

## **COMMENTS OF THE COMMITTEE ON JUDICIAL ACCOUNTABILITY ON THE JUDGES ENQUIRY BILL, 2006**

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Before making detailed comments on the Bill, it is necessary to understand the problem of Judicial Accountability, which this Bill seeks to address. The problem of Judicial Accountability, or rather the lack of it, has been gradually increasing due to the progressive whittling down of whatever little accountability of the higher judiciary that existed earlier. This lack of accountability has been further accentuated by the increasing exercise of powers by the higher judiciary making inroads into by passing orders even on matters which are within the domain of executive policy such as interlinking of rivers, demolition of Jhuggis from the Yamuna Pushta, laying down the policy for hawkers, cycle rickshaws, etc. It is this increasing assertiveness of the judiciary coupled with an almost total lack of accountability has led to a situation where large sections of the judiciary have effectively sought to declare themselves above the Right to Information Act and claimed immunity from it. Thus, while many High Courts have not even appointed Information Officers, others like the Delhi High Court have framed rules which prohibit the release of information on administrative matters such as expenditures on the Judges and appointments of class III & IV staff of High Court by the Judges. The Supreme Court has even recently asked the Government to amend the Right to Information Act to remove the Supreme Court from the purview of an independent Central Information Commission and also to provide that the Chief Justice of India can interdict the release of information which shall not be questioned.

The problem of Judicial Accountability is as follows:

- (i) The actions of the Judiciary on the premise of independence of the Judiciary while understandable cannot be at the expense of accountability. Accountability and independence are not mutually exclusive.
- (ii) The disciplinary control via the process of impeachment, which, as seen in Justice V. Ramaswami's case, is an impractical and extremely difficult process to pursue in practice.
- (iii) The additional immunity with which the judges have cloaked themselves in Justice R. Veeraswamy's case, to the effect that even an FIR for any crime committed by a Judge, can not be registered against him without the prior permission of the Chief Justice of India.
- (iv) The failure to even make known/disclose the complaints against judges and the action taken thereon by the so-called in-house mechanism coupled with the exemptions/exclusion being sought from the RTI.
- (v) The persistent failure to recognize truth as a defense in an action for contempt of court proceedings and the exercise of the power of Contempt of Court which can be and has been occasionally used to punish even legitimate criticism of the judiciary. Even if the power of contempt has been rarely used, it is a sword which hangs over the neck of people, particularly that of the media, and has undoubtedly intimidated

them from exposing the rot within the judiciary. The recently introduced amendment that truth may be a good defence in a contempt action, while mitigating the problem, does not solve the problem because, apart from the fact that it may sometimes be difficult to prove the truth of an allegation which has been made in good faith, one often needs to prove the truth of that allegation before the same Judge against whom the allegation has been made. The threat of contempt, has insulated the judiciary even further from any semblance of accountability. Of course, the judiciary, unlike the Parliament, or the Government, is not democratically accountable in the sense that it does not have to seek re-election. Now the judiciary has even sought to remove itself from the purview of Right to Information Act.

It is in the above context of total lack of accountability, that this current proposed Judges Enquiry Bill must be examined. The bill seeks to amend the Judges Enquiry Act and provide for a National Judicial Council consisting of the Chief Justice of India, two senior-most Judges of the Supreme Court and two Chief Justices of the High Courts (two more Judges of the Supreme Court in the case of an enquiry against a Supreme Court Judge) as members to enquire into allegations of misbehavior against the Judges of the Supreme Court and the High Courts. The Bill also provides in section 6 that the Council may also investigate into the conduct of any person other than the Judge if it considers necessary to do so. One change from the existing Judges Enquiry Act is the change of composition of the Enquiry Committee from a sitting Judge of the Supreme Court, a Chief Justice of the High Court and one other Jurist (to be selected by the Speaker as provided in the existing Act), to this ex-officio Committee of 5 sitting Judges provided in this Bill. The other change is that the enquiry, apart from being initiated on an impeachment motion presented in Parliament, can also be initiated on a complaint made to the Judicial Council. The Bill further provides that the complainant must verify the complaint and also disclose the source of his information and if the complaint is found to be frivolous, or made in bad faith or with the intent to harass the Judge, he shall be punished with imprisonment which may extend up to one year and also to a fine.

If, after the enquiry, the Council holds the Judge to be guilty of misconduct, it can, if it considers the charges do not warrant any removal of the Judge, issue advisories, warnings, censure or admonition including requesting the Judge to voluntarily retire or withdraw judicial work for a limited time. If it is, however, satisfied that the charges are so serious so as to warrant his removal, it shall advise the President accordingly and the matter will be laid in the Parliament in accordance with the procedure for impeachment and removal provided in the Constitution. It also provides that the Judge aggrieved by the order of removal of the President or from the final order of the Council imposing any other minor penalty of censure, etc., may file an appeal before the Supreme Court. The Bill further provides in Section 33 that all papers, documents and records of proceedings related to a complaint, shall not be disclosed to any person in any proceeding except as directed by the Council. Section 36 of the Bill further 32 provides that the restatement of judicial values adopted in the Chief Justices' Conference of 1999 shall be record of conduct and can be further amended by the Judicial Council. These are the salient features of the Bill.

The positive features of the Bill are that it creates another statutory procedure for initiating an enquiry into the allegations of misconduct of a Judge. While earlier it could only be done by an impeachment motion, it can now also be done against complaints made by individuals to the Judicial Council. The other positive feature is that the restatement of judicial values of 1999 adopted by the Chief Justices' Conference is given statutory status by this Bill.

However, the above relatively minor positive features of this Bill, are overshadowed by far more serious problems with the Bill which, in our opinion, is going to reduce whatever little accountability of Judges remained under the present Judges Enquiry Act. This is for the following reasons:

- (a) The Committee of 3 Judges/Jurists under the existing Judges Enquiry Act, 1968 are to be selected by the Speaker and at least one of these three could be outside the sitting judiciary. In the present Bill, the Judicial Council is an in-house Council of sitting Judges which is similar to the Judicial Council proposed when the restatement of judicial values was adopted by the Chief Justices' Conference in 1999. This in-house body of sitting judges, hardly ever enquired into allegations against judges, much less recommended any action against judges in the last many years it existed. Even in the recent case of serious allegations against Justice Jagdish Bhalla which was backed by documentary evidence and official reports, the in house procedure under the restatement of judicial values was not resorted to by the Chief Justice of India and instead the Collegium, without even causing an enquiry to be made into the charges, recommended his elevation as Chief Justice of Kerala. Even in the other case of a serious charge against Justice Vijendra Jain of the Delhi High Court, when he had decided the case of a litigant (Hari Ram) in his favour despite the fact that he knew the litigant well enough that his grand daughter's marriage had taken place from his official residence, it was ignored by the Chief Justice by saying that the Supreme Court did not have disciplinary powers against judges. However, when it was pointed out that under the restatement of judicial values, charges against the Judge to be enquired by an inhouse Committee of Judges, the Chief Justice said that he had looked into the charge and did not find any merit in it. He thus dismissed the charge without even any in-house enquiry and without assigning any reasons.
- (b) The in-house Committee of Judges is not an appropriate mechanism to enquire into the conduct of their brother judges with whom they sit in the Court every day. It is common knowledge that Judges regard their brother judges as part of their judicial family and also find it very embarrassing to hold any of their brother judges guilty of any misconduct. It is, therefore, highly unlikely that they would be able to dispassionately decide allegations against their own brother judges with whom they are sitting in and out of courts day after day. It is in fact more likely that the complainant would be strictured and even sent to jail under the powers given to the Judicial Council under section 26 of the Bill.
- (c) Even more objectionable is the provision in section 33 of the Bill for not disclosing any information relating to the complainant to any person in any proceedings except as directed by the Council. This will make it impossible for the complainant to publicise the charges and the incriminating material against the judge once he chooses to approach the Council. It is likely that if the Judicial Council dismisses even a good bona fide and substantial complaint against a brother judge, it will not be possible for the people to know what the

charges and materials were and how they have been dealt with by the Judicial Council. In fact, these two provisions (section 26 and section 33) are likely to deter any complaints being made to this Judicial Council at all, particularly with the knowledge that the brother judges almost never break ranks among themselves.

- (d) It is, therefore, absolutely essential that if any enquiry is to be conducted into the conduct of a sitting judge, it must be done by an Enquiry Committee or a Council which does not consist of any sitting judges at all. It may consist of some retired judges but it must have persons from outside the judicial family. What is really required is constitutional amendment to put in place a 5 member National Judicial Commission, consisting of persons who could be retired judges or other eminent persons and chosen in the following manner:
- (i) One member to be nominated by a collegium of all the judges of the Supreme Court.
  - (ii) One member to be nominated by a collegium of all the Chief Justices of the High Court.
  - (iii) One member to be nominated by the Cabinet.
  - (iv) One member to be nominated by a collegium of the Speaker, Leader of the Opposition in the Lok Sabha and the Leader of the Opposition in the Rajya Sabha.
  - (v) One member to be nominated by a Collegium of Chief Vigilance Commissioner of the Central Vigilance Commission, Comptroller and Auditor General and the Chairperson of the National Human Rights Commission.

Thus, the National Judicial Commission will have 5 members nominated as above who would not be sitting judges and would be full time members, having an assured tenure. They must have an investigative machinery under their administrative control through whom they can get charges investigated against judges. If they find any prima facie case against the Judge, they could hold a trial of the Judge and if found guilty, recommend his removal after which his removal should be automatic.

The view which has been propagated particularly by the Judiciary, that it cannot be held accountable by any body outside itself, since they would compromise its independence, is completely without merit. Independence of judiciary means independence from the Government and Parliament and not independence from accountability to an outside independent body. It cannot be said that accountability to a National Judicial Commission of the kind mentioned above, would compromise the independence of the judiciary. Independence from accountability from any outside body in practice means independence from accountability altogether, which cannot be countenanced for any body or any institution in this country. Everybody, including the President, is accountable to outside bodies. There is no reason why the judiciary should not be so accountable to an independent high powered and credible body of retired judges and eminent persons selected in the above manner. The proposed Judges Enquiry Bill 2006 falls far short of the above requirements and would, in fact, far from improving the accountability of the judiciary, serve only to diminish it.

The Committee on Judicial Accountability, therefore, recommends a complete overhaul of the proposed Bill and its replacement by a constitutional amendment for constituting a Committee on the lines proposed above.

**Note: Comments of Shri Anil B. Divan regarding the aforementioned bill**

The aforementioned new bill is worse than the old Judges Inquiry Act and it needs to be scrapped in toto. This new bill is nothing but a sham. The detailed comments on the accountability of the higher judiciary will be sent later on by the Committee on Judicial Accountability.

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