting Judge are normally endorsed by the Full Court and become part of the annual confidential reports and are foundations on which the career or a judicial officer is made or marred. Inspection of subordinate courts is thus of vital importance. It has to be both effective and productive. It can be both effective and productive. It can be so only if it is well regulated and is workman-like. Inspection of subordinate courts is not a one day or an hour or few minutes affair. It has to go on all the year round by monitoring the work of the Court by the Inspecting Judge. The casual inspection can hardly be beneficial to a judicial system. It does more harm than good."
-Hon'ble SC in *High Court of Punjab and Haryana v. Ishwar Chand Jain* (1069) 3 JT (SC) 266
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2. 'IDENTIFYING THE DIFFERENT OBJECTIVES OF 'INSPECTION' AND 'VIGILANCE'[81]

The matter relates to identifying the different objectives of 'Inspection' and 'Vigilance'.

Regarding Inspection

As far as the objective of inspection is concerned, it would be apt to quote the relevant provisions of Rules & Orders (Civil) and (Criminal) in this respect. The provisions are being reproduced as under:-

Rule 566 of High Court Rules & Orders (Civil): "The object of inspection is to satisfy the District Judge and through him the High Court that the Courts are functioning properly, that rules are understood and followed and that work is disposed of promptly and regularly. At the same time the inspection offers the District Judge an opportunity of helping and instructing his Civil Judges and of correcting faults in procedure which would not normally require reference in an appellate judgment and full advantage should be taken of this opportunity"…….. "Inspection with its opportunities for helping junior Judges and for improving the standard of the judicial administration generally is one of the more important aspects of a District Judge's work, and is an aspect to which he should devote considerable attention. Unhelpful and routine notes are to be strongly deprecated."

Rules & Orders (Criminal) 703: …….. "An inspection note is not only a commentary on the court inspected but also on the officer inspecting. The important quality is insight and penetration, and attention should be given to the court's method and attitude in trying cases rather than to legal points unless there are mistakes of an obvious kind in law or procedure. It is important that when an error or a fault is revealed the way to avoid it should be explained at the same time, to show not only what was done wrong but also how it should have been done and why."

Thus the object of inspection is to satisfy the District Judge and through him, the High Court, that the courts are functioning efficiently and that the work is disposed of promptly and regularly. It also gives opportunity to the District Judge to make remedial measures and correct the faults in the procedure creeping into the work of subordinate judges. District Judge also evaluates as to whether the Judge whose inspection he is carrying out, has not shown undue delay in disposing of the case. The more careful the inspection is, the higher will be the quality of work in Courts. Minor matters should be disposed of in a personal discussion with the judicial officer but all important points should find a place in the inspection report. Various sections such as account section, copying section, record room, library, establishment etc. are required to be inspected to ensure their proper, efficient and corruption free working.

It is quite clear that the standard of work, both of judicial and administrative nature shall witness an enhancement in terms of quality and quantity, if the inspection is carried out as per norms and guidelines.

An approved note about the ambit and scope of "inspection" dated 26-06-1996 (Flag-A) prepared by the then Registrar (Vigilance) is submitted for kind perusal.

Regarding Vigilance

"**Vigilance" means to be watchful, to be alert as to what is happening and what may happen.** Role of Vigilance is to protect the Institution from internal dangers which are more serious than external threats. Vigilance is surveillance for the prevention of improper behavior and conduct of the

[81] Available at: http://mphc.gov.in/pdf/cirrculars-orders/Inspection-and-Vigilance.pdf visited on: 08/09/2015 at: 17:39

duty holders. Vigilance is to keep watchful eye on the activities of the court official to ensure integrity of personnel in dealing with the litigants. It is to ensure clean and prompt administrative action towards achieving efficiency and effectiveness of the court officials in particular and the courts in general.

The objective of vigilance is identifying places and points of corruption. A vigil over work both judicial and administrative and the conduct and contacts of officials is also an important objective of vigilance.

Vigilance administration may be improved by creating a culture of honesty, by greater transparency/openness in administration and speedy disposal of departmental enquiries.
The term 'Vigilance' is wrongly understood as barely enquiring, fixing responsibility etc Vigilance is not only punitive but also preventive in nature. Prevention of misconduct is as important function of vigilance as punishment is. The principle behind preventive vigilance is "Prevention is better than cure" and the purpose is to reduce corruption and bring about a higher order of morality in official functioning. Preventive vigilance is nothing but adoption of a package of measures to improve the system so as to eliminate corruption. This can be done by identifying sensitive and corruption prone areas by detection of failure in quality or speed of work.

As part of preventive vigilance, a system of maintaining the list of officers of doubtful integrity shall be required to be maintained. Similar such list of Class-III and Class-IV employees shall also be required to be prepared. **The purpose of maintaining this list is to enable the organization to take such administrative action as is necessary and feasible. The action can be transfer from sensitive place and post, non-sponsoring the names for deputation, refusal of re-employment after retirement etc. The names of officers/ officials should be retained in this list for a specific period.**

Instances of prevention vigilance in judiciary may be seen when the High Court issues advise or non recordable warnings to judicial officers in matters in which the impugned acts are not so serious enough to bring them within the ambit of "misconduct'. Similarly, circulars issued from time to time, in order to curb undesirable traits/practices, are also instances of preventive vigilance.

When one talks of punitive vigilance, the concept of "misconduct" has to be brought forth. When the impugned act is proven to be misconduct, the delinquent is liable to be punished as per rule 10 of MP. Civil Services Classification Control and Appeal Rules, 1996. The delinquent may be subjected to major/minor penalty as per the nature of misconduct. The term 'misconduct' has although not been defined in M.P. Civil Services (Conduct) Rules, 1965, yet, a fair idea can be gathered about the concept of 'misconduct' from perusal of specific instances of misconduct enumerated from Rule 3-A to Rule 23-A of M.P. Civil Services (Conduct) Rules, 1965 apart from the general Rule 3. T may be seen that amendments in rules have incorporated discourteous behavior and deliberate adjournments as instances of misconduct amongst others.

General rule 3 of M.P. Civil Services (Conduct) Rules, 1965 provides that a Government Servant shall maintain at all times, absolute integrity, devotion to duty and do nothing which is unbecoming of a Government Servant. While the expression 'integrity' denotes uprightness or honesty, 'devotion to duty' is faithful service. It must be remembered that ability enables an officer to get promotion but it

takes integrity and devotion to duty to keep him there. Integrity or honesty is not a concept or a word; it is a way of life.

Apart from integrity and devotion to duty, officers/officials must display strong moral character. Law Lexicon defines "Moral Turpitude" as "Anything done contrary to justice, honesty, principle or good morals, an act of baseless, vileness or depravity in the private and social duties".

Work ethics of an officer/official should be such which is free from any kind of moral turpitude and employs using one's skill with

It would be apt to cite the case of **"*State of Punjab v. Ram Singh Ex. Constable*"**[82]in which it has been held that 'misconduct' may involve moral turpitude, it must be improper or wrong behavior, unlawful behavior, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty, the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve.

It may be seen that Rules relating to misconduct are concerning Government servants. Judicial Officers/Officials are although Government servants, yet the standard of conduct expected of them has to be a notch higher than other Government Servants because of sanctity attached to the judicial system as a whole and in order to maintain and enhance reposition of faith in the system amongst the public at large. The Preamble of Bangalore Principles of Judicial Conduct, 2002 underlines the importance of maintenance of high standards of judicial conduct and enjoins the judges to strive to enhance and maintain confidence in the judicial system.

Rules of propriety and conduct for judicial officers have apart from being underlined in the aforementioned Bangalore Principles of Judicial Conduct, 2002, also been emphasized in Restatement of values of judicial life (Code of Conduct), 1999 and D.O. letters/ circulars sent out to Judicial Officers from time to time.

Inspection and Vigilance-

It can thus be seen that the objective of 'Inspection' is to periodically monitor the functioning of a Judicial Officer/ Official and propel and guide him in respect of any procedural and legal lapses. It is for correction and guidance of duty-holders. On the other hand, the objective of 'Vigilance' is keeping a vigil over work, both judicial and administrative as well as the conduct and to identify as to whether the impugned acts of the judicial officer and the court staff comes within the ambit of misconduct as provided under the M.P. Civil Services (Conduct) Rules, 1965.

[82] AIT 1992 SC 2188

3. Important Cases on 'Inspection of Courts'

SUPREME COURT OF INDIA

Bishwanath Prasad Singh, v. State of Bihar And Others[83]

JUDGES

A S Anand, R C Lahoti, Shivaraj V Patil

CASE SUMMARY

Background

The Petitioner who was a member of Bihar Superior Judicial Service and posted as District & Session Judge, Giridih, seeks issuance of writ in the nature of mandamus directing the State of Bihar to frame rules for enhancement of age of superannuation of the judicial officers of the State as per directions of the Supreme Court issued in the and also for a writ or direction quashing the communication contained in the letter dated 17th May, 2000 of the Registrar General of the Patna High Court informing the petitioner that having assessed and evaluated the services of the petitioner in the light of the decision of this court in ***All India Judges Association & Ors. v. Union of India & Ors.***[84] the High Court has been pleased to decide not to allow him the benefit of enhancement of the retirement age from 58 years to 60 years and that the petitioner shall cease to be a member of the judicial service of the State on completion of the age of 58 years in October, 2000.

Issues raised

The Order of the High Court was challenged on the three grounds-

firstly, that in view of the decision of the Supreme Court, the retirement age of judicial officers stood increased to 60 years and before attaining such age of retirement, the petitioner could not have been made to retire at the age of 58 years except by following the procedure applicable to compulsory retirement; **secondly**, that the petitioner holds a civil post under the State of Bihar. The order of retirement can be passed only by the Governor of Bihar; the jurisdiction of the High Court being only advisory. As the State of Bihar/Governor of Bihar has not passed any order of retirement, the petitioner cannot be made to retire by the High Court acting on its own; **thirdly,** that the impugned order is arbitrary, based on no material and hence is vitiated.

Observation of the Court

Hon'ble SC went through in detail into the records of the case and the service record of the petitioner was also considered and is as under :

August, 1987 :

JC - Integrity doubtful. C Grade. **He is a Judicial Officer with doubtful integrity.**

I had already submitted a note to Honble C.J. Details have been mentioned in my inspection notes as well.

[**Sd/- Inspecting Judge] May, 1988** : B On the whole satisfactory since he had recently joined, it is difficult to express any opinion on these points, in respect of cols. 6,7, & 8 relating to reputation for honesty and impartiality, attitude towards his superiors, subordinates and colleagues and behaviour towards members of the Bar and Public.

May, 1989 - B - (Satisfactory) Jan, 1996 - B Plus, Good April, 1997 - (Satisfactory) November, 1997 - B in respect of Col.No.3, i.e. regarding quality of order and judgments. No comments in respect of Col.No.10. The Evaluation Committee consisting of 8 judges and presided over by Hon'ble

[83] (1993) 4 SCC 288

[84](1993) 4 SCC 288

the Chief Justice held its meeting on 2nd May, 2000. Cases of 27 officers came up for consideration. As to 19 the Evaluation Committee resolved to give them the benefit of increase in the retirement age from 58 to 60 years. As to 8 officers, including the petitioner, the Evaluation Committee formed an unanimous opinion that their further continuance in service will not be in public interest as they do not have potential for continued useful service.

Bishwanath Prasad Singh was posted as Additional Judicial Commissioner between 28.5.1997 and 23.3.2000 at Lohardagga. Then he was transferred on promotion as District & Sessions Judge, Giridih. Periodical inspections of the work and conduct of the petitioner at Lohardagga were not carried out and therefore the High Court directed a special inspection to be made and entrusted the same to a Judge of the High Court. Intimation of the proposed inspection was given to the petitioner so that if he so liked he could remain present at Lohardagga at the time of inspection. Though the petitioner did not come to Lohardagga but the inspecting judge came to know that he had sent messages to his contacts including lawyers and judicial officers that nothing should leak out. Some of them on condition of anonymity disclosed to the inspecting judge having received calls in this regard from Giridih.

The inspecting judge also learnt that the petitioner had accepted illegal gratifications on a large scale. Files of all the bail applications disposed of by the petitioner and all the criminal cases decided by him during the last six months of his posting at the station were called for and inspected. The inspecting judge formed an opinion that the bail orders passed by the petitioner suffered from inconsistency in judicial approach and also to some extent exposed perversity apart from the fact that the disposal of some of the applications was delayed while some were disposed of expeditiously. He also found the judgments suffering from injudicious approach of the officer. The inspecting report in conclusion said in overall view of the matter considering in particular the reputation which the officer has left behind, I do not think he deserves the benefit of the extended age of superannuation.

The petitioner has not alleged any bias much less any mala fides against the High Court. No such allegation could have been made either, obviously because the evaluation as directed by the 1993 case having been undertaken by an Evaluation Committee consisting of 9 judges including Honble the Chief Justice. It cannot, therefore, be said that there was no material available with the High Court whereon the finding arrived at by it could be based. The High Court took an extra care to carry out a special inspection by sending a judge of the High Court on the spot.

The reliability of information collected by the judge and placed on record cannot be doubted. An overall view of the service record, with requisite emphasis on recent performance, was taken into consideration. We do not think the opinion formed by the High Court is either arbitrary or based on no material or is vitiated for any other reason.
As we have already held no right much less any fundamental right inhers in the petitioner to continue in service beyond the age of 58 years which is the age of retirement of judicial officers in the State of Bihar under the existing Rules applicable to the petitioner. The question of granting any relief to the petitioner in exercise of the jurisdiction conferred on this Court under Article 32 of the Constitution does not arise. We find the petitioner not entitled to any relief and the petition filed by him liable to be dismissed. It is dismissed accordingly.

Held
His case was also before the Evaluation Committee on May 2, 2000 along with the case of

Bishwanath Prasad Singh and several others. The same opinion was formed about this petitioner also by the High Court in accordance with the directions of Supreme Court in 1993 case. The grounds of challenge are the same as in Writ Petition (Civil) No.419/2000 and the same fate follows. The pleas raised by this petitioner are covered by the view of the law which we have taken hereinabove in the case of Bishwanath Prasad Singh. This petition too merits a dismissal. It is dismissed accordingly. No order as to the costs.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

V.P.Indira Devi v. The High Court of Kerala[85]

Judge: Hon'ble Mr. Justice C.K. Abdul Rehim

CASE SUMMARY

Background

While the petitioner was holding charge as Chief Judicial Magistrate, Thrissur Ext.P1 (b) Official Memorandum was issued by the High Court directing her to take steps for conducting a thorough police investigation with respect to forgery committed at the Judicial First Class Magistrate's Court, Chalakudy in issuing receipt in ST No.1510/2013 and with respect to missing of records of S.T. Cases, 1510/2013 1511/2013.

It is stated in Writ petition that the petitioner had conducted annual inspection at the Judicial First Class Magistrate Court, Chalakudy on 15-03-2014, after giving prior information to the High Court. The petitioner camped at the Forest Guest House situated near to the court premises at Chalakudy, in connection with the inspection. It is mentioned that, in another room in the Guest House the Investigating Officer in Crime No.357/2014 was questioning some of the accused persons including one Smt. Mini, who is an Advocate clerk attached to a lawyer practicing at Chalakudy. Version of the petitioner is that, after preparing the notes of inspection, while going out she had noticed the presence of certain Advocates and Media persons in the premises. Thereafter on 17-03-2014 the 3rd respondent requested the petitioner to be present in the very same Forest Guest House, at 9 a.m. on the next day. When the petitioner was present on 18-03-2014 there were a large number of Media persons with Cameras at the Guest House. **The petitioner had signed the proceedings of enquiry prepared by the 3rd respondent which according to her was without properly reading the notes, unsuspectingly in an honest manner. But on the next day the impugned order of suspension was issued with immediate effect.**

Issue raised

The impugned order is attacked as violative of Article 14, 19 & 21 of the Constitution of India. Besides, allegation is that it is malafide and issued in an abuse of the power vested on the respondents. The petitioner contented that the order of suspension is totally unwarranted and it is not on the basis of any public interest, but a malafide action which is in the nature of vindictive victimization. Various contentions on factual aspects are also raised to substantiate that the petitioner was totally innocent with respect to the circumstances related to the inspection and camping at the Forest Guest House on the particular day.

Held

After full scrutiny of the case Hon'ble Court held that, "having found that the grounds raised in challenge of the impugned order is not sustainable, the writ petition fails and the same is hereby dismissed.

[85] WP (C).No. 8359 of 2014

Delhi High Court

High Court of Delhi v. Shr. Purshottam Das Gupta And Others[86]

Judges: A K Sikri, S K Mahajan

Factual Matrix

Respondent No. 1 joined DJS on 28th January, 1978. He was granted selection grade in the said service in June 1993 w.e.f. 31st May, 1991. On 18th May, 1996 meeting of Full Court was held and one of the items of agenda was consideration of eligible judicial officers in DJS for promotion to DHJS. This consideration was not possible without there being record of ACRs of all the eligible officers. Accordingly ACRs of 23 officers were recorded by the Full Court and thereafter Full Court considered the cases of these officers for promotion to DHJS. As far as respondent No. 1 is concerned, he was given adverse remarks "C Integrity Doubtful" for the years 1994 and 1995 in that meeting. He was also not found fit for promotion to DHJS and was superseded.

On 27th May, 1996 a communication was sent from the High Court to respondent No. 1 informing him about the adverse remarks and he was asked to make representation, if within six weeks, of communication of such remarks. Respondent No. 1 submitted his representation on 8th July, 1996 to District Judge which was forwarded by the District Judge to the High Court on 10th July, 1996 with his endorsement for favourable necessary action, remarking that no complaint has been received/pending in his office. This representation was followed by another representation submitted on 21st February, 1997 in which it was also stated that his case for promotion for DHJS may be considered with retrospective effect. Yet another representation dated 16th September, 1997 was made to the District Judge for a personal hearing in the matter by the Full Court which was forwarded by the District Judge to the High Court. Representations of respondent No. 1 as well as of some other officers came up for discussion in Full Court Meetings from time to time. On 18th January, 1997 the Full Court constituted a Committee of four Judges to enquire into these representations. The Committee gave its report on 22nd July, 1997. Report shows that representation of as many as 19 judicial officers were considered in the meetings of the Committee held on various dates. The Committee had perused personal files, complaint files, ACRs files and also judgment of some of the officers. The Committee also made some enquiries (as there is some dispute about the nature of enquiry, this aspect would be dealt with by us at the appropriate stage). After fully considering and examining the matter, the Committee gave its recommendations on each of the representation submitted by these officers. Some of the representations were rejected while some were accepted by the Committee. In so far as representations of the respondent No. 1 are concerned, the recommendation of the Committee was to reject his representations.

The recommendations of the Committee were accepted by Full Court, after due deliberations in the meeting held on 20th September, 1997. The decision of the Full Court rejecting the representations of the respondent No. 1 herein was conveyed to the District and Sessions Judge by letter dated 25th September, 1997 and he was asked to inform respondent No. 1 of the said rejection. Respondent No. 1 challenged the decision by filing CWP No. 4334/97 on 15th October, 1997. As mentioned already, this writ petition of respondent No. 1 herein has been allowed by the judgment dated 28th May, 1999 and present appeal is preferred impugning this judgment.

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[86] 2001 (90) DLT 203 146

The reliefs given by the learned single Judge can be compartmentalised under three heads :
1. Expunging of the adverse remarks of respondent No. 1 for the years 1994 and 1996.
2. Declaring that respondent No. 1 is deemed to have been graded as B+ for the years 1994 and 1995.
3. Declaring that respondent No. 1 stands promoted to DHS w.e.f. 18th May, 1996 and entitled to his due seniority with all other consequential benefits.

Held

In view of the discussion, we do not agree with the conclusion of the learned single Judge therefore, set aside the order of the learned single Judge on this point whereby the grading 'C' given to respondent No. 1 for the years 1994 and 1995 was quashed/expunged by the learned single Judge.
To summarise, it is held :
(a) The adverse remarks recorded by the High Court in the Confidential Reports of respondent No. 1 for the years 1994 and 1995 were not without any material. They were recorded on the basis of 'material' on record and the judgment of the learned single Judge quashing those remarks is hereby set aside.
(b) The learned single Judge should not and could not have graded B+ to respondent No. 1 as it is the function of the High Court to assign appropriate grading. Therefore, the matter should have been referred to the Full Court for giving appropriate grading. This direction of the learned single Judge is accordingly set aside.
(c) Direction of the learned single Judge in treating the petitioner as promoted w.e.f. 18th May, 1996 is not correct in law and is therefore set aside.
The point No. 2 is decided on the presumption that the judgment of the learned single Judge on point No. 1 was sustainable and point No. 3 is decided on the presumption that judgment of the learned single Judge on point No. 1 and even on point No. 2, was sustainable.
This appeal is, therefore, allowed. The impugned judgment of the learned single Judge is set aside. The CWP No. 4334/97 filed by the petitioner stands dismissed.
There shall be no order as to costs.
Appeal allowed.

Session-9
Sexual harassment at work place-
Role of Registrar
(Vigilance/Intelligence)

1. Some insights on menace of Sexual harassment at Workplace

Justice V. R. Krishan opined that the, "[s]ocial justice is the human essence of the Indian Constitution. One facet of it is gender justice which is a composite concept. Gender justice is no mystique; it is the human right of woman, to enjoy equality with man, the uninhibited and free opportunity to be herself and to unfold her full faculties, eliminating from the social milieu all sex prejudices, sex bans, sex servitude..... Law, if it speaks the truth, must heed this cry for sex justice, real in life, not only in printed pages. For law is what law does." Rabindranath Tagore in a conversation about 'the function of women's *shakti* in society' observed that "women are objects of lust not to the brave, but to the cowards amongst men. And it is these cowards who degrade women to the level of their low desires."
-Quoted by Hon'ble Kolkata High Court in *Sri Subrata Kumar Choudhury v. State Bank of India*[87]

Dr. Justice A.S.Anand, former Chief Justice of India opined that, 'it humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a relatively minor punishment as the present system pays no attention to his injured feelings. Imposition of appropriate punishment on the criminal is the response of the courts to the society's cry for justice.'
-Quoted by Hon'ble High Court of Madras in *G. Pushkala v. High Court of Judicature,*[88]

[T]hat the incidents of sexual harassment in work places result in violation of fundamental right "Gender Equality" and the "Right to Life and Liberty". It is a clear violation of right under Articles 14, 15 and 16 of the Constitution. It is also the logical consequences of such incidents, that the fundamental right under Article 19(i)(g) "to practice any profession or to carry out any occupation, trade or business" is always violated.
-Hon'ble SC in *Vishaka v. State of Rajasthan*[89]

"Regarding the nature of approach that courts should take while dealing with cases of sexual harassment at the place of work of female employees, it is to borne in mind that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. Any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or the dictionary meaning of the expression "molestation". They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the delinquent superior officer is wholly misplaced and mercy has no relevance.

[87] (2008) 4CALLT183 (HC)
[88] 2007 (4) M.L.J. 692
[89] (AIR 1997 SC 3011)

It has also been held therein:
"Findings of disciplinary proceedings should not be treated as one of criminal trial. Courts should examine the broader probabilities of the case and not get swayed by insignificant discrepancies or narrow technicalities. They must examine the entire material to determine the genuineness of the complaint."
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2. International Law on Sexual Harassment at Work Place

A. Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention under Article 1 defines 'discrimination against women' as *[F]or the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.* Article 2 of the convention provides the action plan for achieving the aims of the convention.

Article 2
States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women.

B. Beijing Declaration and Platform for Action, 1995
"Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms……. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture".
Para 178.c- Enact and enforce laws and develop workplace policies against gender discrimination in the labour market, especially considering older women workers, in hiring and promotion, and in the extension of employment benefits and social security, as well as regarding discriminatory working

conditions and sexual harassment; mechanisms should be developed for the regular review and monitoring of such laws;
Para 179.c- Enact and enforce laws against sexual and other forms of harassment in all workplaces[90]

E. Declaration on the Elimination of Violence against Women, 1993

Article 1

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

[90] Available at: http://www.un.org/womenwatch/daw/beijing/platform/economy.htm visited on: 07/09/2015 at: 14:59

Sexual Harassment Cases against Judicial Officers

THE SUPREME COURT OF INDIA

Additional District and Sessions Judge 'X' v. Registrar General, High Court of Madhya Pradesh and others[91]

CASE SUMMARY

Background

Former Additional District and Sessions Judge (MP) resigned from the said post and alleged that at the behest of the a sitting Judge of the High Court her request for cancellation of transfer was not considered even though there are valid reasons, and the entire system including Registrar (Vigilance) is used against her to make her to heed to sexual demands of the said High Court Judge. The issue of sexual harassment was brought before Chief Justice of the High, CJ of High Court constituted the inquiry committee, and committee required the petitioner to be present before it for the purpose of inquiry. However, petitioner denied to appear, and she contended that- after compliant as is required- Accused Judge was not suspended from his position of Administrative Judge and he was not debarred from judicial work until the matter is disposed off. Further it was contended by the Petitioner that "in-house procedure as is required as per the rulings of SC is not followed, on these ground petitioner refused to appear before the Committee constituted by CJ of High Court.

Petitioner prayed for,

1. Appropriate action be taken, after a fact-finding Inquiry.
2. Re-consider the circumstances under which the Petitioner was coerced and exerted a great duress upon, until the only option she had was to resign.
3. Institute an appropriate mechanism for redressal of grievances like the above, of sub-ordinate services judicial officers.

Held

SC after careful consideration of the facts and circumstance of the case concluded that the procedure adopted by the High Court is unwarranted by law. Deviation of 'in-house proceedings' cannot be allowed (especially where the compliant is made against the High Court Judge) and further SC (CJI) India constituted committee to inquiry into the allegation made against the judge.

Findings of the Committee

The in-house inquiry committee comprised of Allahabad HC CJ Dhananjaya Chandrachud, Delhi HC CJ G Rohini and senior judge from Rajasthan HC Justice Ajay Rastogi. In July 2015, the in-house committee submitted its report to the CJI, concluding that the sexual harassment charges were not proved against Justice Gangele.

The complainant told judges that had she not been transferred, then she would have "probably not" filed the complaint. The committee also said the former additional sessions judge had not come forward with satisfactory explanations and evidence about the three incidents of her alleged sexual harassment. CJI was quoted saying as to the Times of India, "The in-house inquiry report gives him a clean chit. I have accepted the report. The matter stands closed on the administrative side." However,

[91] Available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=42205 visited on: 08/09/2015 at: 18:12

the complainant can still challenge the findings of the report by filing a petition in the Supreme Court.[92]

In the instant case important observations were made by Hon'ble Court on procedure to be followed, in cases where complaints were made against the HC Judge and more importantly court also explained 'in-house proceedings', which are reproduced as under.

Compliant against High Court procedure following thereof

A complaint against a Judge of a High court is received either by the Chief justice of that High Court or by the Chief Justice of India (CJI). Sometimes such a complaint is made to the President of India. The complaints that are received by the President of India are generally forwarded to the CJI. The Committee suggests the following procedure for dealing with such complaints:-

(1) Where the complaint is received against a Judge of a High Court by the Chief Justice of that High Court, he shall examine it. If it is found by him that it is frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file the complaint and inform the CJI accordingly. If it is found by him that the complaint is of a serious nature involving misconduct or impropriety, he shall ask for the response thereto of the Judge concerned. If on a consideration of the allegations in the complaint in the light of the response of the Judge concerned, the Chief Justice of the High Court is satisfied that no further action is necessary he shall file complaint and inform the CJI accordingly. If the Chief Justice of the High Court is of the opinion that the allegations contained in the complaint need a deeper probe, he shall forward to the CJI the complaint and the response of the Judge concerned along with his comments.

(2) When the complaint is received by the CJI directly or it is forwarded to him by the President of India the CJI will examine it. If it is found by him that it is either frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file it. In other cases the complaint shall be sent by the CJI to the Chief Justice of the concerned High court for his comments. On the receipt of the complaint from CJI the Chief Justice of the concerned High court shall ask for the response of the judge concerned. If on a consideration of the allegations in the complaint in the light of the response of the Judge concerned the Chief justice of the High Court is satisfied that no further action is necessary or if he is of the opinion that the allegations contained in the complaint need a deeper probe, he shall return the complaint to the CJI along with a statement of the response of the Judge concerned and his comments.

(3) After considering the complaint in the light of the response of the judge concerned and the comments of the Chief justice of the high court, the CJI, if he is of the opinion that a deeper probe is required into the allegations contained in the complaint, shall constitute a three member Committee consisting of two Chief justices of High Courts other than the High Court to which the Judge belongs and one High Court Judge. The said Committee shall hold an inquiry into the allegations contained in the complaint. The inquiry shall be in the nature of a fact finding inquiry wherein the Judge concerned would be entitled to appear and have his say. But it would not be a formal judicial inquiry involving the examination and cross-examination of witnesses and representation by lawyers.

[92]Read more at: http://www.oneindia.com/india/mp-hc-sexual-harassment-case-matter-closed-judge-gets-clean-chit-1825972.html

(4) For conducting the inquiry the Committee shall devise its own procedure consistent with the principles of natural justice.

(5)(i) After such inquiry the Committee may conclude and report to the CJI that (a) there is no substance in the allegations contained in the complaint, or (b) there is sufficient substance in the allegations contained in the complaint and the misconduct disclosed is so serious that it calls for initiation of proceedings for removal of the Judge, or (c) there is substance in the allegations contained in the complaint but the misconduct disclosed is not of such a serious nature as to call for initiation of proceedings for removal of the Judge.
(ii) A copy of the Report shall be furnished to the judge concerned by the Committee.

(6) In a case where the Committee finds that there is no substance in the allegations contained in the complaint, the complaint shall be filed by the CJI.

(7) If the Committee finds that there is substance in the allegations contained in the complaint and misconduct disclosed in the allegations is such that it calls for initiation of proceedings for removal of the Judge, the CJI shall adopt the following course :-
(i) the Judge concerned should be advised to resign his office or seek voluntary retirement;
(ii) In a case the judge expresses his unwillingness to resign or seek voluntary retirement, the chief justice of the concerned High Court should be advised by the CJI not to allocate any judicial work to the judge concerned and the President of India and the Prime Minister shall be intimated that this has been done because allegations against the Judge had been found by the Committee to be so serious as to warrant the initiation of proceedings for removal and the copy of the report of the Committee may be enclosed.

(8) If the Committee finds that there is substance in the allegations but the misconduct disclosed is not so serious as to call for initiation of proceedings for removal of the judge, the CJI shall call the Judge concerned and advise him accordingly and may also direct that the report of the Committee be placed on record."

A perusal of the observations made by this Court reveals that the existence of the "in-house procedure" is now an established means for inquiring into allegations levelled against a judge of a superior court, through his peers. It is a confidential inquiry for institutional credibility under the charge of the Chief Justice of India. And therefore, its affairs are to be kept out of public domain. The proceedings under the above procedure being sensitive, are required to be inaccessible to third parties. And therefore, the prayer seeking the disclosure of the report submitted on the culmination of the "in-house procedure" was declined. The object sought to be addressed through the "in-house procedure", is to address concerns of institutional integrity. That would, in turn, sustain the confidence of the litigating public, in the efficacy of the judicial process.

It is impermissible to publicly discuss the conduct of a sitting judge, or to deliberate upon the performance of his duties, and even on/of court behaviour, in public domain. Whilst the "in-house procedure" lays down means to determine the efficacy of the allegations levelled, it is now apparent, that the procedure is not toothless, in the sense, that it can lead to impeachment of the concerned judge under Article 124 of the Constitution of India. Such being the cause, effect and repercussions of the findings recorded during the course of the "in-house procedure", this Court in Indira Jaising's case (supra) declined to entertain the writ petition filed at the behest of a third party, seeking details of the proceedings, and the consequential report prepared by the committee of judges. But, that should not

be understood to mean, that an individual concerned, who is called upon to subject himself/herself to the contemplated procedure, should be precluded or prevented from seeking judicial redress. It is now well understood, that an individual who subjects himself/herself to the jurisdiction of an authority, cannot turn around to find fault with it at a later juncture. If there is a fault, the same should be corrected, before one accepts to submit to the jurisdiction of the concerned authority. The submission of the petitioner in the present case, to the "two-Judge Committee", would certainly have had the above effect. We are therefore satisfied to hold, that those who are liable to be affected by the outcome of the "in-house procedure", have the right to seek judicial redressal, on account of a perceived irregularity. The irregularity may be on account of the violation of the contemplated procedure, or even because of contemplated bias or prejudice. It may be on account of impropriety. The challenge can extend to all subjects on which judicial review can be sought. The objections raised on behalf of respondent No. 3, in respect of the sustainability of the instant petition at the hands of Addl. D&SJ 'X', are therefore wholly untenable. The challenge to the maintainability of the instant writ petition, is accordingly declined.

Seven steps of in-house procedure

For recording our conclusions, we have endeavoured to explain the same through "seven steps" contemplated therein. The description of the "in-house procedure", relating to sitting High Court Judges, is being narrated hereunder, stepwise:

Step one: (i) A complaint may be received, against a sitting Judge of a High Court, by the Chief Justice of that High Court;
(ii) A complaint may also be received, against a sitting Judge of a High Court, by the Chief Justice of India;
(iii) A complaint may even be received against a sitting Judge of a High Court, by the President of India. Such a complaint is then forwarded to the Chief Justice of India;
In case of (i) above, the Chief Justice of the High Court shall examine the contents of the complaint, at his own, and if the same are found to be frivolous, he shall file the same.
In case of (ii) and (iii) above, the Chief Justice of India shall similarly examine the contents of the complaint, by himself, and if the same are found to be frivolous, he shall file the same.

Step two: (i) The Chief Justice of the High Court, after having examined a complaint, may entertain a feeling, that the complaint contains serious allegations, involving misconduct or impropriety, which require a further probe;
(ii) The Chief Justice of India, on examining the contents of a complaint, may likewise entertain a feeling, that the complaint contains serious allegations, involving misconduct or impropriety, which require a further probe;
In case of (i) above, the Chief Justice of the High Court, shall seek a response from the concerned Judge, and nothing more.
In case of (ii) above, the Chief Justice of India, shall forward the complaint to the Chief Justice of the High Court. The Chief Justice of the High Court, shall then seek a response from the concerned Judge, and nothing more.

Step three: The Chief Justice of the High Court, shall consider the veracity of the allegations contained in the complaint, by taking into consideration the response of the concerned Judge. The above consideration will lead the Chief Justice of the High Court, to either of the below mentioned inferences:

(i) The Chief Justice of the High Court, may arrive at the inference, that the allegations are frivolous. In the instant eventuality, the Chief Justice of the High Court shall forward his opinion to the Chief Justice of India.
(ii) Or alternatively, the Chief Justice of the High Court, may arrive at the opinion, that the complaint requires a deeper probe. In the instant eventuality, the Chief Justice of the High Court, shall forward the complaint, along with the response of the Judge concerned, as also his own consideration, to the Chief Justice of India.

Step four: The Chief Justice of India shall then examine, the allegations contained in the complaint, the response of the concerned Judge, along with the consideration of the Chief Justice of the High Court. If on such examination, the Chief Justice of India, concurs with the opinion of the Chief Justice of the High Court (that a deeper probe is required, into the allegations contained in the complaint), the Chief Justice of India, shall constitute a "three-member Committee", comprising of two Chief Justices of High Courts (other than the High Court, to which the Judge belongs), and one High Court Judge, to hold an inquiry, into the allegations contained in the complaint.

Step five: The "three-member Committee" constituted by the Chief Justice of India, shall conduct an inquiry, by devising its own procedure, consistent with the rules of natural justice. On the culmination of the inquiry, conducted by the "three-member Committee", it shall record its conclusions. The report of the "three-member Committee", will be furnished, to the Chief Justice of India. The report could lead to one of the following conclusions :

That, there is no substance in the allegations levelled against the concerned Judge; or that there is sufficient substance in the allegations levelled against the concerned Judge. In such eventuality, the "three-member Committee", must further opine, whether the misconduct levelled against the concerned Judge is so serious, that it requires initiation of proceedings for removal of the concerned Judge; or that, the allegations contained in the complaint are not serious enough to require initiation of proceedings for the removal of the concerned Judge.
In case of (i) above, the Chief Justice of India, shall file the complaint.
In case of (ii) above, the report of the "three-member Committee", shall also be furnished (by the Committee) to the concerned Judge.

Step six: If the "three-member Committee" constituted by the Chief Justice of India, arrives at the conclusion, that the misconduct is not serious enough, for initiation of proceedings for the removal of the concerned Judge, the Chief Justice of India shall advise the concerned Judge, and may also direct, that the report of the "three-member Committee" be placed on record. If the "three-member Committee" has concluded, that there is substance in the allegations, for initiation of proceedings, for the removal of the concerned Judge, the Chief Justice of India shall proceed as under :-
(i) The concerned judge will be advised, by the Chief Justice of India, to resign or to seek voluntary retirement.
(ii) In case the concerned Judge does not accept the advice of the Chief Justice of India, the Chief Justice of India, would require the Chief Justice of the concerned High Court, not to allocate any judicial work, to the concerned Judge.

Step seven: In the eventuality of the concerned Judge, not abiding by the advice of the Chief Justice of India, the Chief Justice of India, as indicated in step six above, the Chief Justice of India, shall intimate the President of India, and the Prime Minister of India, of the findings of the "three-member Committee", warranting initiation of proceedings, for removal of the concerned judge.

It is apparent from the "seven steps", of the "in-house procedure", for sitting High Court Judges, that the role of the Chief Justice of the High Court, is limited to the first three steps.

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

Smt. Sushila Nagar v. The High Court of Judicature for Rajasthan & Ors.[93]

Hon'ble the Chief Justice Shri S.N. Jha

Hon'ble Shri Justice Ajay Rastogi

CASE SUMMARY

Background

An unusual writ petition by a Judicial Officer and member of the Rajasthan Judicial Service who filed complaint alleging sexual harassment at the hands of fellow judicial officers. Not satisfied with the result of the enquiry she has now approached this Court on judicial side seeking directions as under:

(1) by an appropriate writ, order or directions quash and set aside the order dated 18.10.2003 rejecting the application for amending the charge. It should be directed that the charge against the respondentNo.2 may be reframed as prayed for in the application dated 6.9.2003 (Annexure-20).

(2) by an appropriate writ, order or directions this Hon'ble Court may further be pleased to direct the respondent No.1 proceed against the four remaining officers named in the complaint of the petitioner (Annexure-1) who have been exonerated in the preliminary enquiry.

(3) by an appropriate writ, order or direction that the respondent No.3 the State Government may be directed to take statutory steps to enforce the norms and guidelines prescribed by the Hon'ble Supreme Court in Vishakha's case and create adequate infrastructure for the same.

(4) That the respondent No.1 may be directed to take all proper steps to enforce the norms and guidelines prescribed with Hon'ble Supreme Court with regard to gender discrimination and sexual harassment.

Factual Matrix

The case of the petitioner briefly stated is that on her appointment to the Rajasthan Judicial Service she was posted as Additional Munsif and Judicial Magistrate at Ajmer in March, 1992. Shri Uma Shanker Vyas, a batch senior to her, was also posted there. In the beginning he tried to be intimate with her and later tried to make advances. He then spread rumours about her character. Once he was admonished by the then District Judge, Ajmer Shri D.C. Dalela. On intervention of other judicial officers, however, he submitted a written apology on 22.8.1992 and the petitioner did not pursue the matter.

The petitioner has then referred to the conduct of Shri Magha Ram Choudhary posted as Additional Chief Judicial Magistrate No.1, Ajmer from 1992-94. According to the petitioner he was an elderly person and she gave him due respect. But, strangely, she started receiving anonymous letter which she finally found had been written by him. Letters contained "adolescent expressions tending to be some time romantic".

[93] 2004 [2006] RD-RJ 1698

Inquiry Report

The enquiry was held by the Registrar General (Vigilance) who submitted report on 9.11.2001 recommending disciplinary action against Shri Magha Ram Choudhary and Shri K.C. Singhal. Shri Uma Shanker Vyas, Shri Narendra Kumar Purohit, Shri Rakesh Kumar Mathur and Shri Vinay Kumar Goswami were let off. The petitioner submitted a number of applications to supply her copy of the enquiry report and other related documents but it was only in September, 2003 that copy of the report was supplied. She submitted representation against the enquiry report immediately on 23.9.2003.

It may be stated here that the conduct of Shri K.L. Vyas does not appear to have been examined because he had superannuated from service and died soon after. Shri K.C. Singhal was compulsorily retired and in the circumstances the departmental proceeding commenced against Shri Magha Ram Choudhary alone. The charge-sheet served on him referred to the period 10.6.1992 to 25.5.1993 even though, according to the petitioner, the enquiry report adverted to allegations for the subsequent period too**. Her case is that she pointed out the mistake to the Registrar (Vigilance) who was acting as the Presenting Officer in the departmental enquiry.** He moved application for amendment of the charge on 6.9.2003. The Enquiry Judge (a sitting Judge of the High Court) however, by order dated 18.10.2003 rejected the application. The petitioner also made allegation against previous Enquiry Judge and, it is said, on her complaint on 30.9.2002 the Enquiry Judge was changed.

Contention on behalf of petitioner

In the rejoinder to the reply of the High Court, the petitioner has stated that the preliminary enquiry was not held according to law and it was eyewash. No opportunity of cross-examination was given to prove her case. The complaint filed by the petitioner was not dealt with as per the directions of the Supreme Court in *Vishakha's case*. The petitioner has tried to find fault with the preliminary enquiry report asserting that no reasonable person could reject the allegations in view of the materials which had been placed on record. She has denied that the orders passed by the High Court on administrative side were communicated to her, it was only through newspapers that she came to know about them.

Contentions on behalf of High Court

On behalf of the High Court, it was submitted that the petitioner filed complaint only after the Full court issued show cause notice on 24.5.2001 for committing acts of impropriety. The complaint related to incidents which had allegedly happened years ago.

In any view, the matter was got enquired into, but the enquiry revealed prima facie case against only Shri Magha Ram Choudhary and Shri K.C. Singhal, and not against the rest. The correctness of findings which was approved by the Chief Justice cannot be gone into in a proceeding under Article 226 of the Constitution.

Judicial review, according to the counsel, is permissible only in cases of illegality, procedural irregularity, irrationality and proportionality. So far as the complainant is concerned, he/she can only assist the Enquiry Authority. The question of delinquency or misconduct is basically between the delinquent and the employer and the complainant cannot pursue the matter beyond a certain point.

On behalf of the respondent-officers it was submitted that the writ petition is not maintainable as the cause of action is said to be rejection of the application for amendment of charge, but if the

Presenting Officer was not aggrieved by the order, the petitioner has no *locus standi* to challenge the same. Not only the complaint was filed after years of the alleged incident, the writ petition was also filed after three years of the preliminary enquiry. Counsel appearing for the officers reiterated the

stand of the High Court that the reliefs sought by the petitioner are beyond the scope of judicial review as the Court cannot sit in appeal over the findings in the preliminary enquiry and re-appraise the evidence and reach a different conclusion. On pleadings of the parties and the submissions made, two questions broadly arise for consideration first, whether the enquiry was not held in accordance with law and whether there has been violation of the guidelines laid down in Vishakha case; and second, whether the complainant can seek amendment of the charge and/or challenge the findings of the enquiry officer in the preliminary enquiry and, further, seek direction to initiate departmental enquiry against the persons accused of misconduct.

Observation of the Court

Misconduct is misconduct and irrespective of the date of the offence, enquiry into complaints of sexual harassment after the judgment in Vishakha case will have to be dealt with in accordance with the guidelines. As a matter of fact, the judgment does not enact any law, it only recognizes the fundamental rights of working women under Articles 14, 15, 19 and 21 of the Constitution of India and fixes guidelines for enforcement of those rights.

Court accepted the contention of the petitioner that Complaints Committee constituted in accordance with the guidelines, that is to say, by a Committee headed by woman judge and comprising of women - not less than half as members. Further, some NGO should have been associated with the enquiry. **Preliminary Enquiry, held by the Registrar (Vigilance) in the instant case, therefore was not in accordance with law.**

We have given our anxious consideration to the submissions of the counsel. In our understanding, the Complaints Committee referred to in the Guidelines is intended to be a permanent committee or body in every department which can look into complaints relating to sexual harassment at workplaces as a fact finding body. The enquiry by the Complaints Committee is different from disciplinary enquiry. Where the enquiry by the Complaints Committee reveals facts amounting to any offence under Indian Penal Code or any other law the employer is required to initiate appropriate action in accordance with law, and where the enquiry reveals conduct amounting to misconduct in employment as defined in the relevant service rules, appropriate disciplinary action is required to be taken by the employer in accordance with the concerned rules.

Adverting to the instant case, admittedly, the preliminary enquiry was held as precursor of regular departmental enquiry. It is almost a practice in this Court to hold a preliminary enquiry before holding departmental enquiries under rules 16 or 17, as the case may be, of the Rajasthan Civil Service (CCA) Rules. The point for consideration is where preliminary enquiry is held in which statements of witnesses are recorded, documents are received in evidence and thereafter findings are reached about existence of prima facie case necessitating regular enquiry, the enquiry so held can be said to be falling short of the enquiry contemplated in Vishakha case so as to warrant a further enquiry? As seen above, the objection of enquiry by Complaints Committee is to verify facts, prima facie, to find out as to whether the conduct alleged amounts to `criminal offence' or `misconduct', but where an enquiry is held " in accordance with the rules" to use the phraseology in guideline 5, the direction of the Supreme Court must be deemed to have been substantially complied with.

Held

As per the facts and circumstances of the case, it cannot be said that the enquiry was superficial or perfunctory. It is not the case of the petitioner that she was denied opportunity to participate in the enquiry. In fact, as seen above, she examined witnesses, besides herself, and produced documents which were taken into consideration. Had this been a case of total denial of opportunity to the

petitioner to substantiate her case, the position might have been different. Opportunity of hearing having been allowed and the enquiry held in accordance with the settled practice and procedure of this Court, in the absence of any procedural error it is not possible to direct a departmental enquiry against the concerned officers. Relief no.2 which is the main relief sought by the petitioner and essence of her case thus cannot be granted. Apropos relief no.1, that is, quashing of the order of the Enquiry Judge by which the application for amendment of the charge was rejected, we find substance in the stand of the respondents that no such application having been filed by the petitioner for amendment of charge, she cannot make any grievance of the order on merit. It may not be out of place to mention that while rejecting the application for amendment of charge, the Enquiry Judge noticed that the allegations related to the period 10.6.1992 to 25.5.1993 and there was no justification to amend the charge so as to cover the subsequent period.

Before closing the discussion, we may briefly deal with the submission of Ms. Indira Jaisingh that after the petitioner made complaint in 1992 as many as ten charge-sheets were issued against her. The High Court has enclosed statement giving particulars of the complaints and the action taken thereon against the petitioner. It appears that in all 21 complaints were received between 1993 and 19.7.2004 out of which nine were `filed' and in one of them she was exonerated. In one complaint advisory remark was issued against which appeal was pending at the relevant time. Some complaints have been shown to be pending which include five departmental enquiries three under rule 16 (for major penalties) and two under rule 17 (for minor penalties), as mentioned above. The charge-sheets in these enquiries were issued respectively on 22.9.2000, 20.1.2001, 6.6.2001, 28.7.2001 and 21.12.2001. Thus two enquiries were initiated prior to the date of the complaint of the petitioner on 22.9.2000 and 20.1.2001. Be that as it may, it cannot be said that the petitioner was slapped with departmental enquiries only because she dared to make complaint against the concerned officers as suggested on behalf of the petitioner.

In the above premises, we conclude that no case has been made out for interference by this Court. The writ petition is accordingly dismissed along with miscellaneous applications, if any.

Sexual Harassment in the Workplace Guidelines and norms laid down by the Hon'ble Supreme Court *in Vishaka and Others v. State of Rajasthan and Others*[94]

HAVING REGARD to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993, TAKING NOTE of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time, It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the Employer or other responsible persons in work places and other institutions:
It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

[94] (JT 1997 (7) SC 384)

2. Definition:
For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
a) physical contact and advances;
b) a demand or request for sexual favours;
c) sexually coloured remarks;
d) showing pornography;
e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:
All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:
Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.
In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism:
Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:
The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.
The Complaints Committee should be headed by a woman and not less than half of its member should be women.

Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.
The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:
Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:
Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.

10. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.
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- **Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment?**

- **Is physical contact with the female employee an essential ingredient of such a charge?**
- **Does the allegation that the superior tried to molest a female employee at the place of work, not constitute an act unbecoming of good conduct and behaviour expected from the superior?**

These questions came before SC in ***Apparel Export Promotion Council v. A.K. Chopra***[95]and SC answered it affirmatively and held that, "sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India."

In this case Court also referred to ILO Seminar held at Manila, wherein it was recognized that sexual harassment of woman at the work place was a form of gender discrimination against woman. Court asserted that, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.

Hon'ble SC also considered the message of international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.

[95] AIR 1999 SC 625

Session-10:
Contribution of Registrar (Vigilance/ Intelligence) in maintaining Higher Judicial Standards

JUDICIAL ETHICS: EXPLORING MISCONDUCT AND ACCOUNTABILITY FOR JUDGES[96]

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This paper has attempted to present some of the ethical issues that are faced by the Judiciary. The paper explores the usefulness of Judicial Codes of Conduct as an answer to uncertainty and increased public scrutiny on judicial accountability. Author observed that, there is an unfortunate perception that Judicial Codes are somehow a punishment for judges who do not meet the ethical standards of office.

Author tried to demonstrate that, 'Codes of Conduct' are a useful and increasingly necessary tool for judges. The values and standards required of a judge vary with changes in the society that underlies the judiciary and it is important that judges be aware of these changes. This paper has looked at some of the ethical issues facing judges and the importance of appropriately responding to these issues.

The research work in its various aspects is comparative but generally Canadian perspective is more dominant. However, this work is very relevant on many counts. It starts with the traditional role of judges and wherein author stressed on the need of High Standards of behaviour from judicial officers. In the next segment of the paper, author dealt with qualities of good judges and need for judicial ethics and paper also focuses on the need for ascertaining the parameters for assessment of judicial ethics.

In the succeeding segment author appraises the growth of Judicial Codes, and author viewed that media scrutiny vis-a-vis non-judicious behaviour of the judicial officers eroded the public confidence.

In the concluding part, author stressed on the need of judicial education, and especially relating to ethical realities and issues relating to it. He tried to demonstrate with help of various illustrative cases that the public and private life of judges needs to be balanced so as to maintain judicial aloofness and to avoid possibility of bias. Interesting and thought provoking observations are also made on the issues relating to sexual harassment and author ends with various kinds of sanctions can be made operative against delinquent judicial officers.

Justice is not settled by legislators and laws - it is in the Soul;
It cannot be varied by statutes, any more than love, pride, the attraction of gravity, can;
It is immutable - it does not depend on majorities - majorities or what not,
come at last before the same passionless and exact tribunal.

[96] Find the full article at: http://cjei.org/publications/mackay.html visited on: 04/09/2015 at: 23:03

For justice are the grand natural lawyers, and perfect judges -it is in their Souls;
It is well assorted - they have not studied for nothing- the great includes the less;
They rule on the highest grounds - they oversee all eras, states, and administrations.
The perfect judge fears nothing - he [she] could go front to front before God;
Before the perfect judge all shall stand back - life and death shall stand back - heaven and hell shall stand back.
- Walt Whitman

I. The Traditional Role of the Judge

The importance of the role of judges in our society is a respected and well recognized historical fact. Jeffrey M. Shaman, Director of the Center for Judicial Conduct, in his article "Judicial Ethics" indicates the power of judges in society.

Judges are important public officials whose authority reaches every corner of society. Judges resolve disputes between people, and interpret and apply the law by which we live. Through that process, they define our rights and responsibilities, determine the distribution of vast amounts of public and private resources, and direct the actions of officials in other branches of government.

The extraordinary power invested in the judicial office demands a high standard of behaviour. Perhaps the earliest affirmation of the requirements of conduct for judges, particularly commonwealth judges, can be found in a 1346 statute in the time of Edward III.

We have commanded all our justices that they shall from henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person, and without omitting to do right for any letters or commandments which may come to them from us, or from any other, or by any other cause.

For six hundred years the judiciary has been guided by these principles: the commitment to uphold the law and to do so in an impartial and unbiased manner. These fundamental principles are affirmed in the Oaths of Office that are required of judges. An example of the Oath required is that of the English Judiciary:

I do swear that I will well and truly serve our sovereign... and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will...

Despite the affirmation of these principles, they were not always adhered to. There was until 1725 the custom of judges selling offices which they had the power to appoint. More recently the Marshall Inquiry and the Hryciuk Inquiry brought into public controversy the behaviour of judges. When these principles are ignored they bring the justice system into disrepute. These two Canadian cases concerning alleged misconduct on the part of judges will be explored in more detail later in this piece.

ii. The Judicial Role: Myths and Realities

The late Chief Justice Bora Laskin listed a number of qualities which he felt were essential to being a good judge - **character; integrity; honesty; industry; life experience, which can include politics; flexibility of mind; knowledge of the law; willingness to listen - but indicated that not all were easily ascertainable in advance, and some "must be taken on expectancy."**

An empirical study of Alberta judges conducted by P. McCormick and I. Greene shows that knowledge of the law was not at the top of the list of desirable qualities identified by the judges themselves. McCormick and Greene asked judges, from the Provincial Court to the Court of Appeal, what characteristics they thought made good judges. The top seven most mentioned qualities in order of frequency were as follows:

1. industry, diligence
2. courtesy

3. empathy
4. patience
5. knowledge of the law
6. intelligence
7. sense of fair play

These judges esteemed humanity, patience and courtesy at roughly the same level as knowledge of the law or intelligence. Equally interesting were some of the qualities that were mentioned only once or twice: independence and objectivity. It is ironic to note that text writers and judicial councils tell us this is the very essence of being a judge. These clashes with the judicial self-assessment of the qualities required for good judging. Yet the traditional version of the judge continues to dominate the public's perception. It is necessary to expose these myths if express codes of conduct are to be accepted.

One of the burdens of being a judge is that one is expected to rise above mere mortal status and dispense justice with an objectivity that borders on the divine. Independent from the pressures of everyday life and free of political influences, the judge is to resolve difficult legal disputes with the wisdom of a Solomon. This is the idealized version of the judge and is at best something to aspire to. It tends to obscure the human dimensions of the practical task of judging.

I conclude by reminding you that the law has two faces. It is, firstly, a practical craft and one whose texture is highly technical and precise. It is, secondly, a human process whose polar star is the protection and development of human dignity.
Given the high expectations that we have for judges, it is little wonder that we forget that they are human beings with the attendant strengths and weaknesses. Judges should aspire to objectivity but they cannot avoid being shaped by their background and life experiences.

The element of objectivity clearly distinguishes the judiciary from the other branches of government and makes its members the logical choice to chair a government commission. Judges are prized for their impartiality and willingness to listen to all sides of an argument with an open mind. Allegations of bias or partiality would be fatal to public confidence in the judiciary, so cautious restraint was seen as the best road to neutrality. Judges were also expected to stay away from the legislative or policy role or engage in it in a very limited way:
In spite of the judge's role as legislator, justice must be administered according to law, not according to the judge's individual sense of justice. The judge's legislative competence is narrower than that of the legislator. His/her role is to legislate between the gaps, to fill the open spaces in the law. Thus the rule of law is maintained.

Any suggestion that judges were adjudicating in a biased fashion was not taken lightly. When members of the press were impertinent enough to suggest that the Supreme Court of Canada, headed by the late Chief Justice Laskin, favoured the federal government in relation to the constitutional distribution of powers, the response was quick and to the point. Then Chief Justice Laskin responded as follows:
The allegation is reckless in its implications that we have considerable freedom to give voice to our personal predilections and thus to political preferences. We have no such freedom, and it is a disservice to the present members of this Court and the work of those who have gone before us to suggest a federal bias because of federal appointment. Do we lean? Of course we do, in the direction in which the commands of the constitution take us, according to our individual understandings.

Many judges and lawyers still accept this traditional view of the judge, but others have begun to question how objective one can really be even in pursuit of the correct legal solution. Even Professor Ronald Dworkin, who continues to have faith in the ability of the **"Herculean judge" to distinguish between law and politics and find the correct legal answer, admits that objectivity is more of an ideal than a reality.**

There is beginning to emerge a more modern conception of the role of the judge which is more tolerant of elements of subjectivity. Those who support this version of the judge argue that to completely factor out all subjective perceptions would make judging mechanical and inhuman. It would also be virtually impossible to do. This more subjective and human judge is not to be substituted for the objective judge. The challenge is to put the two roles together. The argument for representation in the judiciary follows from this paradigm: more perspectives leads to more open mindedness, more ways of seeing things. This in turn destroys stereotypes that may otherwise not be confronted if the dominant image of objectivity is not challenged.

Recognizing one's biases may be the best route to impartial judging. Justice Wilson makes this point by citing the following passage from another judge:
[T]he judge who realizes before listening to a case, that all men have a natural bias of mind and that thought is apt to be coloured by predilection is more likely to make a conscious effort at impartiality and dispassionateness than one who believes that his elevation to the bench makes him at once the dehumanized instrument of infallible logical truth.

This approach to the role of the judge has important implications the scope of judicial ethics. If revealing one's biases as a judge is a positive thing, then judicial expression should be encouraged rather than restrained.
The traditional perspective sends a clear message that a judge must be restrained in most matters and where possible err on the side of caution. This has certainly been the traditional view of the judge, inherited from the United Kingdom, but does it apply to the Canada of the 1990's and beyond? More particularly, should a judge continue to exercise restraint when the 1982 *Canadian Charter of Rights and Freedoms* has cast the judge in the role of a significant policy-maker? As the judge enters the uncharted territory of policy-making, it is even more important that the judge be guided by express standards of ethical conduct rather than rely upon his or her innate common sense. As judicial power grows so does the need to adhere to clear ethical standards.

iii. Judicial Power
Judge Learned Hand eloquently identified the centrality of judges to the administration of justice in his decision in *Brown* v. *Walter*:
Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge.
The power a judge has to affect the life and future of individuals and society is tremendous. This power must make demands of ethical standards of conduct that the ordinary citizen is not required to meet. Despite the importance of ethical behaviour, there is very little guidance in most jurisdiction about what is appropriate behaviour. This paper will seek to identify some of the pressing ethical concerns facing judges and the use of judicial codes as a mechanism for establishing and articulating proper standards of conduct.

A recent Canadian case highlighted the importance of having a written standard of conduct for judges. In an inquiry into the conduct of a Provincial Court Judge it became apparent that the misconduct had

been occurring for a number of years, yet this behaviour was only now being questioned. Judges occupy a position of power relative to other actors in the administration of justice. Madame Justice MacFarland indicated in the *Inquiry Re: W.P. Hryciuk a Judge of the Ontario Court*:
While a judge has no official authority over other persons working in the court system, in terms of playing any role in the hiring, firing or otherwise disciplining of those persons, it is apparent that by his very office he plays a significant and unique role in their working lives. Judges must take particular care never to misuse or to abuse that power.

A Code of Judicial Conduct provides a standard against which to assess judicial behaviour. It also serves as a guide to judges about what is and is not acceptable behaviour. While the conduct of Judge Hryciuk was the sexual harassment of lawyers and judges in his domain, and thus should have been recognized by all as unacceptable, there are other kinds of judicial misconduct that are less apparent. It is in these grey areas that the concept of judicial ethics become particularly important. There would likely be widespread agreement that a judge should not abuse his or her position of power but less agreement about what would constitute such an abuse.

B. "Judicial Ethics": A Need for Definition
These are various definitions of judicial ethics and interestingly some dictionaries which provide no definition at all.

The Canadian Law Dictionary
Ethics: The basic principles of right action. "Ethics of a Profession" means the general body of rules, written or unwritten relative to the conduct of the members of the profession intended to guide them in maintaining certain basic standards of behaviour.
An increasingly popular topic of discussion and debate this term remains ill defined.

***Black's Law Dictionary* (6th Ed.)**
Ethics: Of or relating to moral action, conduct, motive or character; as, ethical emotion; also, treating of moral feeling, duties or conduct; containing precepts of morality; moral. Professionally right or befitting; conforming to professional standards of conduct.

Gilmer's Revision: The Law Dictionary
Ethics: no definition.

Stroud's Judicial Dictionary of Words and Phrases
Ethics: no definition.

Ethics is a concept central to the judges role but it is not a well defined concept. To confront some of the issues facing the Judiciary it is first necessary to look at the meaning and requirements of judicial ethics. The Honorable Mr. Justice Thomas of the Supreme Court of Queensland identified two key issues that must be addressed. The identification of standard to which members of the judiciary must be held and a mechanism, formal or informal, to ensure that these standards are adhered to.

Some jurisdictions including the Unites States, Kenya, Tanzania, and South Africa have chosen to provide formal guidance to judicial officers through the use of codes of conduct. Namibia currently has a judicial code under consideration but it is not yet in force. Despite the usefulness of Judicial Codes they are not and will not become substitutes for the ethics of individual judges. The codes are

useful guides and provide a thoughtful analysis of the perceptions and consequences of judicial misconduct. Peter Moser in his article on Judicial Ethics indicates:

[**J]ustice in the courtroom cannot be attained solely by providing standards in a code of judicial conduct. Achieving justice depends significantly upon not only the discretion and abilities of each judge, but upon what that judge does to assure that *every* proceeding is fairly heard and decided and to assure that litigants and the public have confidence in the impartiality and independence of the judiciary. The 1990 *Code* [*Model Code of Judicial Conduct*] provides improved standards under which judges are better able to ensure fairness and justice in litigated matters.**

There is likely to be no clear agreement about what is encompassed in the realm of judicial ethics. While there may be some general principles that have a universal appeal, at least within Commonwealth trained judges, judicial ethics, like most concepts, is context specific. One of the most important contexts is the historical, geographical and political setting in which judges operate. In that respect North American views about what constitutes judicial misconduct may vary from those in Africa. Indeed, there may be substantial differences between various countries within the vast continent of Africa.

In writing this paper I am undoubtedly influenced by my experiences as a Canadian operating in a North American continent that is dominated by the United States of America. There is extensive reference in this paper to the content and evolution of the American Code of Judicial Conduct - not because it is necessarily the best but rather because it is readily available and has attracted the most commentary. It may also be that my frequent reference to the North American experiences will make my conclusions less relevant in a different context. This is a possible problem to which I wanted to alert you. I am confident that much can be learned from a comparative analysis of the problems of judicial ethics.

PART II: JUDICIAL CODES

A. The Rise of Judicial Codes

As media scrutiny increases and public confidence is eroded by judicial scandals, Judicial Ethics has become an increasingly important topic for judges. The only Canadian Jurisdiction with a written code of judicial conduct is British Columbia. However, there has been an increased interest in the development of judicial codes of conduct. The Canadian Bar Association has recently solicited an opinion about the constitutionality of a code of judicial conduct in Canada. At its 1995 annual meetings the Canadian Bar Association intends to debate the following recommendation:

WHEREAS in order to ensure public confidence in the administration of justice and in a demonstrable spirit of openness and transparency, but always ensuring the integrity and independence of the judiciary, there should be an open and credible complaints procedure:

THEREFORE BE IT RESOLVED:
10.11 That the Canadian Judicial Council and its provincial and territorial counterparts develop a Code of Judicial Conduct that includes a list of unacceptable behaviour and graduated levels of sanctions for breaches of the Code.

There has been a recent increase in the use of Judicial Codes in Africa. The Introduction of the *Code of Conduct For Judicial Officers - Kenya* indicates that the development of codes is a response to current opinion:

The need to formulate a code of conduct for the Judiciary was recommended by the Kotut Committee to inquire into the terms and Conditions of Service of the Judiciary (1991- 1993). The same sentiments were unanimously expressed recently during a seminar for Judges and Magistrates on "Judicial Education and Accountability" held in Mombassa between 6th and 9th September 1994.

The underlying emphasis is on openness and public confidence but the development of codes of conduct also has benefits for the Judiciary. The development of codes can provide an opportunity for discussion and canvassing of ethical issues. The code would also serve as a guide for judges. Despite the potential benefits of judicial codes of conduct there has been some resistance to their articulation.

Judicial codes would appear to be a recent phenomenon in many countries including a number of those in Africa. Some African countries have adopted codes at an early stage but many of the codes such as that of Namibia are of recent vintage. The United States is an exception in that it has experimented with various forms of judicial codes since at least the 1920s. This early development in the United States may in part be explained by the American practice of electing some of their judges and the potential increases for judicial misconduct which that may entail. Whatever the reason for its early development, the breadth of the American experience has attracted much comment in this paper. The hope is that we might learn from the successes and failures of the American experience.

B. Resistance to Judicial Codes

i. Judicial Independence

Judicial independence is often cited as the reason why judges should not be restricted by codes of conduct.

No change is tolerable which renders judicial tenure insecure, which undermines the position of respect in which judges are traditionally held, or, in short, which directly or indirectly threatens the independence of the judiciary.

Independence has always been considered a cardinal feature of the role of a Judge. However, the reason for this grant of independence must not be lost. Mr. Justice McGarvie indicated:

It is important in this area not to cast a good principle too widely. The only independence which I seek to justify within the principle of judicial independence, is that which, if absent, would put at risk impartiality in deciding court cases.

The premise underlying the grant of judicial independence is that it is in the interest of justice. It is also vital that the independence be vested in persons who will behave in an ethical manner in their judicial and personal lives.

There is recognition in Judicial Codes that the cardinal feature of the justice system is still independence. In the preamble of the *Code of Conduct For Judicial Officers - Kenya* there is a recognition that the Code is intended to promote and not inhibit independence.

[T]his code contains several general rules of conduct to be observed by a judicial officer so as to maintain integrity and independence and to uphold the dignity of the judicial office.

The independence to be respected must be seen as existing to protect the impartiality of judicial decisions and not the personal interests of the judges. With this understanding it is necessary to reconsider the use of judicial codes of conduct. The question that must be asked is whether the requirement of independence is impinged by requiring certain standards of conduct in judges.
There is a commonly held view that setting judicial standards of conduct and making judges accountable for their breach will interfere with the independence of the judiciary. This conflict between independence and accountability is more apparent than real. I have argued elsewhere that judicial independence and accountability are mutually supportive. The ultimate goal of both concepts is to advance impartial justice and increase public confidence in the capacity of judges to do so. A recognition of this view might decrease the resistance of judges to the articulation of judicial codes of conduct.

C. Creating a Judicial Code

One concern with the development and use of Codes of Judicial Conduct is that they allow the legislative branch of the government too much input into the conduct of judges. However, codes do not have to emanate from the legislature. Another concern is that the code will be rigid and unrealistic and interfere with the judges' primary responsibility. To explore these concerns it is useful to look at the American experiences, particularly the American experience in revising its *Code* in 1990.

i. Revising the Code: The American Experience

The American *Code* is not an inflexible or frozen instrument: it is revised to reflect changing realities and new concerns. The revision of the American Code is a long process with a tremendous amount of input from a variety of sources.

The ABA Standing Committee on Ethics and Professional Responsibility began revising the *Code* in 1986. A Sub Committee on Judicial Conduct was appointed. The Committee held public hearings and consulted formal sources, and advisers. They conducted a complete study of existing codes, legal literature, law review articles, and statistical studies. Judges at both the federal and state levels were sent surveys. Surveys were also sent to all state judicial conduct organizations, to the conferences of the American Bar Association Judicial Administrative Division, and to the American Judicature Society.

The process of revision was a long one, extending over three years. This process demonstrates that judicial codes are not just legislative documents imposed on judges but rather comprehensive and well researched attempts to assist judges in maintaining a very difficult position in the community. The revision of *Model Code of Judicial Conduct* is the result of a cooperative effort on the part of the public, judges, judicial and legal institutions. Codes need not be the dictates of the legislators, and they should be capable of growth and evolution.

ii. New Judicial Codes: The African Experience

There has been a recent upsurge in popularity of Judicial Codes in Africa most recently in Namibia. The Code adopted in Tanzania in 1984 is innovative in that it was not a legislative mandate. The code indicates it was adopted by the Judges' and Magistrates' Conference.

The Kenyan Code was also the result of judicial interest. The unanimous sentiments expressed at a seminar for Judges and Magistrates was instrumental in the creation and adoption of the Code.
It is critical to the effectiveness of the Code that it have the respect and the support of the judiciary. The development of a code also allows judges and magistrates the opportunity to address concerns

and establish guidelines. The support and interest in establishing and adopting codes by the Judicial Officers in Africa is indicative of the importance of and desire for standards.

PART III: *THE BENEFICIARIES*

A. The Public

i. Public Confidence

The judiciary does not exist in isolation. It is an institution of particular societies. Judges require the respect and faith of the communities they serve to be effective. Public confidence is critical to the administration of justice.

In a democracy, the enforcement of judicial decrees and orders ultimately depends upon the public co-operation. The level of co-operation, in turn depends upon a widely held perception that judges decide cases impartially... . Should the citizenry conclude, even erroneously, that cases were decided on the basis of favouritism or prejudice rather than according to law and fact, then regiments would be necessary to enforce judgements.

The public at large benefits from having an understanding of the rigorous ethical standards to which a judge is held. Analogous to the oft sighted "Justice must not only be done but be seen to be done" is the fact that judges must not only be ethical but must be seen to be ethical. Educating the community about the role of judges is gaining recognition as a key element of maintaining the respect for the Judiciary. Making judges accountable for their conduct is another vital aspect of maintaining public respect for judges.

ii. An American Study: Perception of Bias

An argument is often made that judges are capable of regulating their own behaviour and that a code of ethics is not necessary. However, a judge may not be aware of how his or her activities are perceived. As an example of the importance of Judicial Codes of Conduct this paper will now discuss a recent revision to the American *Model Code of Judicial Conduct*. Among the revisions made to the code in 1990 was a change in *canon 2* by the addition of Section 2C. This section indicates:

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of sex, religion or national origin.

A situation arose in Louisiana, one of the states of the United States, which allowed a more detailed examination of the ramifications of this section. Due to litigation concerning the new section of the Code, the president of a public opinion and research consulting company was hired to conduct opinion polls in the area. This study provides an excellent example of public perception about the judiciary and its role.

In this study a Federal District Judge for the Eastern District of Louisiana was an active member of an elite New Orleans social club. This club was involved in litigation with the City of New Orleans and the Judge also presided over several lawsuits involving members of this club as participants or counsel in the lawsuits.

The methodology of the study was to interview between September 8th and 12th, 1993, a total of 814 residents in thirteen parishes (counties in New Orleans). The results of this study indicate that a high percentage of the people surveyed believed that the judge's treatment of issues and his decision would

be influenced by membership in the club. This study clearly demonstrates that the public is responsive to personal choices a judge makes, and the public's reaction to these choices affects its perception of the justice system. Matters of ethical conduct do have a clear impact on the general perception about the legitimacy of judicial decision-making.

iii. Impartiality: Objectifying the Standard of Conduct

Another feature of Judicial Codes of Conduct is that they objectify the conduct of judges. As the Court indicated in *Pepsico, Inc.* v. *McMillan*:

The test for an appearance of partiality is meant to be an objective one, whether an objective, disinterested observer fully informed of the relevant facts would entertain a significant doubt that the judge in question was impartial.

This creates a standard of a reasonable observer and not the subjective standard of a particular judge. This standard is more likely to prevent situations where the public questions the impartiality of a judge. This will increase the likelihood of public confidence in the Judiciary. Codes can provide a concrete measure of whether judges are achieving the high standards which we expect of them.

The existence of judicial codes provides a tremendous opportunity for educating the public about the ethical standards to which the judiciary holds itself. It can be argued that while justice has a face it should not have a personality. A Judicial Code of Ethics reassures the public that decisions are not the result of an individual judges preferences and biases. Justice must not only be blind but also appear to be blind. Judicial Codes can help reinforce this view.

B. The Judiciary

i. Judicial Education: Bringing Ethics into the Light

A concern that faces the individual judge is how to identify and define the standard of behaviour to which he or she should adhere. Many jurisdictions, including Canada, lack a judicial code of conduct that would provide guidance. Mr. Justice Thomas indicates that one of the challenges that judicial ethics face is the lack of a forum for discussion.

In the absence of known criteria, one tends to approach questions of conduct from a personal standpoint. Perhaps judges hesitate to discuss this topic because discussion may invite scrutiny of the judge's own conduct, values and taste; and there is grave danger of treading on the sensitivity of other judges.

Ethical behaviour is often considered a very personal characteristic and judges may be reluctant to engage in discussions on the topic. Judges, especially judges in rural or isolated areas, may lack the opportunity to regularly communicate with their peers. This prevents the exchange of experience and information.

The development, updating and implementation of Judicial Codes of Conduct provide an opportunity for discussion within the Judiciary, without individual judges feeling they are under attack. The American experience with revision demonstrates that the use of a standard formula of conduct can be an opportunity to solicit feedback from other organizations and the public. The African codes provide the same kind of opportunity as is evidenced by educational sessions such as the ones for which this paper was prepared.

ii. Misunderstandings and loss of respect for the Judiciary

A judge in our society holds a tenuous position: he or she must be like Caesar's wife; or risk embarrassment and censure at the hands of the community and the media. In an increasingly complex society a Code of Judicial Ethics can provide a base for judges to assess their behaviour. It can provide a map (be it ever so general) in largely uncharted seas.

Secure in the knowledge that they can avoid unethical behaviour by following set standards, judges may make decisions in their judicial role or in their private lives that will accord with what people expect of a judge. As indicated in the Louisiana example, public perception can tarnish the ethical judge as easily as the corrupt judge. A code of ethics that addresses concerns and perceptions of the public is of considerable assistance to the well-meaning judge who makes an innocuous but subsequently unwise choice. It is difficult to adhere to standards of conduct if they are not known in advance.

Mr. Justice Thomas discussed some of the ethical concerns that may arise based on what seems like very innocuous behaviour. These include general community involvement, judges advocating certain causes or judges acting as a character witness. According to Constance Dove, executive Director of the California Judges Association: "Judges do not feel confident that they know what the rules are." This situation is likely to be bad for morale as well as performance.

When the American Bar Association's *Model Code of Judicial Ethics* was revised in 1990 it included more commentary. "The Code greatly increases the use of Commentary to give additional guidance and examples to judges." The commentary is particularly useful in providing guidance to judges. The commentary gives the realistic and practical guidance that general statements of ethical principles may lack.

An example of this type of revision would be a section dealing with spouses and close personal relations of a judge. There is recognition of the reality that in many families both parties work and the commentary provides assistance in balancing the judicial role with the reality of a judge's family life. The *Code* removes the judge from ethical isolation and allows him/her to draw on the experience of other judges and surveys of the public to determine the appropriate behaviour. This area is also an illustration of how ethical standards are culturally specific. The concept of the family and the extent to which it should be separated from public life may be quite different in an African country than it is in North America.

In a recent Canadian inquiry into judicial misconduct the judge attempted to excuse his behaviour by indicating he was unaware that such conduct was intolerable. One of his arguments was that in his cultural background there was a different view about what constituted acceptable physical contact in the work place. It is unfortunate that very often the misconduct is inadvertent.

Rather than wilful or knowing violation, most judges who violate judicial ethics do so through inadvertence or pressure of time, failure to recognize the ethical issue or even from ignorance of rules of judicial ethics.

A Judicial Code of Conduct would provide judges with the ability to assess their behaviour against standards of conduct. The existence of a Code protects the unwary but innocent judge and helps to expose the unethical. However, the codes are only a beginning and must be the focus of ongoing discussion and evolution.

PART IV: ETHICAL REALITIES: ISSUES

The effectiveness of Judicial Codes of Conduct depend on how realistic the standards are. Codes must be sensitive to different jurisdictions, and the different situations faced by judges. They must also be sensitive to the different national contexts in which the code is to operate. The following are some examples of concerns that would have to be addressed in developing codes of conduct.

A. Rural Judges

Canada is a large and in some cases sparsely populated country. A real concern in the establishment of judicial standards is the recognition of the differences in the situation between a judge in an urban area and a judge in a rural area. In a rural area judges often know the community well and were, prior to their appointment, active in community affairs. These rural judges do not have the luxury of leaving their judicial persona at the office. Their views and attitudes are common knowledge in the community and their conduct is assessed on that basis. A difficulty with a standard Code of Ethics is that it may ignore the great disparity that may exist between urban and rural settings. The revised American Code provides some assistance in this area by explicitly recognizing the reality of the rural judge. This provides a useful example of the flexibility and pragmatism of the Judicial Codes.

B. Public v. Private Lives

The America Bar Association Code of Judicial Conduct indicates in Canon 2 that a judge should avoid the appearance of impropriety in all his [her] activities. There is a recognition that a judge must accept restrictions on his [her] conduct which would be viewed as burdensome and onerous by an ordinary citizen. Increased media attention and public scrutiny allows judges very little privacy and the behaviour of judges, even in their private capacity, can have serious effects on the public's perception of their impartiality. The Louisiana situation referred to earlier demonstrates the profound effect a personal choice can have on the ability of a judge to fulfil his or her role.

There is a recognition of the reality of judicial office in the *Code of Conduct for Magistrates* in South Africa. The preamble indicated that:

Magistrates as judicial officers are required to maintain high standards of conduct in both their professional and **personal capacities**

Rule 4 provides:

A Magistrate acts at all times **(also in his/her private capacity)** in a manner which upholds and promotes the good name, dignity and esteem of the office of the magistrate and the administration of justice. [Emphasis added]

Clearly it is a well accepted fact that judicial office does not end at the courtroom door. This makes the educational and guidance features of Codes of Conduct even more important.

C. New Issues: Ethical Considerations

The reality of judicial office is changing. Judges are being drawn into sensitive social issues and are coming under increased attack by the media.

One could point to many examples to show that we are living in an era of **confused values, what some have called an ethical crisis**. New situations arise in all areas of society that require constant re-examination of ethical constraints. The judiciary is not immune to this process. Judges need to continually discuss and evaluate their role and conduct.

The increase in the use of *Bills of Rights*, or *Charters of Rights* in many countries has put highly controversial cases before the judiciary. These cases excite strong and diverse opinion. A code of ethics can be helpful in ensuring that both the public and the judges understand the appropriate roles that judges should play. The code can also assist judges in formulating appropriate responses to increased community and media pressures.

In Canada, many moral issues are being brought to Court through the use of Charter challenges to existing laws or government action. Examples of such issues are euthanasia, abortion, and religious and gender equality. The sensitivity of these issues make it imperative that the judiciary be seen as unbiased. Whether or not a country has a *Charter of Rights*, citizens are increasingly turning to judges to resolve difficult moral and ethical problems.

The American revisions to their Code to include Canon 2, section 2(c) and Canon 3B(5) indicate how serious issues like discriminatory behaviour are, and how adverse the *perception* of personal prejudices can be to public confidence in the justice system. The rise in human rights legislation, Charters and other constitutional entrenchments of rights, demonstrates an increased awareness of the importance of equality. The new American Canons are a reflection of changing societal values. The codification of these values ensures that judges will be aware of their ethical obligations and reassures the public about the standards of conduct that are required. It is important that judicial codes be flexible and responsive to ethical changes in society. The response to sexual harassment is another change in society that is important for judicial codes to recognize.

The importance of equality and the absence of discrimination is also recognized in the *Code of Conduct for Judicial Officers - Kenya* in Rule 2:
They [judicial officers] should not be improperly influenced by:
the sex, ethnic or national origin, religions, beliefs, political association of the victim, witness, accused person, plaintiff, or defendant.

This provision is an extremely broad mandate against discriminatory conduct.

i. Sexual Harassment

There is an increased recognition in society that sexual harassment is intolerable. This position is reflected in the standards of conduct we expect from judicial officers. The Hryciuk Inquiry demonstrated Canada's unwillingness to tolerate sexual harassment in its courts. The inquiry found Hryciuk to be an excellent judge, but his misconduct was sufficient to bring into question his ethics. The effect of this conduct on public perception was sufficient to prevent the public from having confidence in Hryciuk's ability to act in his judicial capacity. He was accordingly disciplined for his judicial misconduct.

Judge Hryciuk raised as a defence a lack of awareness of the offensiveness of his conduct. This type of scenario illustrates the importance of making commitments against sexual harassment clear. Unfortunately the American Code is the only code that I have researched, to specifically address the issue of sexual harassment. This is a 1990 revision to the American Code. Canon 3, B (5) provides:
A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by word or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

The mandate against sexual harassment is clarified in the commentary accompanying the Canon:
A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judges direction and control.

This commentary clarifies the conduct required of judges. If such a code had existed in Canada at the time of the misconduct by Judge Hryciuk then the Judge would have been unable to claim that he was unaware that his conduct was inappropriate. A clear statement prevents retrospective analysis of judicial behaviour.

The existence of a written code with express provision on judicial behaviour would have been extremely helpful to the complainants in this case. It became apparent that the misconduct had occurred for sometime before it was reported. A code of ethics would have clarified the inappropriateness of the conduct. Knowing what the rules are is better for all parties concerned with judicial behaviour.

ii. Judiciary and the Media
Unfortunately one has only to turn on the television or pick up a magazine to see the increased prominence of trials and judicial proceedings. This creates some difficulty for judges, particularly if no guidance is provided in dealing with increased media attention. In recent years Canadian and American courtrooms have been sources of media attention. The traditional dominion of judges in their courtrooms must give way to some coherent pattern of behaviour.

Despite the increasingly high profile of media attention in the courtroom, this was not explicitly addressed in the recent American revision of the Judicial Code. The issue was addressed in the South African and Namibian Codes. Rule 13 provides:

A Magistrate shall not without the permission of the Commission permit the proceedings in his/her court to be televised or broadcast or taped for that purpose, or that photographs be taken or television cameras or similar apparatus be used in his/her court during the court proceedings, during recess and immediately prior to or after court sitting.

Two examples, sexual harassment and media attention, demonstrate the flexibility and responsiveness of Judicial Codes. There are differences across various codes because the societies whose judiciary must adhere to these standards sometimes face different pressures. It is very important that the judicial codes reflect the realities of the countries in which the affected judges serve. Nonethless, there may be some common issues. It is with this in mind that I present the following detailed case study on judicial free speech in Canada. There are common issues but the appropriate responses may vary from country to country.

PART V: JUDICIAL SPEECH: A CANADIAN CASE STUDY IN THE NEED FOR GUIDANCE

As the media increases their coverage of sensitive cases and their comments about the conduct of judges provokes frustration for the judges, there is a serious question about what is appropriate conduct for judges. A well recognized principle of the *Code of Judicial Conduct*, Canon No. 3A(6) [American Bar association] is that out of court a judge does not make any public comment to the press or elsewhere, about a case in which he or she is involved.

It is important for these principles to be articulated and accepted. This will help prevent the unwary and frustrated judge from speaking out when the interests of justice are best served by his or her silence. Another area where judges must take care is in making comments out of court that will lead to the fear that issues are being pre-judged. However, as with many aspects of judicial ethics there are different views about when a judge should speak and when he (she) should be silent.
I have developed at some length an argument about the proper limits of judicial free speech in an earlier article and I shall not repeat these arguments here. However, I will briefly restate my view on this issue which I should warn is a non-traditional one. A more traditional view would be that a judge should say very little outside the courtroom and exercise considerable free speech within the courtroom. I challenge this common wisdom especially in light of Canada's *Charter of Rights*. I will leave to you to judge the applicability of my views in other national contexts or indeed, even the Canadian one.

Not only has the *Charter* enhanced the policy making role of the judge, it has also made Canadians a more rights conscious people. Freedom of expression is guaranteed in section 2(b) of the *Charter* as follows:
Everyone has the following fundamental freedoms:
...
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

While it is obvious that the *Charter* has given judges new responsibilities, it is less obvious that it has given them rights, including freedom of expression. Clearly judges are encompassed in the term "everyone" used in section 2 of the *Charter*. The real question becomes what are the reasonable limits on judicial free speech, pursuant to section 1 of the *Charter*. Only the most extreme advocate of judicial objectivity would suggest that a judge does not have the right to "thought, belief and opinion," so the real area of contention is the *expression* of views. The essential limits on the right of judges to express themselves are the nature of the judicial office and the perception of the judge's role.

Justice Sopinka argues that the arrival of the *Charter* has not only enhanced the right of judges to speak on broader social issues but also imposed an obligation to do so in *some* contexts:
While I support the rationale for *some* restrictions on speech, the public must also realize that judges *do* have views on issues and must have the confidence that the judiciary is capable of setting aside personal political views when such views threaten to interfere with their impartiality in deciding particular cases.

By contrast, the late Chief Justice Laskin continued to adhere to the restrained view of judicial speech even after the arrival of the *Charter* in 1982:
Surely there must be one stance, and that is absolute abstention, except possibly where the role of a court is itself brought into question. Otherwise, a judge who feels so strongly on political issues that he must speak out is best advised to resign from the bench. He cannot be allowed to speak from the shelter of a "judgeship."

In its *Commentaries on Judicial Conduct* the Canadian Judicial Council appears to come down more on the side of Laskin and implicitly endorse a more monastic approach to judicial free speech -- especially after the *Charter:*

We agree that the *Charter* has tended to blur the distinction between political and legal issues. Almost any issue may now become the subject of litigation. We see that as a reason for judges to be more, rather than less, circumspect than in the past. A personal view which has been publicly proclaimed is less easily set aside, when it becomes part of an issue before the court than one privately held. And what of the perception of the litigants and public? They should not be required to have on their case a judge who is a declared opponent of the point of view they come to court to present. If a judge, who has publicly proclaimed a personal view, later gives a judgment expressing the same view, will the unsuccessful party, and the public in general, not tend to conclude that the personal view, publicly expressed, affected the judge's impartiality?

The Canadian Judicial Council appears to be more concerned with appearances than with whether judges hold views. Views publicly expressed are what is worrisome. This sort of obfuscation of the reality of judging, however, becomes a self fulfilling prophecy: the public comes to expect that judges should have no views, when indeed they do.

Knowing where individual judges stand on broad social and political issues is crucial to the administration of justice. Once one accepts that judges have views on broad social and political issues, the litigants are better served by knowing the judge's perspective in advance. The guarantee of freedom of expression contained within the *Charter* should thus expand and protect judicial expression outside of the court. The judge must, of course, not prejudge the issue at hand. On the other side of the coin, the equality values entrenched in the *Charter* provide some limitations to judicial expression in and out of court. Prejudicial comments or views issued from the Bench regarding vulnerable groups, specifically those protected in section 15 of the *Charter,* ought to be censured. Needless to say, the values expressed by the *Charter* provide guidelines to judicial speech uttered outside the courtroom as well.

I tend to agree with Justice Sopinka that the *Charter* gives more rather than less scope for judicial free speech. This surely must be true with respect to what judges say in their reasons for judgment. Furthermore, there should be a distinction between "in court" and "out of court" judicial free speech. Even before the *Charter* judges have had a wide reign with respect to "in court" comments; it is "out-of court" speech that has produced most of the controversy. Ironically, the *Charter* may place greater limits on "in court" speech to promote values such as equality, while expanding the "out of-court" freedom of expression of the judge. Any expansion of judicial free speech must be accompanied by effective mechanisms of accountability for abuse of this freedom. Judicial speech and accountability should go hand in hand.

The *Charter* has ushered in an era in which judges are required to make more policy oriented decisions and acknowledge that this is what they are doing. Heightened public awareness of judicial influence has generated an increased need for judges to be more open regarding their views and perspectives. There is a growing call for accountability, a concept traditionally divorced from the judicial branch of government. People want to know who these judges are and call them to account when they misbehave.

The Canadian experience supports the view that judges are censured for impropriety outside the courtroom more often than they are evaluated on their in court conduct. It seems that the independence of the judge within the courtroom provides a security almost beyond reproach. In court, judges appear to have free reign over their speech and, until recently, were rarely criticized. In some cases the judge's in court remarks were highly offensive. Restrictions are placed on judges with

respect to how they publicly express themselves outside of court, and certainly on the topics they choose to discuss.

Examples of out of court censure include the case of Justice Thomas Berger, who was swiftly reprimanded and openly criticized by his peers for publicly criticizing the absence of Aboriginal rights in the proposed *Constitution Act, 1982*. The result of the *Berger Inquiry* is difficult to reconcile with that of the *Marshall Inquiry*, where judges were perceived as guilty of serious mis-judgment in the performance of their duties yet were never disciplined. The critical difference appears to be that the latter involved in court conduct, in the form of comments in the judgment itself.

Although many judges agree that the administration of justice and issues relating to the judicial system are appropriate topics for judicial comment, there is no consensus on the scope and extent of that freedom of expression. When and where such public expressions cross the threshold dividing the judicial from the political remains at the core of the debate.

The Resolutions of the Canadian Judicial Council regarding the inquiry into allegations of judicial misconduct on the part of Justice Thomas Berger had this to say regarding appropriate judicial expression: "[M]embers of the judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the Courts."

While agreeing that caution must be exercised when criticizing government policy, Justice Sopinka does not believe that such statements clarify the situation. Ultimately, he states,
The extent to which a judge does so must be left to the individual judgment of the judge. Surely a judge entrusted with the extraordinary powers which I have mentioned should be permitted to decide what the limits are of his or her public participation.

Whether judges are for or against an expansion of judicial speech outside the courts, most do concur on one point: that limits should be self imposed rather than external. Such a view goes some distance to explain the judicial resistance to a codification of rules concerning judicial conduct and speech.
Interestingly, restraint is not only applicable while a judge is active on the Bench. Once a judge, always a judge restrictions are applied to speech and conduct even upon retirement or resignation. On this point, Justice Sopinka completely disagrees.

Certainly upon resignation or retirement, judges should have the freedom to speak on any issue within the ambit of protected expression. It is difficult enough to give up temporarily, freedoms held by society at large, and it would be very difficult to recruit quality people for the judiciary if a judge permanently lost his or her right to freedom of speech upon appointment. Sometimes I wonder whether such strictures are more an excuse to protect the tranquillity of judges than because of some lofty goal to cerebral impartiality.

The *Charter* can provide a concrete framework in which to evaluate judicial speech. The reasonable limits clause of the *Charter* would justify limitations on judicial free speech. One such limit is that the speech of the judge should be consistent with his or her institutional role. There are other limits as well. Three such limits have been outlined by Justice Sopinka in his address "Freedom of Speech Under Attack." These include (a) penal sanctions, (b) civil sanctions, and (c) political correctness.

Highlighting specific cases in which the Supreme Court has decided that certain types of free speech must give way to other and more pressing societal concerns, Justice Sopinka describes how criminal

sanctions limit free speech. *R. v. Keegstra*, the *Prostitution Reference* and *R. v. Butler* have attempted to define these limits narrowly, so as to restrict freedom of expression as little as possible. The balancing of such competing values, although difficult, is recognized by the courts as a valid exercise in a democratic society. Such a balance must also be found when dealing with the activities and expression of members of the Bench. It would be a rare case in which a judge was subject to a criminal sanction as a consequence of her or his expression.
The second limit examined by Justice Sopinka is civil sanctions. Civil proceedings, in the form of libel or slander actions, are an attempt to balance the protection of individual reputations against the values of freedom of expression. Although not addressing how this would affect the judiciary, Justice Sopinka explains that libel laws, as old as the protection of free speech itself, are an effective check on malicious or false comment: "As has been recognized in the protection of all rights, the use of a right or freedom by one person must yield if that use causes injury to another."

The third limit described by Justice Sopinka is that created by "demands for political correctness." Before examining Justice Sopinka's concern regarding "political correctness" it is important to comment on the phrase itself. Political correctness has become a derogatory term. By using such a phrase, one is assumed to be referring to the dogmatic approach it now signifies, rather than to the valid goals of those who wish to promote, encourage and entrench the equality rights of all Canadians within our society. These two conceptions must not be confused. Although I will be using the term political correctness in a limited way throughout this article, I do so only to address the concerns of those who believe it to be a restriction on their freedom of expression. I do not adhere to the notion that the values of many are being restricted by the values of a few; nor do I condone using the spectre of "political correctness" to justify suppressing the views of those supposedly guilty of imposing it. We have always had an unwritten code of "political correctness" but because it coincided with the views of the established majority, there was a limited outcry. The real complaint may be that outsiders are now trying to set the agenda!

Justice Sopinka points out that political correctness, as a movement, has not been entirely negative. In fact, it has been an effective force in sensitizing the judiciary to issues and perspectives of which they may have otherwise remained ignorant. He also addresses the concern that such a movement reveals an intolerance for freedom of speech and warns that overzealous dissection of every word that drops from the bench, with a view to finding some indicia of political *in*correctness ... may result in decisions that are politically correct but not legally and factually correct. A judge who is looking over his or her shoulder may decide a case in a way that will avoid the Judicial Council rather than accord with the material presented.

When one takes account of outside groups clamouring for politically correct speech and conduct on the part of judges, there are clear dangers. There is, however, a clear distinction between general claims to represent the public interest and efforts to make judges conform to the entrenched values of the *Charter*, such as equality. A demand that judges refrain from sexist, racist or homophobic speech is not a call for "political correctness" but rather a call for conformity with the *Charter*. This is a theme to which I will return when considering the impact of lobby groups as an informal mechanism of accountability for judges. For the present, the point is that demands for conformity with *Charter* values are of a different order than demands that judges be "politically correct."

In reviewing the activities and speech of judges both on and off the Bench, one persistent dilemma emerges. This is the lack of consistency in imposing limits on judicial speech and conduct. In order to illustrate this point, I will briefly review four cases in which judges have been the subjects of formal

complaints and investigation by judicial councils. These cases illustrate that judicial free speech and accountability are issues worthy of attention, with the potential to impact significantly on those involved with the judicial system.

The investigation into Justice Thomas Berger's conduct in 1981, and the inquiry into the Court of Appeal Judges on the Donald Marshall Jr. case in 1990, will be discussed in a later section. The complaints against Judge Andrée Ruffo in Quebec and those laid against Judge Raymond Bartlett in Nova Scotia are also addressed later in this article. However, for the purposes of this discussion on the limits to judicial free speech, it is important to provide a brief summary of each. These cases reveal the ad hoc approach of judicial councils when faced with disciplinary complaints about judges.

i. The *Berger Inquiry*: Out of court speech

After the government omitted Aboriginal rights protection and a veto for Quebec in the Constitutional Agreement reached in 1981, Justice Thomas Berger was publicly critical of the decision. A complaint was lodged with then Chief Justice Bora Laskin by Justice Addy, who thought that Berger's conduct was not appropriate for a judge. An Inquiry Committee, set up in March 1982, found that Berger's conduct warranted removal, but the Council itself did not go this far, preferring instead to state that judges should steer clear of political debates in the future. This directive, however, is not very helpful in clarifying the parameters of judicial free speech.

By today's standards the decision rendered in the *Berger Inquiry*, though short of removal, was indeed harsh, if not wrong. Justice Berger was commenting on a broad social issue that most believe is now crucial to the survival and dignity of this nation. To object to the omission of Aboriginal rights in the Constitution, especially in light of the *Charter*, seems more a fulfilment of the judicial role than a denial of it. Given Justice Berger's impressive track record on Aboriginal rights and his consistent advocacy of justice for the First Nations, his public statement did not reveal anything that was not already known about his views. Where was the damage to his role as a judge?

The Berger affair raises some important questions regarding the limits to judicial free speech. Although it was not so very long ago, it does seem that there would not be the same outcry if a judge were to comment in a similar way today. However, even though some restrictions may be relaxed, there is still no clear set of guidelines for the judiciary as well as the public and the press to refer to when dealing with judicial free speech.

ii. The *Nova Scotia Court of Appeal Inquiry (Marshall Affair)*: In court speech

The conduct of the Court of Appeal judges on the Donald Marshall Jr. case dealt with in court rather than out of court speech. At issue were the comments made in the Court of Appeal's reasons for judgment in acquitting Donald Marshall Jr. of the charge of murder, which essentially blamed him for being the author of his own misfortune. The Royal Commission on the Wrongful Conviction of Donald Marshall Jr. was highly critical of the performance of the Nova Scotia Court of Appeal and the wording of its judgment acquitting Marshall. One result of this criticism was a complaint to the Canadian Judicial Council and the formation of an Inquiry Committee which unofficially reprimanded the Appeal Court judges, but did not call for their removal from the bench.

By contrast, the criticism of Thomas Berger's out of court speech, which did not obstruct the administration of justice, appears not only extreme but misplaced. Surely inappropriate speech within a court can do more harm to the administration of justice than a speech delivered outside the

courtroom. The effect of the Nova Scotia Court of Appeal judgment was to diminish the value of the compensation awarded to Donald Marshall Jr. compensation he deserved after spending 11 years in jail for a crime he did not commit. To make matters worse, the justices of the Nova Scotia Court of Appeal were using their position of power on the Bench to make comments about a member of a vulnerable minority in society. Donald Marshall Jr., as a Micmac from Sydney, had come to expect no better from the Nova Scotia justice system, but he deserved more. This was a serious, even if unintended, abuse of judicial power.

Another problem with judicial speech in the courtroom and its broad immunity from attack is that some judges (fortunately a minority) exhibit racism and sexism. Judicial speech which violates the basic principles of equality enshrined in the *Charter* should be severely censured. The equality guarantees of the *Charter* are an important guide to the proper scope of freedom of expression in the courtroom. The independence of the judge to speak freely in her or his courtroom and judgments must be limited by the dictates of the *Charter*. Short of this, judges should also be very conscious of the position of power from which they speak.

iii. Judge Ruffo: Activism in and out of court

The complaints laid against Judge Andrée Ruffo of the Court of Quebec, Youth Division, dealt with her unorthodox decisions and the manner in which she ran her court. They also addressed Judge Ruffo's out of court speech regarding specific cases, and her public comments regarding the Quebec child welfare system. There is no doubt that Judge Ruffo has a different view of the role of the judge than many of her colleagues. She also acts upon her own vision of the judicial role.
The fact that Judge Ruffo has a penchant for speaking publicly about cases pending, or giving thinly disguised details of cases that she has heard, is cause for justifiable concern. Obviously, issues concerning children are raised in Judge Ruffo's court and she is knowledgeable about child welfare issues and the inadequacies of the present system. The extent to which she ought to be allowed to publicly address these issues in broader terms is not so clear.

There is little doubt that if the standards applied in the *Berger Inquiry* were used to deal with Judge Ruffo her tenure on the Bench would be in considerable jeopardy. She has not just entered the political controversy, she has in many instances created the controversy. It is hard to disagree with the value of crusading on behalf of children and doing it with the energy and commitment of Judge Ruffo. The question is whether one can do this kind of political advocacy and still be an effective judge. In the current judicial system I have to conclude, reluctantly, that Judge Ruffo's conduct is not appropriate for a judge. To legitimize such political activism from the Bench would require a total redesign of the judicial role, in a way that would create more problems than it solves. If judges can use the Bench as a base for political activism for causes that society supports, they can equally use it to promote causes that the broader society opposes. There are also questions about the proper ways in which a judge can pursue his or her goals.

iv. The *Bartlett Inquiry*: Speech beyond the pale

The case of Family Court Judge Raymond Bartlett in Nova Scotia concerned in court speech of such an outrageous nature that the judge was eventually removed from the Bench. The fact that it was not until a women's group complained that anything was done about Judge Bartlett is an issue in itself, Judge Raymond Bartlett, a self professed born again Christian, used his court as a forum in which to air his views. His lectures were primarily directed at women and related to their proper roles within

the family and society. He berated women for not obeying their husbands when some of these women were seeking redress from abusive spouses or other related divorce issues. Judge Bartlett's speech was not hidden nor, presumably, was it condoned by those within the legal community. In fact, Judge Bartlett's reputation preceded him and some lawyers said they had known about his behaviour for as long as 10 years.

In a far more extreme form than the *Nova Scotia Court of Appeal Inquiry (Marshall Affair),* the Bartlett case provides an example of judges using their power to victimize vulnerable people. It must have been very painful for the women appearing before Judge Bartlett to be lectured about the virtue of being obedient to a spouse who has beaten her and her children. Indeed, the cruel irony of the situation was heightened when Judge Bartlett was himself charged with assaulting his spouse. The fact that he was finally removed in early January of 1987 after a formal investigation by the provincial Judicial Council is only a partial victory. It cannot satisfy critics who point out that Judge Bartlett had remained on the Bench for far too long. There is a serious need to make judges accountable for their conduct and speech within the courtroom.

v. *Quo vadis* on judicial speech?

No consistent approach to complaints emerges from the brief analysis of these four cases. The laying of the complaint, the timing and source of the complaint, and the subsequent process reveal the mechanisms of accountability to be unpredictable in approach and application. Each case dealt with judicial speech in some form, but the conclusions reached by the various judicial councils stressed different aspects of the speech, and ranged in their pronouncements regarding its gravity. This brief look at pertinent cases reveals the vagueness of the guidelines for limiting judicial free speech. Although most judges are clear about certain long accepted limits to judicial speech and conduct (e.g., partisan participation, business activities, etc.), they will admit that there is a wide range of judicial speech which has never been classified as appropriate or inappropriate. It does not seem fair, either to the public or to the members of the Bench, that one must wait until the limits are breached in order to discover the limits to judicial free speech.

It is obvious that a formalized set of standards cannot, and should not, attempt to categorize or anticipate every type of offensive or inappropriate speech. Neither are speech and conduct indivisible concepts. A Canadian judicial code of ethics could formalize the broad statements to which all within the judiciary adhere. These would emphasize the principle of judicial independence as well as the integrity of the judicial role. The challenge will be to strike a balance between generalities and details that will provide some practical guidance for all concerned.

The American Bar Association Model of Judicial Conduct developed in 1990 states that the American Canons are designed to establish standards of ethical conduct in a broad manner.

Canon 1 requires that judges uphold the integrity and independence of the judiciary. Canon 2 calls upon judges to avoid impropriety and the appearance of impropriety in all activities, and Canon 3 requires judges to perform the duties of their office impartially and diligently.

Issues of appropriate speech would fall under provisions regarding judicial propriety and/or performing duties in an impartial manner. A perusal of some of the cases involving judicial discipline in the United States shows that both in court and out of court conduct is monitored with perhaps more emphasis on in court behaviour. Although independence is paramount, accountability of the judiciary is also considered crucial in maintaining public confidence. The fear that a code would prove inflexible, as times and accepted behaviour change, has not proved highly problematic in the United

States. Conduct not perceived as wrongful when the American Code was written 25 years ago is now being pursued in commission procedures. There is no reason to believe that it will not continue to evolve by both amendment and interpretation.

As is typical in Canada, a middle ground should be sought which draws from the British traditions as well as the experiences of the United States. The *Charter* enunciates the principles and values which we prize in Canada. Thus it is vital that the judiciary be active in promoting such values. Just as the *Charter* evolves, so too do the roles of judges and the standards they must maintain. A Canadian code of ethics would provide a much needed reference point by which to ascertain the limits to judicial speech. Such rules should be clear but would not prevent the evolution of the judicial role or impose a single set of ideals regarding appropriate judicial speech. A framework within which to operate will not halt the evolution of standards and norms but rather strengthen public confidence in a judiciary that can and does take responsibility for its actions and speech.

Judges should be heard as well as seen, but they should also be accountable for what they say both inside and outside the courtroom. Examples such as that involving Judge Raymond Bartlett confirm the need for closer scrutiny of judicial speech and conduct in the courts. A set of clear guidelines would not only change the official disciplinary process from one that is ad hoc in its approach to one that is consistent, but would also inform judges about the limits of their speech. Increased accountability as well as openness on certain levels will not only improve public confidence in a system that appears ever more removed, but will ultimately ensure the continued independence and integrity of the courts.

PART VI: ENFORCEMENT

This paper clearly establishes the importance of ethical behaviour in the Judiciary it is now necessary to look at what procedures are required to enforce the standards. There is little point in articulating clear standards unless there is a practical consequence for deviating from them.

i. The Tennessee Judicial Code

The Tennessee Code provides mechanisms for the enforcement of the Code of Judicial Conduct. This code provides that violations of the code are brought before the Court of the Judiciary. The Court of the Judiciary is a statutory court which has the power to investigate, hear, and determine charges of judicial misconduct. The Court is composed of fourteen individuals including judges, lawyers and lay persons.

The Court has a broad range of remedies. The court has the power to sanction by formal reprimand, cease and desist orders, suspension with pay for a period not exceeding thirty day, or by recommending removal from office to the legislature. Tennessee is fairly typical of the approach to disciplining judges for misconduct in the United States, although there are variations from state to state.

ii. The Kenya Experience

The Judicial Code in Kenya provides comprehensive sanction provisions. Unlike the Tennessee sanctions, which were relegated to a Supplement, the Kenyan sanctions are included as part of the

Code. The Judicial Code provides for a wide variety of sanctions ranging from dismissal to reprimand. The relevant section of the Kenyan Code reads as follows:
SANCTIONS
Where an officer has contravened any of foregoing provisions of this code he is liable to suffer one or more of the following punishment.

(i) dismissal in accordance with part iv of the Service Commission Act - cap 185
(ii) reduction in rank or seniority(demotion)
(iii) stoppage of increment in rank.
(iv) withholding of increment.
(v) deferment of increment.
(vi) reprimand (including severe reprimand)
(vii) no recovery of the cost of any or part of the cost of any loss or damage caused by default or negligence.

The inclusion of the sanctions within the body of the provisions allows the judges to be very aware of the potential consequences of their misconduct. This also demonstrates the seriousness of the Code provisions. Another innovative feature of the Kenyan Code is the inclusion in the section entitled EXPLANATIONS of the following provision:
(ii) Violation of any of the rules contained in this code shall constitute judicial misconduct or misbehaviour calling for disciplinary action.
Such a provision helps to alleviate uncertainty that judges may feel when faced with a code of conduct. Also it confirms the importance of adhering to the standards set and the certainty of negative consequences is a violation of the standards is proven.

iii. The Canadian Experience
The powers of the Court of the Judiciary are much broader than those of the Canadian Judicial Council. This is a body of federally appointed judges who are established by statute to judge their peers. In legal form they are an advisory body who merely recommend to Parliament, which has the ultimate power of removal. The test for judicial misconduct which was articulated in *Nova Scotia Court of Appeal Inquiry (Marshal Affair)* is:
Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing Judicial Office. Lacking express standards of behaviour this test must be applied to a wide variety of misconduct.

The only remedial power the Canadian Judicial Council has is to recommend removal. They lack of an intermediate sanction power, including even a reprimand power is a problem. The ultimate removal must come as a result of a joint address of both Houses of the Canadian Parliament. The severity of removal prevents judges from learning from their past misconduct. Either the conduct is not severe enough to justify removal, so the judges are not sanctioned, or the judges are removed. In neither case can they learn from their mistakes.

Another weakness of the Canadian Judicial Council is the composition of the Council. The Council is composed solely of judges. Self-regulation may add to a perception that judges are getting off. This can have an adverse effect on public confidence. There has never been a case of a federal judge in Canada being removed from office.

The Ontario *Court of Justice Act* permits the following dispositions where the Ontario Judicial Council has completed a hearing and found that there has been misconduct by the **Judge in question: warning, reprimand, ordered apology,** the taking of a specific measure such as receiving education or treatment, as a condition of continuing to sit as a judge, suspension with pay for any period, suspension without pay but with benefits for up to thirty days, and the recommendation of removal. These broad remedial powers provide an opportunity to deal with judicial misconduct effectively, without necessarily being required to remove judges. Moreover, this broad range of powers means judges are more likely to be sanctioned for conduct that is not sufficient to justify removal.

A wide range of sanctions makes having an express standard of conduct more important. Judges who are going to face a variety of penalties deserve to know the types of behaviour that could result in sanctions. Codes of Conduct provide this type of information to judges. In Tennessee a judge can submit questions to a Ethics committee to get an opinion. This seems like a good preventive mechanism that could be easily incorporated in judicial discipline procedures.

"THE CORRUPTION IN THE JUDICIARY AND ITS DEFINING, DELIMITATION AND ELIMINATION"

By: Aleksandar Shopov

A brief research work rightly identifies the deficiency of well conceptualised understanding of corruption in Judiciary. Author is right in saying that the corruption in judiciary is not effectively regulated because of lack of design (effective mechanism). Thus paper raises important preliminary questions viz. What is judicial accountability? What are illegal transactions that are prohibited for judges?

This concise work rightly concludes that corruption in the Judiciary gives the rest of the government a bad name and seriously impedes the effectivity of the governance. In its concluding part author focuses on the modes of confronting the corruption in judiciary. He argued that defining judicial accountability, designing proper mechanism for tackling the problem of corruption and raising awareness regarding the level of corruption in the judiciary, in itself reduces the corruption to large extent.

An independent, trustworthy and effective judicial system is an essential pillar of a democratic state. The judicial system is a guarantor of property rights and a mechanism of dispute resolution, and is crucial to the achievement of good corporate governance in the private sector as well. The efficiency of the courts is an essential discipline on other structures of the State and thereby underpins their credibility also.

In this paper, at first, I intend to explain that, unfortunately, in many countries, especially in the developing ones, the judicial system is not effective, but corrupted and inadequate to its' right dimension and incompatible with the model as it should be: effective, independent and appropriate. The judges and court officials are liable on corruption and bribery and, in many cases, they are not doing their job in the face of the justice, but often in the face of their own interests. Inefficiency in courts and other systemic corruption have led to the deterioration of the quality of service delivered by government agencies. Because corruption has been an intrinsic part of the way the state has operated in many countries, it will be impossible to remodel the state if corruption persists.

The first step to be made in researching this type of problems is defining and delimitation of the corruption in judiciary. It is important to divide overlapping and complicated terms such as corruption, scandal and fraud. Corruption is defined as an "illegal transaction, where both actors benefit from their special position in the market or the government". Scandal is "the public reaction to allegations of corruption and thus it is interconnected with the issue of legitimacy". Fraud, however is a purely criminal category. As it is mentioned in the book of Ph.D. V. Chingo, corruption can only be defined within a specific society and at a specific time. This culture specific aspect of corruption is reflected in the division of so called black, white and grey corruption.

Black corruption in a given society is a reprimanded behaviour both by the public and by experts. It is

a well defined area of the untolerated behaviour. White corruption on the other hand is the behaviour that is tolerated by the public in a given society and not looked upon as misbehaviour. Grey corruption is the area in between, which is tolerated by a part of the society, while seen as corruption by the other part. It is also important to realize the dynamics of the definition of corruption, as it changes with geography or time from black to grey and to white corruption (or vica versa). Corruption scandals are often only a sign of this change in the public perception of corruption.

It can be obvious that in countries with cultural and social differences a behaviour of a court official person can be considered as corrupted by one country, and considered as "white corruption" by another country. Anyhow, the corruption as a problem persists and will be present in the judiciary for time to come, but the objective is to minimize it and turn it to high risk for anyone who's behaviour is corrupted. This is because corruption in the judiciary gives the rest of the government a bad name and seriously impedes the effectivity of governance. Corruption degrades the judiciary and transforms it to a marketplace where justice goes to the highest bidder-regardless of the law, regardless of the fundamental principles of fair play, and sometimes, regardless of plain common sense. Also, many judges reportedly sit short hours, often from 9am to 12pm, three days a week. Recourse to the courts is seen as impractical and outcomes are seen as unpredictable, partly because of incompetence but very often because of corruption.

Corruption in the judiciary has the potential to do far more damage to society than corruption elsewhere. An independent, impartial, judiciary is often cited as a fundamental institution supporting civil society and a well-functioning market economy. When judicial decisions become suspect due to corruption, businesses reduce productive activities, particularly those with greater potential for disputes, such as long-term investment contracts or the production of complex goods. There are several motive forces behind corruption: greed, ambition, and the desire to put one over others, and these forces influence directly to judges and court officials to their corrupted behaviour. But shouldn't we ask ourselves why are judges bribable and liable to corruption? And what is the cause that makes the level of courts' mistakes great, and a lot of judicial decisions of verdicts of regional courts to be frequently cancelled by the Supreme Court? The most widespread phenomenon is a fact that among the judges there are persons who absolutely don't merit the high status of a judge, and when their responsibility is questioned, the corporate solidarity is shown. And at last, how can this dangerous social disease be cured?

It is important to identify the causes of corruption in order to design measures that should be taken to prevent and control corrupt behaviour. Identifying the sources or causes of corruption will allow countries to develop a corruption prevention plan that changes the organizational features that allow corruption to occur. A corruption prevention plan should address issues of accountability, efficiency and effective administration. This would improve the attitudes of the staff and the overall integrity and performance of the institution by minimizing the opportunities for bribery and corruption. The judiciary is supposed to provide an essential check on the other public institutions. As a result of this role, a fair and efficient judiciary is key for any anti-corruption plan. Therefore, corruption in the judiciary should be dealt with from the start. In order to design policies in the fight against corruption, it is necessary to build a data base with quantitive and qualitive information related to all the factors thought to be related to certain types of corrupt behaviour (embezzlement, bribery, extortion, fraud, etc.).

Based on some empirical researches, I can get to a conclusion that in the judicial systems of the developing countries, consideration should be given very soon to the status, training and pay of the

judicial profession. Rather than being seen as the crown of the legal profession and an essential arm of the state, judges are low-paid and not well respected. The low pay of judges and court officials creates incentives for corruption, and the low status of the profession undermines efforts to make professional standing and reputation for integrity a disincentive to corrupt behaviour. Issues of financial autonomy and personal safety of judges depended also upon the will of the executive. In developing countries, not only that the judges are not receiving salaries according to their position, but those salaries could not satisfy the basic minimum of existence at subsistence level. The court budget is a part of the state budget, hence it was determined and mostly spent without the control of the judiciary. The financial status of judges just used to show how government was disinterested in making the judiciary truly independent. Moreover it leads to the inclination of corruption in the judiciary. The ruling parties are involved in most cases of corruption also. They are granting apartments loans and promotions to obedient and "suitable" judges. And the judges bring corrupt verdicts just because they can really use the money or other goods that they will "earn" with their obedient decision. And that is because their salaries, as I mentioned, are very low. If the salaries were higher, then it would be much more expensive for one party in one case to bribe a judge, and also, the judges themselves would made no risks of their job and their credibility that easy! So, I can argue that a possible solution of the corruption in courts is raising the salaries of the court official persons. But that does not mean that the problem is solved. There are more things to be done.

Some countries implement other instruments on fighting corruption in courts. Combating corruption is not confined to the government alone. The private sector, which has a considerable stake in suppressing corruption, must help the government in this mission. One partnership between the government and the private sector in eliminating corruption is the improved feedback loop arising from greater transparency and effective information dissemination system. In the Supreme Courts in some countries, this strategy is being implemented through the operations of the Public Information Office (PIO), which is mandated, among other things, to inform the public on the policies, plans, activities, and accomplishments of the Office of the Court Administrator and the lower courts. The PIO demonstrates the effort of the Supreme Court to engage the public-more specifically the media-in a cooperative and constructive partnership that would increase the changes of corrupt practices being uncovered. Thus, making judiciary officials directly accountable to the public.

To confront the problem of corruption in judiciary, there are a variety of approaches and possible solutions and actions that should be considered and taken, both in higher and lower levels of court systems. And anyhow, the result should go to strengthening judicial integrity and getting back the trust and confidence in the system.
The objectives of strengthening judicial integrity are to:

- Design practical approaches which will result in better judicial conduct and raise public confidence in the Rule of Law;
- Define judicial accountability and devise ways to introduce that concept without compromising the principle of judicial independence;
- Facilitate a learning environment in which judges can be exposed to tested practices for judicial reform, management of change and the strengthening of the rule of law; and
- Raise awareness regarding the level of corruption in the judiciary, the proof that an anti-corruption strategy can and does work and the role of judges in combating corruption.

In closing, I have to argue that judiciary corruption is not likely ever to be fully eliminated, but the objective is to minimize it, so that it becomes an exception and not a rule, by turning it from a low risk and high return activity into a high risk and low return activity.