

SEVEN QUESTIONS ON JUDICIAL ACCOUNTABILITY

A Basic Paper for Campaign for Judicial Reforms
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By
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Introduction: The Constitutional Basis: A Constitutional Bench of the Supreme Court of India said¹ that the State should secure the proper operation of legal system and proper opportunity to get justice, which shall be its Fundamental Obligation as per Article 39A of Constitution of India.

Indian Judiciary, which is the most powerful judiciary in the world², and next only to that of USA, continues to command respect and credibility despite delays and deficiencies, and thus there is a serious obligation cast upon us to secure that credibility, because the Judiciary is the only constitutional hope that a person can look to for help when his/her human rights are jeopardized. It is needless to say that for realization of human rights, vibrant democratic machinery with rule of law is essential. That is possible only when judiciary and legal profession shines with its integrity and gains efficiency besides being independent and immune from ordinary influences such as inducement and bribery.

International Commitment: This is the standard requirement which formed basis of **UN Basic Principles on Independence of the Judiciary** and the Role of Prosecutors endorsed by the UN General Assembly in 1985 and 1990 respectively.

In 1990 the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in Havana adopted the Guidelines on the Role of Prosecutors. These standards were reflected in paragraph 27 of the Vienna Declaration and Programme of Action, which reads:

Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development...

¹ Kartar Singh Vs State of Punjab, (1994) 3 SCC 569

² T R Andhyarujina, Judicial Accountability: India's Methods and Experience, "Judges and Judicial Accountability, Cyrus Das, K Chandra, 2004, pp 101-130

One hundred and seventy-seven nations assembled in Vienna adopted this Declaration. Practically all the sovereign states then in the Asia–Pacific were present there³.

The immediate concerns identified by Param Cumaraswamy, Former UN Special Rapporteur on the Independence of Judges and Lawyers⁴ are regarding the

- i) Independence of judicial officers in the lower judiciary;
- ii) Role of chief justices;
- iii) Abuse of judicial independence; and,
- iv) Parameters of judicial accountability.

I would like to raise seven questions about accountability of judiciary for initiating a debate, discussion and campaign for judicial reforms with an intention to increase the credibility of judiciary and improve the quality of life of people and democracy.

Question I

Independence of officers in the lower judiciary: Independence of lower judiciary was almost not bothered by any body including those in judiciary. The ‘subordination’ is some times even worse than that in departments like police and revenue. Judicial Independence continues to be a significant component of constitutional governance not confined only to echelons of higher judiciary. Apart from independence, the PIL like powers are technically not limited to appellate courts only but as a matter of law, fact and policy should work at each and every court of law whether at District or Taluq. Compared to higher judiciary, the district and lower judicial officers are more accountable and less independent. They are somewhat amenable to processes of disciplining and Anti Corruption Bureau has enough powers and opportunities to check, control and punish their corruption.

Cumaraswamy said in above referred lecture: Very often principles of judicial independence are addressed to judges of the higher judiciary, namely in the high courts and the appellate courts. These principles are not often addressed at judicial officers like magistrates, session judges or district judges of the lower judiciary, though a very large proportion of cases—particularly criminal cases—are tried and disposed of before their courts. The Basic Principles do not make any distinction between these two categories.

The Powers and Role of Chief Justices: The Chief Justices have enormous responsibility to lead the entire judicial mechanism and administer them in a very efficient

³ Dato’ Param Cumaraswamy, Former UN Special Rapporteur on the independence of judges and lawyers, ‘Tension between judicial independence and judicial accountability’, Asian Legal Resource Centre: source: <http://www.article2.org/mainfile.php/0205/104/>

⁴ Ibid

way to deliver justice to the people according law in the context of their specific situations and needs. The administration of justice includes judicious selection of judicial officers through transparent process, effective case and time management, disciplining the judges of every rank, their promotion and elevation to higher courts, assessment of performance of judges and finally curbing the corruption. In addition, the Chief Justice has esteemed power to manage the affairs of High Court and see that all the judges render impartial judgments without fear in deciding the cases dealing with fundamental rights of the people and violations by the executive. The history of certain states in India is replete with wonderful workmanship and statesmanship of judges and chief justices who brought laurels to their estate. However it does not mean that every thing was alright. Reviewing the role of Chief Justices, Cumaraswamy observed:

Of late the position of chief justices or presidents of apex courts has come under criticism in some countries. Complaints have been largely regarding abuse of power and interference with adjudicative processes of junior judges, particularly those who await recommendations from the chief justice for promotions and so on. Chief justices and presidents are generally given the power to empanel sittings of the appellate courts. In such cases there have been allegations of ‘fixing’ in selective appeals.

All power is a trust – that we are accountable for its exercise – that from the people, and for the people, all springs, and all must exist⁵.

Discretion becomes a duty when the beneficiary brings home the circumstances for its benign exercise.

This will apply to judiciary as well.

The International Basic Principles and the regional standards do not provide standards for chief justices or presidents, though principle 6 of the Beijing Principles regarding interference in the decision-making process must necessarily apply to chief justices. With regard to judicial appointments and promotions, national constitutions that do not provide an independent mechanism for selections and recommendations leave it to the chief justice to select and recommend.

There have been allegations of favoritism, cronyism and nepotism. Thus, the Question No. 1 is: **HOW TO TONE UP JUDICIAL ADMINISTRATION?**

Question II

Corruption: It is inevitable to refer to issue of ‘corruption’ to analyze the independence and accountability of judiciary. The person of questionable integrity started finding place in the judiciary reflecting the backdrop of mounting corruption in the state apparatus. If independence and accountability are separated, it would lead to disastrous consequences for the institution. Judiciary in India is assured of independence both constitutionally and politically, but the people of India were not assured of judicial

⁵ Vivian Grey, Bk VI Ch 7, Benjamin Disraeli, as quoted in Ratlam Case.

accountability. Even if a citizen finds a higher judge taking bribes, he has to wait for permission of Chief Justice of India to register an FIR. Let there be a system to take judicial corruption into cognizance and let us all hope that such a system would never be invoked. The judicial apex body which finds fault with mechanism of 'sanction' from the appropriate authority for investigating the corruption of public officials does not ensure the inquiry of judicial corruption without 'sanction' of CJI, A paradox indeed.

As Judge Clifford Wallace puts it,

"Judicial corruption certainly exists, I know of no country that is completely free of corruption with its insidious effect of undermining the rule of law. Attempts to solve judicial corruption, however, can themselves weaken the rule of law if the judiciary comes under the influence or control of the legislative or executive branch. The challenge to all governments, therefore, is to eradicate judicial corruption without intruding on the independence of the judiciary.⁶

The nexus between politicians and members of judiciary is the unhealthy trend in any democracy which threatens the rule of law. The nexus includes some from the legal profession as well. These people have developed vested interests in the present status as most of the powerful are happy and not interested to change the system so as to have an independent and incorruptible judiciary. Thus some of them from within, and entire civil society from outside should take initiatives to reform the entire mechanism.

All India Lawyers Union felt: The colonial system that we have inherited was not fashioned for this country and is certainly not suitable for a country of over a billion inhabitants, for a society that is driven by inequities of caste, creed, religion and gender, with varied linguistic, cultural and ethnic backgrounds. Besides, unlike in developed countries, it is a society where substantial sections of the people are ill-fed, illiterate and victims of exploitation, poverty and oppression. The judicial system that we have inherited is highly dilatory, expensive and beyond the reach of common man. And at the pinnacle we have a judiciary whose members, in increasing numbers, are involved in scams and scandals⁷.

Most of the judges and lawyers might find the existing judicial mechanism more suitable and could continue with some cosmetic changes. But, a reformed judiciary with greater integrity and sense of responsibility is the need of the people, illiterate or literate, not empowered or not cared. There is an increasing demand for justice from these needy who are subjected to various violations by spouses, relatives, partners, institutions, friends and ultimately by irresponsible public servants. The AIL Union has rightly observed: Who really want genuine changes in the system are those who are most affected. It is evidently the consumers of justice who want an independent and incorruptible judiciary which will

⁶ N R Madhava Menon, reviewing the book titled: JUDGES AND JUDICIAL ACCOUNTABILITY: Cyrus Das and K. Chandra — Editors; Universal Law Publishing Company Ltd., C-FF-A, Ansal's Dilkhush Industrial Estate, G.T. Karna Road, Delhi-110033.

⁷ Har Dev Singh, "On Corruption in Judiciary and Judicial Accountability, People's Democracy, June 8, 2003 Vol 28, No. 23

safeguard the constitution and frustrate the attempts of the government and the powerful vested interests in the society to use it for their gain⁸.

The Chief Justice of India⁹ stated: ".....I have said it before and I will say it again: in my opinion, more than 80 per cent of the Judges in this country, across the board, are honest and incorruptible. It is that smaller percentage that brings the entire judiciary into disrepute. To make it known that the judiciary does not tolerate corruption in its ranks, it is requisite that corrupt Judges should be investigated and dismissed from service. This is very much possible in the case of subordinate judiciary because disciplinary control lies with the High Court. It is difficult where the higher judiciary is concerned because the only recourse in law is impeachment, which is cumbersome process and which, as a recent instance showed, may not achieve the desired result for reasons that are political. The Supreme Court and the High Courts have attempted to evolve an informal procedure to meet the situation, but it is yet to be tested.¹⁰ This information was given by the Union Minister of Law, Justice and Company Affairs, Shri Arun Jaitley in a written reply to a question from Dr. Sushil Kumar Indora and five other Members in the Lok Sabha on March 14, 2002.

Legislators or caught taking bribes for raising questions, or using their passports for money to illegally transport labour out of country. Important Political Executives are many a time before the courts of law. The matter of corruption in Judiciary is difficult to be discussed because the data is not available and it is sensitive to bring out certain facts. The The Center for Media Studies¹¹, (CMS) made a scientific study of the possibility of corruption at different levels in judicial hierarchy, which rated that 33 per cent of the people bribed judiciary to the extent of Rs. 3817 crore in just one year.

In the study by CMS called "India Corruption Study 2005, Volume II (Eleven Public Services) one chapter is on perception of corruption in Judiciary. It is based on the opinion expressed by some people in litigation; the inferences were drawn as follows:

- ✍ Value of corruption in the Judiciary in the entire country is estimated at **Rs. 2630/- crores per annum**
- ✍ Around **13.37%** of households claimed to have interacted with Judiciary in the last year. This figure is higher in urban areas (15.73%) than rural areas (12.43%).
- ✍ **6.3% of the households interviewed have claimed to have paid bribes.** This figure is 8.2% in case of urban households as against 5.5% in case of rural households.
- ✍ 73% of those who had been to Judiciary had visited courts for civil cases, while 26%
- ✍ came for criminal cases
- ✍ **More than half (57%)** of those ever visiting court had **visited for at least 4 times** in last one year.

⁸ ibid

⁹ CJI on December 23, 2001 at a joint conference organized by the Bar Council of India and the State Bar Council of Kerala

¹⁰ PIB Press Release March 14, 2002, LOK SABHA, CORRUPTION IN JUDICIARY

¹¹ India Corruption Study 2005, Volume II (Eleven Public Services) Corruption in Judiciary, by Centre for Media Studies, RESEARCH HOUSE, Community Centre, Saket New Delhi – 110 017, Phone # 011-2685 1660, 2686 4020, Fax # 91-011-2696 8282, Email # naveen@cmsindia.org; Website: www.cmsindia.org

- ✍ **80%** of those who have interacted with courts **agreed that there was corruption** in the Judiciary.
- ✍ **64%** of those interviewed **believed that corruption had increased** during last one year.
- ✍ **Almost 54%** respondents **took the alternate process** like using influence or paying bribes for getting their work done. Of those who paid bribes, **61% had paid money to a lawyer**, whereas **29% paid money to court officials**, while 15% paid money to middlemen to get their work done.

Pending Cases & Corruption: The CMS study suggested: As of now, **2.6 crore cases are pending** in Indian courts. 87% of these cases are pending in lower courts, while 12% of them are pending in High Courts. Of the cases pending in High Court, **almost 40% cases are pending for more than 5 yrs, while in Supreme Court this percentage comes around 6.6%**. According to a Supreme Court judge, six times more judges are needed for expediting the pending cases and supporting the present system **Almost one-fifth (22%) of the respondents interacting with the department have cases pending for more than five years**. Clearly, seeking justice in India is a slow and a complex process. To understand the frustrations of court goers, respondents were questioned on the number of visits and the difficulties faced by them.

Why people do not complain and fight the corruption? I find a comparison with domestic violence. Spouses who are supposed to live with partners try to adjust and compromise rather than bringing their home to street and disrepute. We respect judiciary as our big brother or grand parents of joint family. That respect should not be interpreted as acceptance to misconduct and irresponsibility of the elderly people. In Domestic violence there is at least an aggrieved party to expect a complaint. But in judiciary aggrieved victim is the 'justice', the mute sufferer. Unless there is an aggrieved party corruption cannot be exposed. Only alternative is the sting operations, but the corporate media feels insecure to do so. It is not possible to count the percentages of corruption at different levels of administration, judicial or executive or legislative.

N. Vittal, former Central Vigilance Commissioner analyzed that the corruption in our system flourishes because of five factors. These are -

- ? Scarcity of goods and services
- ? Red tape and delay
- ? Lack of transparency
- ? Cushions of safety, which have been created by the legal system on the principle that everybody is innocent till, proved guilty. The legal provisions and procedures are effectively exploited by the corrupt to escape punishment.
- ? Tribalism or the tendency of the corrupt to defend each other in organizations¹².

¹² N Vittal, Central Vigilance Commissioner, Retd, Keynote address in the International Seminar on Judiciary in Asia, "Legal Prevention and Judicial control of corruption", 15th February 1999, New Delhi

These factors were generally applicable to all systems. The judiciary has a distinction as delay is enormous; transparency is unthinkable except the great characteristic feature of openness of trial; need to obtain sanction of CJI¹³ to register an FIR against a judge for his crime or bribery; and very strong cushions of safety which makes it almost impossible to impose and enforce accountability among the judges.

Professor Madhava Menon says:

Half-truths and untruths prevailed in discourses on judiciary which did greater damage to the institution in many ways. Judges are not in a position to defend themselves. Lawyers debated the issues selectively and in a manner which did not carry conviction. We are today in an uneasy situation in which what Judge Wallace feared might happen if the judiciary as a whole does not come forward acknowledging the malaise that has set in and instituting mechanisms in place which are credible and confidence-building. What is at stake is not just the independence of the judiciary but the very survival of rule of law and constitutional values¹⁴.

Thus the second question is: **WHAT SHALL THE CIVIL SOCIETY DO TO CURB CURRPTION IN JUDICIARY?**

Question III

Adequate Manpower and Transparent Appointment process: The manpower in manning the judicial system is still not adequate. In 1987, Law Commission has recommended appointment of 107 judges per million people, when it found that at that time the ratio was only 10.5 judges per million people and it wished the same to begin with appointment of 50 judges per million people.

It is clear that we do not have transparent and fool-proof system of appointment of judges to higher judiciary and for regulating them for misbehaviour. Mechanisms to give the government a say in appointing Supreme Court judges and to hear "complaints of misbehaviour and incapacity" against High Court and Supreme Court judges, have been recommended by the National Commission to Review the Working of the Constitution (NCRWC). The recommendations by the commission led by Justice M.N. Venkatachaliah, India's former Chief Justice, are very relevant in the wake of calls for greater judicial accountability. A Parliamentary Standing Committee has openly blamed the judiciary for delays in filling judicial vacancies — a key factor in increasing backlogs of cases in courts.

The Parliamentary Standing Committee on Home Affairs headed by senior Congress member Pranab Mukherjee absolved the government of wrongdoing in filling up of vacancies in higher judiciary: "The judiciary in whom the power and the responsibility now vests has failed to fill the vacancies in judicial posts promptly and punctually and those

¹³ K Veeraswamy v Union of India (1991) 3 SCC 655

¹⁴ N R Madhava Menon, reviewing the book titled: JUDGES AND JUDICIAL ACCOUNTABILITY: Cyrus Das and K. Chandra — Editors; Universal Law Publishing Company Ltd., C-FF-A, Ansal's Dilkhush Industrial Estate, G.T. Karna Road, Delhi-110033.

vacancies of judges in all courts contribute to the huge pendency in a big way," its report to Parliament said.

"The committee is aware that for this state of affairs the Union Law Ministry is not blameworthy... The government is bereft of role in initiating the process of filling up of the vacancies," it said.

The report indicated that the situation had developed since October 1993 when the function of initiating a judicial appointment was taken over by the judiciary after a Supreme Court judgment. Until then, the process to appoint a judge had to be initiated by the Justice Department as far as possible six months before the date of vacancy. Delays occurred, "but the government was answerable and accountable to Parliament," the report recalled. The committee also called for a mechanism to ensure judicial accountability.

Academicians as Judges: Only advocates having prescribed practice and district judges in service have the chance of getting elevated to higher judiciary. Our Constitution provided under Article 124 (3) (c) for appointing eminent jurists as judges of Supreme Court, which was, unfortunately never used. This provision should be extensively used and extended to High Courts so that many eminent legal academicians and jurists would become judges. Even at the lower level of judiciary, there must be possibility of mutual exchange of judges and academicians.

At present the entry into judiciary is decided on person's political links and strong impressions were made with CJ and Law Minister. Thus, it is impossible for those who are unconnected and not resourceful though they are capable, honest and deserving, while it is easy for rich, well connected to ruling party and some how in the practice to impress the appointing authorities like CJ and Law Minister. Their background, honesty, or perception about them among the people is absolutely immaterial. Once they gain entry, the continuance is assured and unquestioned; what ever might be their quality of judgments or behaviour. Exit is almost impossible, unless he wants to relinquish the office. The meaning of independence of judges should be transparent appointment, security of tenure, free from interference from executive. It was never meant that none could question the conduct, behaviour, integrity and functioning of an individual judge. There is no possibility of questioning the conduct and functioning, effective disciplinary mechanism and thus the 'independence' bereft of 'answerability'. Thus the Question No. 3 is: **IS IT POSSIBLE TO EXPEDITE FILLING VACANCIES, AND ENSURE TRANSPARENCY IN APPOINTMENT?**

Question IV

Adverse Criticism is not Contempt: Threat of contempt has insulated the judiciary even further from any semblance of accountability¹⁵. Veiled threats, suo moto notices, motions by advocates and advocate general against the journalists and politicians for contempt of court became common now-a-days. Arundhati Roy was sent to jail for one day for talking about rehabilitation of families uprooted by Narmada projects adversely against

¹⁵ See Comments of the Committee on Judicial Accountability on the Judges Inquiry Bill, 2006

judicial actions and inactions. Zaheera Sheik, victim and witness of communal violence was imprisoned for contempt. EMS Namboodripad, former Chief Minister of Kerala is fined one rupee for attributing class character to top judiciary. While the Law Minister Mr. P Shiva Sankar was let off for making comments similar to those of Namboodripad. One can understand the use of contempt penalizations for enforcement of law, but it is archaic to use it to silence the criticism in the name of scandalization. If criticism amounted to scandalization the individual judge should initiate action for defamation rather than using very high, arbitrary, self imposing, summary powers to punish for contempt.

As Attorney General, Soli Sorabjee stressed amending the law of contempt. “If as a journalist you publish such and such judge is corrupt, you will be hauled up for contempt, even if you are ready to prove it with evidence”. “The law does not allow any justification in contempt. If there is a serious challenge (in the Supreme Court) this may be regarded as an unreasonable restraint on the freedom of expression. How can we not allow a person to justify what he says is not contempt? If he fails, we will come down heavily on him. Otherwise the law of contempt operates as a cover for a corrupt judge.”

Recently, senior advocate Fali Sam Nariman pointed out : “It would be absurd to say that although Article 124 (4) provides for the removal of a judge for proved misbehaviour, no one can offer proof of such misbehaviour except on pain of being sent to jail for contempt of court.

“This is a glaring defect in our judge-made law, that needs to be remedied — hopefully by the judges themselves; if not, reluctantly then by Parliament,” Nariman said delivering the C.L. Agarwal Memorial Law Lecture at Jaipur last December¹⁶. He said the contempt jurisdiction “is mercurial, unpredictable, capable of being exercised differently in different cases and by different judges in the same court.” Asserting that the law was certainly not ideal, he stressed that “truth and good faith must be reinstated as valid defences in the power to punish for contempt because they are vital for the future administration of justice.”

Senior Advocate Rajiv Dhawan wrote: Following the Punjab revelations of judicial corruption came the Karnataka `sex' scandal implicating its High Court judges. Both required investigation. Both revelations were sought to be silenced..... How does one uncover judicial corruption and misbehaviour? There is no complaint mechanism. The moment an allegation is made against a judge, contempt notices may issue. The formal procedure of making such complaints is under the Judges Inquiry Act, 1968, en route to the initiation of impeachment proceedings. Judges do not impeach easily — as is self-evident from the Justice V. Ramaswami imbroglio of 1990-94. The Bar and the media are the best placed to expose judicial corruption. If both are to be stifled we will be left nowhere. During the Bombay judicial crisis (1994-95), the Supreme Court was drawn into questions relating to the exposure of judicial corruption by lawyers. In a remarkable decision in the A.M. Bhattacharjee case (1995), the Supreme Court prescribed secret in-camera procedures for the Bar to quietly report the matter to the Chief Justice of that Court who, following his investigations, would involve the Chief Justice of India who, in turn, would — through peer

¹⁶ C.L. Agarwal Memorial Law Lecture at Jaipur December 2004

pressure — resolve the matter albeit by compelling a resignation. The Bar was pushed into public silence — presumably on pain of contempt proceedings. The Court hoped that "non-cooperating... (judges) could be disciplined by self-regulation through in-house procedure". No doubt, judges should not be irresponsibly pilloried or subjected to needless public obloquy. But what happens if this procedure does not work? Or, proves unsatisfactory? If the ruling in the Bhattacharjee case is read in a restrictive way (as it was sought to be in far off Malaysia), lawyers and bar associations who publicly expose judges without following the secret in-camera procedure will be imperilled by the threat of contempt proceedings. This will stifle the responsibility of the Bar to make known embarrassing judicial truths which require public revelation¹⁷.

Though truth is made a defence in 2006 amendment to Contempt of Court Act, 1971 woos of critics of the judiciary is unending, because the defence is made conditional and again left to the discretion of the judges. The amendment which introduced section 13(b) says "The courts may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide. The issue of punishing press and others for raising critical issues, and speaking the contemporary trends in administration of justice or making a critical analysis of the functioning or talking about corruption in judiciary, is increasing. It might be nearly impossible to satisfy the angry court about 'public interest' in pleading truth of contemptuous statement and bona fide character of the request to invoke that defence. Fair Comment is still no defence.

The United States gave up the power to punish for contempt unless it happened on the face of the court, and the jailing for scandalization did not happen in recent times. The courts in UK also are not so rigid about the contempt powers now-a-days, whether it is contempt of court or contempt of house. In fact, sending people to jail for adverse remarks is more emotional or psychological than real.

The judiciary though unique for its openness of trial, is not so open when it comes to criticism of its functioning. Its information systems are yet to be opened and open minded.

Arun Jaitley, former Law Minister, said that he has been perturbed over the courts in India using their power of contempt to compel journalists to reveal their confidential sources. He said that legislative measures might become necessary to curb an improper use of the contempt power¹⁸.

As judges are bound to give reasons for their judgments because they are functioning their public way, they are also bound to receive the responses and reactions from public. The right to comment and criticize judgments is an indispensable part of the accountability process. Former Chief Justice Verma welcomed analytical review of judgments in journals like Law Quarterly Review instead of advocates writing in praise of judges. He said misuse of contempt power was reason for erosion of credibility of the judiciary. Justice Verma also felt

¹⁷ Rajeev Dhavan, Senior Advocate of Supreme Court, Contempt of Truth, The Hindu December 13, 2002,

¹⁸ <http://syndication.indiatimes.com/cms.dll/articleshow?artid=40264087> website of the Times Syndication Services TSS, visited on 27.7.2006.

at the way the PIL is being killed, quoting a single judge of Gujrat High Court who imposed Rs 48 lakh of fine on petitioner for filing a PIL against pollution of an Industry in Vapi. He also referred to dilution of right to life and eviction of poor occupiers of government land which was under their possession for more than 30 years. According to Specific Relief Act, none should dispossess those who had more 30 years of possession. How the judicial decisions are favouring eviction of poor, recently? Justice Verma asked¹⁹.

Thus question 4 is: **WILL THERE BE ANY RESTRICTION ON EXCESSIVE USE OF CONTEMPT POWERS?**

Question V

Ensuring Efficiency: Judicial inefficiency is as realistic as the very very long cause list issued by courts every day. Judicial incapacity, Judicial inactivism, lethargy, disinclination to learn, lack of effective and strict law teaching mechanism to equip judges, lack of common sense and common knowledge are equally worrying factors that block delivery of justice. Apathy of courts and problem of litigant is as real as the Ajay Ghosh who was in prison for 38 years as under-trial. Communication of judicial orders and record keeping in India is highly deficient and negligent as evidenced by the incidents such as Rudul Shah who served sentence of imprisonment for 14 years even after acquittal.

More than corruption, the efficiency factor affects the efficacy of justice administration. Teaching the judges about work culture, keeping pace with increasing docket filings, marching ahead with changing times and altering legal atmosphere in and around the country is essential to deliver justice in time. There is an imperative need to have an independent training institute at different levels as the existing academies are not sufficient to teach the existing strength of judiciary. Continuing Legal Education must form essential component at regular intervals for judges, law teachers and advocates. Efficiency includes the effective case management also. After knowing that there are 27 million cases pending, what is our approach to manage this monster of pendency? No syndicated programme of case load management in India. We are happy blaming executive as lethargic, media as sensational, legislative as indisciplined and non-serious, and any criticism from any quarter as 'unwarranted', 'unrealistic', 'negative' and 'not constructive'. If not considered as contempt, we pour all our contempt against such criticism. Without proper case management, how do you solve the problem of adjournments? Once Giani Zail Singh, as President of India commented with a punch of satire, *bade bade vakilonko lambi lambi Tareeq padthi ha?* (= big advocates get long dates of adjournments). I am grateful to judiciary for not taking up suo moto contempt for this statement by the President.

Thus the Question no. 5 is: **WILL ANY BODY ENSURE EFFICIENCY IN CASE MANAGEMENT?**

¹⁹ Inaugural Address by Justice J.S. Verma, "Has the Judiciary turned its back on the poor? A report on Seminar dated 4th November 2006, Indian Society for International Law, New Delhi.

Question VI

Periodical Evaluation of Performance of Judges and Lawyers: The people are deprived of knowing the performance efficiency of judges and even the lawyers. Every activity now-a-days, has securing the feedback mechanism, which is totally absent in administration of justice. Besides the State judicial mechanism of internal evaluation for the purpose of service promotions and administration, there is a need for providing a regular and open assessment of performance of judges by an independent body of people from different walks of life as they are the real consumers of justice though that body might include former judges and representatives of present bar and judiciary. Even if a private agency conducts a survey or collects the opinion or performance assessment according to a set of disclosed standards, it should not be censored or censured as contempt of court.

Enforcing Accountability: Justice Rehnquist has asserted that it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure²⁰.

Though enforcing accountability of judges without compromising on judicial independence is very difficult, it is an urgent requirement. We need to structure a workable mechanism to secure accountability.

The former Chief Justice of India, J.S. Verma, has called for legislation on judicial accountability, based on the resolutions passed by the Supreme Court, to check the erosion of people's trust in the judiciary and to effectively probe charges of judicial corruption. The Supreme Court passed the three resolutions on May 7, 1997 and they were sent to the Prime Minister on December 1, 1997 for making a law on judicial accountability. Unfortunately it has not happened so far, said Justice Verma²¹.

Impeachment of judges did not work and it was clear from the Ramaswamy case. Hence, legislation was a must. Till a law is made, a committee, headed by the Chief Justice and comprising senior judges, should look into allegations against judges. If they found that a case was fit for inquiry, appropriate action could be taken. "This would bring about transparency in the judicial system and deter baseless complaints," Mr. Justice Verma said. Asked in the BBC Hindi special programme, *Aapki Baat BBC Ke Saath* why the rich and powerful escaped any punitive action no matter how serious their wrongdoings were, he said: "It is unfortunate that those who wield power, because of either money or position, get away despite having committed wrongs as first of all, they cannot be arrested; if they are nabbed, then cases against them are not registered properly, and if at all cases are registered, the investigation is not carried out and finally the delay in hearing of cases ensures that conviction of the powerful does not take place."

²⁰ Stephen L Wasby, *Judicial Imperialism revisited*, Professor of Political Science, State University of New York at Albany, in a report in 1982

²¹ *The Hindu* Jan 25, 2005

Judicial independence is always in conflict with judicial accountability. Criminal conduct of a judge has to be investigated and prosecuted, but how to tackle non-criminal misconduct of judge. It is rightly being practiced and argued that those investigations should be primarily left to judicial branch only. Judicial independence depends upon the public acceptance of the judiciary as fair, just and honest body, the judiciary must carefully structure its investigations to assure the public that the judiciary is taking care of its own problems of corruption. Moral leadership and strength of character alone can sustain judicial accountability.

US Experience: US developed judicial councils of circuits (Circuit Councils) local independent administrative bodies comprised of judges. They rarely disciplined judges. 1980 it was amended to provide power to chief judge of circuit to screen frivolous and irrelevant complaints and take informal enquiry and action on serious issues of misconduct and disability²².

Definition of judicial misconduct in US Judicial Councils Reform and Judicial Conduct and Disability Act of 1980:

The circuit council can consider only complaints that allege facts which show that a judge 'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or allege that such a judge or magistrate is unable to discharge all duties office by reason of mental or physical disability'.

Thus Circuit Council is not responsible for determining if judges are involved in inappropriate conduct generally or other details of their personal lives, but whether their conduct affects the effective and expeditious administration of the business of the courts. This law was later found successful in functioning purposefully. We need to examine whether such a definition of misconduct would work in India. An immoral or improper conduct, if it does physically affects the business of the courts cannot be kept beyond definition of misconduct. In fact the immorality and breach of ethics by judges would definitely erode the credibility and business of the system. Judiciary itself should evolve and structure a workable approach to investigate the misconduct and discipline judges for wrongs, because absence of it will shatter the confidence the people reposed in the judiciary.

After examining the system available in US and other countries the following points would emerge for consideration to incorporate within the mechanism to ensure judicial accountability.

1. Judicial officers have no immunity from any level of corruption or misconduct.
2. There should be an effective mechanism to remove judges for offences such as bribery as well as a system for correcting conduct less than a removable offense which provides for a response to complaints from litigants, lawyers and judges.

²² Clifford Wallace, Retd Judge, Resolving Judicial Corruption While Preserving Judicial Independence Comparative Perspectives, 28 Cal.W.INT'L L.J. 341 (1998) republished in "Judges and Judicial Accountability, Ed. Cyrus Das and K Chandra, 2004, pp 86-100

3. Like in US provide a system of having regional control over judicial misconduct, to prevent accumulation of power in one judge or one central body. Decentralized self regulation is required.
4. The power of investigation and disciplinary action must be within the judiciary.
5. See that there are no financial pressures on judges such as low pay of salary and lack of required facilities.

Judicial accountability is need of the hour so that we can enforce the accountability of other institutions through judiciary. The people in India repose enormous confidence and trust in judiciary, and thus it is the responsibility of those who man and operate judiciary to retain that trust and it is for the civil society including media to press for developing a workable mechanism to ensure the judicial accountability without compromising on the vital aspect of judicial independence.

David Pannick wrote: Judicial independence was not designed as, and should not be allowed to become, a shield for judicial misbehaviour or incompetence or a barrier to examination of complaints about injudicious conduct on apolitical criteria. That a man who has an arguable case that a judge has acted corruptly or maliciously to his detriment should have no cause of action against the judge is quite indefensible”

Justice Krishna Iyer wrote: Many “Lordships” hardly deserve the high office, since in their rulings they do not share basic values of their oath, being under the illusion of irremovable office and aristocratic class bias. Luckily, learned, humanist and morally exemplary judges maintain the majesty and high dignity of our courts, with the insolent, ignorant, corrupt and dubiously lazy, still being in minority.

No doubt, it is gratifying to note that such corrupt are in minority, but can we check their further growth in judiciary and ensure appointment of better judges? Thus the Question No. 6 is: **HOW THE JUDICIARY CAN BE MADE ACCOUNTABLE?**

Question VII

The Judges Inquiry Bill, 2006 has a very serious deliberate bad provision. 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. It is apparently meant for blocking frivolous complaints but it will totally stop and deter the people from making any complaint against any judge, because it will be impossible for him to establish good faith or absence of intention to harass the judge in judiciary. It will ensure that complainants would end up in jails while wrongdoers would enjoy the powerful office. It will further ensure the there would be no accountability at all. This provision is made ignoring the principles in law of evidence, which include proved, not proved and disproved. It is not justified to punish if the complaint is not proved because of lack of evidence. Only when the allegation is disproved and malicious intention is also established the complainant could be prosecuted and penalized. It is atrocious to seek punishing the complainants who had no resources or strength to bring in evidence, while the complained

continue to wield the wild power happily influencing the witnesses and manipulating the inquiry machinery. This provision is death trap of the entire law and puts a full stop to any effort of introducing the accountability. Look at the contrast provision. Even if the allegation is proved and judge is held to be guilty, the Council need not remove the judge but issue advisories, warnings, censure or admonition including the requesting the judge to voluntarily retire or withdraw judicial work for a limited time. If charges are serious, the Council would advise President to initiate further action of laying the matter before Parliament for impeachment, etc.

Section 33 says all the papers, documents and records of proceedings relating to complaint shall not be disclosed to any person except as directed by the Council. A complaint against ordinary citizen, people representative or a public servant will be heard openly, evidence is discussed and debated in media, reports of internal enquiry can be ordered to be disclosed either by courts or under RTI. But, the complaints against judiciary any paper relating to it, the reports can never be disclosed. And it is not just giving power to order secrecy but it is an legal provision making secrecy a mandatory one. Except a minor positive feature of creating another statutory procedure for initiating an enquiry into allegations of misconduct of a judge, the Bill, if becomes law, will ensure judiciary much more immune from accountability besides ensuring that none would dare to complain. Thus the Question No. 7 is: **WHETHER THE JUDGES INQUIRY BILL 2006 SERVES THE AVOWED PURPOSE OF INTRODUCING JUDICIAL ACCOUNTABILITY? IS IT JUDGES INQUIRY BILL OR JUDGES IMMUNITY BILL?**

The Conclusion

I have some common questions and common demands of a Common Man:
How the Administration of Justice does take cognizance of the following problems and responds? What is the Scheme, Machinery, Programme, law and legal consequences to deal with the following issues?

- ✍ Delay
- ✍ Deficiency
- ✍ Indiscipline & Irresponsibility
- ✍ Lack of legal knowledge, No updating of the knowledge
- ✍ Not accessible to poor, No sympathy for poor, No regard for the time and energy of clients and their advocates
- ✍ Misbehavior with colleagues.
- ✍ Bribery & Corruption
- ✍ Deliberate injustice
- ✍ Uncertainty about reaching of the listed case
- ✍ Nexus with Executive and power politics
- ✍ Elitist and aristocratic approach,
- ✍ Least concern for code of ethics
- ✍ Demanding subordination from lower judicial officers
- ✍ Love for publicity and craze for praises

- ✍ Intolerance to assessment of performance
- ✍ Aversion for truth, opposition to media criticism, inflicting serious fear on people by excessive use of contempt powers, or veiled threats
- ✍ Disparaging remarks from the bench
- ✍ Least regard for witnesses, much less for expert witnesses, Contempt towards party in person, Disrespect for clients, Insulting the advocates
- ✍ Discouraging the PIL, etc

I think answering these questions avoiding the above mentioned situations is judicial answerability. And responding to these issues with development of a system after thorough introspection is the judicial accountability. I have some hopes also.

Some optimistic points:

1. I hope that Judicial Accountability with reference to access to poor will be realized.
2. I hope that the Appointment of judges to higher courts will be transparent, opened up beyond Advocates and District Judges, to legal academicians allotting a prescribed percentage at Supreme Court and High Courts also. The provision of the Constitution to appoint jurists as judges of Supreme Court should be extended to High Courts also and that provision should be extensively used.
3. I hope that no one would ever get a chance to use expressions of Judicial imperialism, Judicial Corruption, autocracy, arrogating the powers, encroaching into arena of other estates etc.
4. I hope that the higher judiciary will give judgments even against the written text of law only to provide complete justice and secure fundamental rights. The higher courts would explain how some of the judgments against the labour law, right to live and shelter reflecting new economic policies are rendering complete justice. I hope there will be no need to observe two minutes silence for death of right to life.
5. I hope that Judiciary will never become an instrument of oppression.
6. I hope that Judges will accept it as their duty to explain public what judges do what they do not do.
7. I hope there will not be any complaints of misconduct against judges and if there is any, the judiciary will effectively tackle it to cleanse the system.
8. I hope that subordinate judges will be respected by higher officers and enough powers to do justice will be availed by them.
9. I hope that higher judiciary rigorously implement the Right to Information Act, 2005.
10. I hope that people will have a fair chance of access to justice. I hope that the present courts of evidence would become courts of law and further the courts of justice. I hope that the people will continue to repose their high confidence in judiciary and do not purchase private justice in streets from settlement mafia run by muscle men, police and politicians, because hopefully there will be no difficulty in getting justice from courts of law.
11. Lastly, I hope that I will not be overhauled for contempt of court for making this presentation.