The Chanakya Law Review (CLR)

Vol. II Issue I, Jan-June 2021, Pp. 47-78

REVIVING A TOUCHSTONE OF INDIAN DEMOCRACY: JUDICIAL ACCOUNTABILITY

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ABSTRACT

Judiciary for a long time has been worshipped as a sacred institution with a sacrosanct spell casted around it. However, a glimpse at the recent accusation against the institution reiterates the need to rethink, redesign and revive the brittle judicial accountability. The aim of the paper is to investigate the efficiency and sufficiency of the various constitutional checks and balances that exist to ensure judicial accountability. The discussion about judicial accountability becomes highly relevant given the newly evolved role of the organ in the contemporary times. At first, judiciary was not conceived as a source of socially relevant power that could independently impact the society, but has now transformed into the centre of activism by taking a significant position in protection of rights. As judiciary and its actors are considered to be the guardians of fundamental rights, it becomes pertinent to find out "who guards the guardians of our Constitution". The paper would analyse the friction between the concepts of judicial accountability and judicial independence, it would discuss the status of judiciary Vis-a-Vis Article 12 of the Constitution and later it will evaluate the efficiency of the internal and external checks and balances against the functions of the judiciary.

KEYWORDS: Judicial Accountability, Judicial Independence, Appointment of Judges, Impeachment

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INTRODUCTION

Individuals possess rights, which are exercised to "preserve their humanity and respect their civility"[67], by the fact that they are human being and it is a "fallacy to regard them as a gift from the State to its citizen"[68]. However, these rights would be mere parchment promises if there is an absence of any authority to effectuate them. This function of giving life to these inherent rights is vested in the hands of the Judiciary, one of the three essential pillars of a democratic state. It protects the rights of individual and groups by interpreting, applying and complying with the rule of law. This is the reason why Judiciary is considered as the "guardian of the Constitution"[69] and the last bastion of hope for the masses to seek redressal[70].

At first, judiciary was not conceived as a "source of socially relevant power that, in its own right, might be expected to have an impact on the society"[71], but now judiciary has transformed into the "centre of activism"[72] to protect, preserve and promote rights of individuals. At the same time, with these evolved roles, judiciary has also obtained few characteristics that disturbs the fundamental principles on which the democratic state rests. As a result, the judiciary as we understand today possess dual-contrasting characteristics by being both "fountains of justice"[73] and "cesspools of manipulation"[74]. This contrast could be visualised through considering the diverging views of two contemporary writers. One claims that through creating social awareness and upholding human rights in every sphere of nation's activity, the judiciary has "transformed the Supreme Court of India into a Supreme Court for Indians"[75]. Taking a contrasting view the other author claims that, judiciary is now "more and more intractable, dilatory, whimsical and protective of the criminal and law breaker having influence or financial clout"[76]. Therefore, even if judges are the guardians of the Constitution, the possibility of them

[67] Fahed Abul-Ethem, The Role of the Judiciary in the Protection of Human Rights and Development, 26 (3) Fordham International Law Journal 781, 783 (2002).
[68] *Id.*
[69] M.C Setalvad, Former Attorney-General for India, The Hamlyn 12th series lectures, The Common Law In India, (1960); Sarojini P Reddy, Judicial Review Of Fundamental Rights 25, National Pub. House (1976); P.B Gajendragadkar., Law, Liberty and Social Changes, Asia Pub. House (1965).
[70] Jetling Yellosa, Judicial accountability in India: A myth or reality, 3(3) International Journal of Law 48, 49 (2017).
[71] R. Sudarshan et al., Judges and the Judicial Power, Sweet & Maxwell (1985).
[72] Rajvir Sharma, Judiciary as Change Agent: Some Insights into the Changing Role of Judiciary in India, 58(2) International Journal of Public Administration, 246, 249 (2017).
[73] Marc Galanter, Competing Equalities: Law and the Backward Classes in India, University of California Press (1984).
[74] *Id.*
[75] Upendra Baxi, Inhuman Wrongs and Human Rights, Har-Anand Publications (1994).
[76] Y.P Anand, A People"s Election Manifesto, A Gandhian Minimum Needs Constructive Programme, (1996).

acting contrarily to the fundamentals of the Constitution can't be completely excluded. This casts doubts on the integrity of the organ.

A glimpse at the recent accusations against judiciary would amply reflect the need for ensuring judicial accountability. An In-house committee of the Supreme Court on May 6, 2019, ruled that there was "no substance"[77] to the accusation by a former junior court assistant against the former CJI Ranjan Gogoi. On April 19th 2019, the complainant wrote to 22 Supreme Court Judges accusing the former CJI of sexual harassment[78]. Even before initiating any investigation, the Secretary General of the Supreme Court out rightly denied the allegations for being "completely and absolutely false and scurrilous"[79]. The CJI formed a bench constituting of Justices Sanjiv Khanna, Justice Arun Mishra and himself, who heard the complaint on a special hearing and dismissed the same holding that the complaint was an attempt to "deactivate the office of the CJI"[80]. As a response to the criticisms for violating the principle of *Nemo Judex in Causa Sua*, by sitting in the bench to judge his own case, an In-house committee constituting of Justice Indira Banerjee, Justice Indu Malhotra, and Justice S A Bobde was formed[81]. The complainant after a multiple due process violation by the committee, opted out of the inquiry as she "[I] felt I was not likely to get justice"[82]. She was not allowed to have her lawyer present, her request to submit evidences on record was rejected, her right to

[77] Deepika Tandon & Shahana Bhattacharya, PUDR Issues Statement Against "Supreme Injustice" in Sexual Harassment Case Against CJI Ranjan Gogoi, 54(19)Economic and Political Weekly (2019); No Substance In Charges": SC Panel Gives Clean Chit To CJI Ranjan Gogoi In Sexual Harassment Case, Outlook, May 16, 2019, available at: https://www.outlookindia.com/website/story/india-news-no-substance-in-charges-supreme-court-panel-gives-clean-chit-to-cji-ranjan-gogoi-in-sexual-harassment-case/329925#:~:text=An%20in%2Dhouse%20inquiry%20committee,employee%20of%20the%20top%20court. (Last visited on March 11, 2021).

[78] *Id.*

[79] Puneet Nicholas Yadav, Dipak Misra Was Reviled as CJI but Ranjan Gogoi Beguiled His Way to Power, Outlook India, August 24, 2020, available at: https://www.outlookindia.com/blog/story/india-news-dipak-misra-was-reviled-as-cji-but-ranjan-gogoi-beguiled-his-way-to-p/4159. (Last visited on March 11, 2021).

[80] *Id.*

[81] Shruti Rajagopalan, Justice Is Dead, Long Live the Justices, The Wire, May 06, 2019, available at: https://thewire.in/law/supreme-court-cji-allegations-justice (Last visited on March 11, 2021); Siddharth Varadarajan, From the Supreme Court, a Reminder that Justice Was Sacrificed to Save a Judge, The Wire, January 23, 2020, available at: https://thewire.in/law/supreme-court-justice-sacrifice-sexual-harassment-allegations-ranjan-gogoi (Last visited on March 11, 2021); Law Students to SC Judges: Principles Of Justice Violated In Sexual Harassment Case Against CJI, News Click, May 11, 2019, available at: https://www.newsclick.in/law-students-sc-judges-principles-justice-violated-sexual-harassment-case-against-cji. (Last visited on March 11, 2021).

[82] Kaunain Sheriff M, CJI sexual harassment case: Not likely to get justice, says woman complainant, walks out of SC probe, Indian Express, May 1, 2019, https://indianexpress.com/article/india/ex-sc-staffer-who-accused-cji-of-sexual-harassment-says-wont-participate-in-in-house-inquiry-5703328/. (Last visited on March 11, 2021); Complainant Against CJI Withdraws From Inquiry Panel, Citing Lack of Sensitivity, The Wire, May 01 2019, available at:https://thewire.in/law/cji-ranjan-gogoi-allegations-complainant-inquiry-committee. (Last visited on March 11, 2021).

get a copy of depositions was rejected, her request to video record the proceeding was denied and she was not notified in advance about any of the In-house committee procedures. The committee decided on an *ex parte* basis by violating the principle of *Audi Alteram partem* and concluded that, after "careful examination"[83] that accusations were "baseless"[84]. Throughout this paper we could consider this particular instance as a case in point to evaluate how the existing mechanisms have failed to create checks and balances against judiciary. Multiple other instances including: when former CJI Dipak Misra misused his role as the "master of roster" by allegedly working under duress[85], when former CJI Jagdish Singh Khehar handpicked investigators by himself to inquire the allegations against him for being involved in the death of former Chief Minister of Arunachal Pradesh, Kaliko Pul[86], and when no actions were taken on the allegation of financial misappropriation against Justice Soumitra Sen, are indications that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by"[87]. In a World Bank working paper it was noted that, applicants from advantaged classes had almost 73% higher probability of succeeding in a claim of violation of fundamental rights equated to only 47% for non-advantaged classes[88]. This apparent discrimination in the most crucial organ in our democratic State raises concerns.

Therefore, the derogating values of judiciary, incidentally or unintendedly, calls for reviving a significant feature of the Constitution "the principle of checks and balances by which every organ of state is controlled by and is accountable to the Constitution and the Rule of Law"[89].

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[83] A Vaidyanathan, Sex Harassment Charges Against Chief Justice Baseless, NDTV, May 6, 2019, available at:https://www.ndtv.com/india-news/sex-harassment-charges-against-chief-justice-baseless-finds-supreme-court-in-house-panel-2033721 (Last visited on March 11, 2021); SC gives clean-chit to CJI; woman complainant "disappointed, dejected, Deccan Chronicle, May 6, 2019, available at:https://www.deccanchronicle.com/nation/current-affairs/060519/sc-finds-sexual-harassment-charge-against-cji-baseless.html. (Last visited on March 11, 2021).

[84] *Id.*

[85] Samanwaya Rautray, SC rejects independent probe in Judge Loya's death, says PIL an attempt to malign judiciary, Economic times, April 19, 2018, available at:https://economictimes.indiatimes.com/https:/economictimes.indiatimes.com/news/politics-and-nation/loya-death-verdict-live-no-reason-to-doubt-statement-of-4-judges-says-Supreme-Court/articleshow/. (Last visited on March 11, 2021); Supreme Court crisis: All not okay, democracy at stake, say four senior-most judges, The Hindu Business, January 18, 2018 available at: https://www.thehindubusinessline.com/news/Supreme-Court-crisis-all-not-okay-democracy-at-stake-say-four-seniormost-judges/article10028921.ece# (Last visited on March 11, 2021).

[86] HC rejects plea for FIR on Kalikho Pul's alleged suicide note, Deccan Herald, May 22, 2017, available at: https://www.deccanherald.com/content/613018/hc-rejects-plea-fir-kalikho.html (Last visited on March 11, 2021).

[87] B. N. Srikrishna, International Standards for the Independence of the Judiciary 122, (Sujit Choudhry ed., 2016)

[88] Varun Gauri, Public Interest litigation In India Overreaching or Underachieving? November 2009, available at: https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5109. (Last visited on March 11, 2021)

[89]Justice S. Muralidhar, The Expectations and Challenges of Judicial Enforcement of Social Rights, available at: https://delhidistrictcourts.nic.in/ejournals/Social_Rights_Jurisprudence.pdf. (Last visited on March 11, 2021)

It is essential that all authorities vested with power and position in democratic State is accountable to its sovereign masses. Further, with this newly evolved "activist role" that judiciary has taken up in pivotal areas like, health, child labour, political corruption, environment, education etc.[90], it becomes even more necessary to make sure that there exists checks and balances in ensuring that judicial activism doesn't transform into judicial overreach. However, the contention for judicial accountability is countered with the need for judicial independence. These two principles become central in the discussion of checks and balances. The aim of the essay is to evaluate the existing forms of accountability on their sufficiency and efficiency in an aspiration to create an understanding of the various principle and features of judiciary that are interwoven together. Simply put, it is to evaluate and find out "who guards our guardians"? It is not the aim of the paper to suggest any alternative forms of creating accountability model, but simply is to identify, review and critique the existing checks and balance and start afresh the discussion on judicial accountability.

Part 2: I would discuss the friction between the concepts of judicial accountability and judicial independence;

Part 3**:** I would discuss the status of judiciary Vis a Vis Article 12 of the Constitution, whether it falls under the purview of "State". The discussions whether, judiciary being a determinant of the contours of fundamentals rights, is subject to the scrutiny of fundamental rights, would become relevant in understanding accountability. Though these discussions related to the scope of Article 12 of the Constitution and judiciary are taken up by courts to understand jurisdictional limits, I argue that bringing judiciary under the definition of "State" would create constitutional checks and balances.

Part 4: To create judicial accountability, it becomes important to comprehend, to whom are the judges accountable to? The paper would identify and analyse four existing modes for "judging our judges". There are broadly two mode, internal checks and balances and external checks and balances. *In Subpart 4.1,* internal accountability, to higher echelons of judiciary, would be discussed. *In subpart 4.2,* External accountability, to the co-equal branches and to the public, would be discussed. It is also imperative to note that the different modes overlap too, for instance, through the provisions of appeal both accountability to public and internal accountability are created.

[90] Nagarathnam Reddy, Judicial Activism Vs Judicial Overreach in India, 7(1) Global journal for research analysis, 82 (2018).

JUDICIAL ACCOUNTABILITY V. JUDICIAL INDEPENDENCE

When we discuss the concept of checks and balances against the judiciary, it becomes important to keep in mind that, any mode of creating judicial accountability doesn't suffocate, one of the hallmarks of democratic system, judicial independence. When the accusation against Former CJI Ranjan Gogoi was raised it became a "matter of great public importance touching upon the independence of the judiciary"[91]. Judicial independence is the appropriate degree of autonomy to allow the judges to adjudicate and protect Rights of individuals as they are "owed to the law, (to protect) peace, order and good governance of all in community".[92]

The notion that "the greatest scourge an angry heaven would ever inflicted upon an ungrateful and sinning people, is an ignorant, a corrupt, or a dependent Judiciary"[93], signifies the importance of an independent judiciary in rendering impartial decisions[94]. On many occasions, the United Nations Human Rights Council has expressed that an independent judiciary is "essential to the full and non- discriminatory realisation of human Rights instruments and indispensable to the process of democracy"[95], as it acts as a pledge of the integrity of the judicial organ to ensure public trust on the judiciary. Over the years, few indicators of judicial independence have been developed, which can be broadly categorised into five types: **Institutional independence, Counter-Majoritarian independence, Operational independence, Law making Independence and Decisional independence**[96]. Institutional

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[91] CJI-led bench holds hearing on sexual harassment charges against CJI Ranjan Gogoi, India Today, April 20 2019, available at: https://www.indiatoday.in/india/story/cji-led-supreme-court-bench-hold-unusual-hearing-on-matter-of-great-public-importance-1506092-2019-04-20. (Last visited on March 11, 2021)

[92] Gerard Brennan, The State of the Judicature, 72 ALJ 33, (1998).

[93] An Independent Judiciary: Report of ABA Special Commission on Separation of Powers and Judicial Independence, Institute for Court Management Court Executive Development Program Phase III Project, available at: https://www.abanet.org/govaffairs/judiciary/report.html.

[94] Hon. Melissa Miller-Byrnes, Judicial Independence, Interdependence, And Judicial Accountability: Management Of The Courts From The Judges Perspective, Institute for Court Management Court Executive Development Program Phase III Project, 2006, available at: https://www.ncsc.org/__data/assets/pdf_file/0018/17622/millerbyrnesmelissacedpfinal0506.pdf. (Last visited on March 11, 2021)

[95] Resolutions 50/181 of 22 December 1995 & 48/137 of 20 December 1993, Human rights in the administration of justice, United Nations: General Assembly; See also Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Basic Principles on the Independence of the Judiciary, United Nations Human Rights office of the high commissioner; Guidelines for the development of legislation on states of emergency, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations document E/CN.4/Sub.2/1991/28; Human Rights and Law Enforcement : A Trainer's Guide on Human Rights for the Police, United Nations, Professional Training Series No. 5/Add.2 (2002).

[96] R Ananian Welsh & G Williams, Judicial Independence from the Executive: A First Principles Review of the Australian Cases, 40 (3) Monash University Law Review, 593, 596 (2015); See also Gordon Bermant & Russell

independence mainly deals with appointment of judges[97] and ensures a fixed and adequate salary and tenure for the judges[98] and Counter- majoritarian independence refers to the power of courts to override and reverse legislative and executive acts, which has been widely recognised as not an essential part of judicial independence[99]. Ensuring availability of sufficient funding to facilitate its function[100], assignment of cases to judges and the power to transfer judges are envisaged under Operational independence[101]. Further, Decisional independence which is the core aspect of judicial independence, deals with the primary function of courts to adjudicate[102]. Among the above said five kinds, it is in the enforcement of Institutional and Operational Independence, the tussle between judicial accountability and independence centres at. Mainly as Thomas Plank contends, Institutional and Operational independence comprises of some of the essential elements necessary to ensure decisional independence[103].

Judicial accountability ensures that there is no vesting of unbound power in the hands of judiciary which may create a shift from democracy to *juristocracy*[104]. Accountability is not seen as a command and control relationship anymore but rather as a fluid concept involving public scrutiny and dialogue which creates individual accountability of judges leading to institutional accountability of judiciary as a branch of the government[105]. It is not only in the issue of overreach where creation of accountability becomes relevant but also the issue of under

R. Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 46 MERCER L. REV. 835, 837, 839, 844-45 (1995).

[97] The Rule of Law in A Free Society, The International Commission of Jurists, 293 (5-10 January 1959).

[98] Thomas E. Plank, The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, 5 (1) William & Mary Bill of Rights Journal, (1996).

[99] Id.

[100] Chief Judge Dr. John Lowndes, Presented at The Northern Territory Bar Association Conference: Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary (July 2016).

[101]Article 7, Basic Principles on the Independence of the Judiciary (1985); Clauses 10 and 13, Bangalore Principles of Judicial Conduct: Commentary, United Nations Office on Drugs and Crime (2007); Article 24, Siracusa Principles: International Commission of Jurists (1985); See also Anthony Mason, Judicial Independence and the Separation of Powers – Some Problems Old and New, 94 (Geoffrey Lindell ed., 2007).

[102] Welsh, Supra note 30.

[103] Plank, Supra note 32.

[104] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, 24-25 Harvard University Press (2007).

[105] Judiciary of England and Wales, The Accountability of the Judiciary, 3, (2007) available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf Last visited on March 11, 2021)

reach where the courts may not full fill their responsibilities in spite of having jurisdiction. There have evolved two theories of judicial accountability as captured by Professor Vernon Bogdanom namely, "explanatory accountability" and "sacrificial accountability". The former is embodied in the duty of courts to give reasoned judgments and orders, to assist in scrutiny and transparency. The latter is to "take the blame for what goes wrong"[106] and forfeiting one's position in judiciary, if something goes seriously wrong.

Then, what is the nature of the relationship between accountability and independence? Is it mutually exclusive? Or Are they correlative obligation by being complimentary? As we can evidently see, the features of both the concepts are indeed in contradiction. For instance, operational independence seeks to provide for a fixed tenure but on the other hand sacrificial accountability tends to disturb the tenure by conferring authority to remove the judge in case of misconduct. However, this contradiction is to be taken "complementary rather than antithetical"[107] as judicial independence shouldn't be considered as an end in itself. They are complimentary in the sense that, both seek to achieve the same goal of maintaining public confidence in the judicial organ. Judicial independence tends to create confidence by ensuring the masses that their function of decision making is free from external influences and judicial accountability seeks to create the same through transparency of functions. As Stephen Burbank and Barry Friedman puts, we shouldn't treat "judicial independence and judicial accountability as dichotomous but rather as different sides of the same coin"[108]. The critical issue lies in creating an appropriate amount of independence required to ensure a satisfactory level of adjudicatory independence[109]. Keeping this in mind, the analysis of the existing modes of check and balance would be made.

JUDICIARY AS STATE

Part III, the *Magna Carta* of the Constitution of India, is enshrined with the Fundamental Rights. DD Basu contends that "the Fundamental Rights were incorporated into our Constitution to limit the power" of the three main organs. Then, could the principles of

[106] Id.

[107] RD Nicholson, Judicial independence and accountability: can they co-exist? 67 ALJ 404, 406 (1993).

[108] Stephen B Burbank & Barry Friedman, Judicial Independence at the Crossroads, SAGE Books (2002).

[109] Thomas Church & Peter Sallman, Governing Australia's Courts, Australasian Institute of Judicial Administration 68, (1991).

fundamental right be construed as an efficient form of check and balance against judiciary? Presupposing that analysis is the necessity to ascertain whether judiciary falls under the purview of "State" under Article 12 of the Constitution. "The object of Part III is to provide protection for the freedoms and Rights mentioned therein, against arbitrary invasion by the State"[110] and therefore, the Constitution defines "State" under Article 12 of the Constitution. As a result, every claim against violation of fundamental right leads to the theoretical inquiry of Article 12, to conclude whether the alleged violator would qualify as a "state". It states,

Article 12- Definition: In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

On interpreting the above definition, it is true that the judiciary doesn't have an explicit mention like the other two organs of the state, legislature and executive. However, the definition is inclusive in nature and non-exhaustive[111], which is evident by the usage of "includes"[112] and the "other authorities"[113], which aids the courts in adapting to the changing circumstances, so that the transformative nature of the Constitution could be upheld[114]. A perusal of the constituent assembly debates, where Dr. B.R. Ambedkar explained that the word "authority" in Article 12 is "every authority which has got either the power to make laws or the power to have discretion vested in it"[115], indicates that judiciary must fall under the scope of "other authorities". On the other hand many scholars argue that, judiciary was intentionally left out by the drafters to ensure and uphold its independence[116].

As a result, a significant amount of controversy surrounds the debate of whether judiciary would fall under the purview of "other authorities" to be considered as state? The centre of controversy is the implication of its inclusion under the definition of "State", if it is not considered "State" then it would mean that judicial decisions can violate fundamental right which would result in grave miscarriage of justice. On the other hand, if it is "State", it would

[110] State of W.B. v. Subodh Gopal, AIR 1954 SC 92.
[111] V.N. Shukla, Constitution of India 378 Eastern Book Company (2010).
[112] The Constitution of Indian, 1949, Article 12, Part II: Fundamental Rights.
[113] *Id.*
[114] Durga Das Basu, Comparative Constitutional Law, 8 (4th ed., 2013).
[115] Dr. Ambedkar, Constituent Assembly Debates, Volume 7, November 25th 1948, available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25. (Last visited on March 11, 2021)
[116] Yellosa, *Supra* note 4.

lead to infinite modes of redress through Article 32 of the Constitution creating a significant burden on the court system.

To begin with, let's analyse whether Judiciary would meet the standard of requirements formed by the courts to examine "other authorities" under Article 12 of the Constitution. The court in International Airport Authority's case laid down six criterions which are: whether "the entire share capital of the corporation held by government"; whether " the financial assistance of State meet almost entire expenditure of the corporation"; whether "the corporation enjoy monopoly status which is state conferred or state protected"; whether there exists "deep and pervasive state control"; whether the function is of "public importance and close related to governmental functions" and whether "a department of the government was transferred to the corporation"[117]. It must also be noted that the court in *Ajay Hasia V. Khalid Mujib*[118] clarified that, while interpreting these criterions a cumulative analysis of all the factors must be considered rather than a strict interpretation. Examining the functions, characteristics and nature of judiciary on the basis of these standards would aid in our enquiry. Firstly, the "entire expenditure" to run the judicial organ comes from the government for both, its judicial and administrative function, which is allotted through the annual budgetary provisions[119].

Further, the judges and other functionaries of the court are paid from the consolidated fund of India[120]. Secondly, judicial and quasi-judicial authorities do exercise "monopoly status which is State conferred and State protected"[121], that is, monopoly to adjudicate by interpreting laws and acts of parliament and to issue orders or directions that are binding in nature. Thirdly, the functions of judiciary are of "public importance" as it is "truly the defensive armour of the country and its Constitution and laws"[122] and the "watching tower above all the big structures of the other limbs of the state"[123]. Even though judiciary can't enforce Directive Principles of State Policy (DPSP) enshrined in the Constitution on the other branches of the government, it has a positive obligation to apply and interpret DPSP in its judicial function as it does have limited power to "issue directions to the parliament and the legislature of the states to make

[117] Ramana Dayaram Shetty v. The International Airport, 1979 AIR 1628.
[118] Ajay Hasia V. Khalid Mujib, AIR 1981 SC 487.
[119] Budget 2019-2020, Department of Justice, Government of India, available at: https://doj.gov.in/page/budget-2019-20. (Last visited on March 11, 2021)
[120] INDIA CONSTI.1949, Article 112(3) (d) (i).
[121] Ramana Dayaram Shetty v. The International Airport, 1979 AIR 1628.
[122] James Medison: Jack N. Rakove, Judicial Power in the Constitutional Theory of James Madison, 43(8) William and Mary Law Review, 1513 (2002).
[123] Justice Untwalia in Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328.

laws"[124]. Justice Mathew in *Kesavananda Bharti* held that, "the judiciary is bound to apply the Directive Principles in making its judgment"[125]. It was further reiterated in *N.M. Thomas*[126], that the court has the task to "inform and illuminate"[127] the goals in Part IV. Hence, judiciary's function is of public importance and would pass the test formulated in *Airport Authority*. However, the position isn't that straightforward and remains a highly disputed grey area, given the unique characteristics of judiciary. These tests fall short as their basis of enquiry is to simply measure the "dependency*"* of the body on the government on the basis of which they determine the "State" like characteristics. Though judiciary is dependent on the government for its administrative activities, it still is the hallmark of democracy to ensure that independency of judiciary from the government exists in its adjudicating function, which these standards fail to consider. Here, it becomes important to differentiate between the judicial and non- judicial functions of judiciary. It is settled law that judiciary falls under the purview of "State" when it is acting in its non-judicial capacity[128] that is while exercising its administrative powers, which the above mentioned standards assent. Such non-judicial function of the organ is envisaged under Article 145 and 146 of the Constitution, which empowers judiciary to make rules for regulating the practise and procedure of the court and appointment of staffs and servants and decide their service condition[129]. The implication being, for instance, if an appointment of a judicial officer is violative of Article 16 of the Constitution, it would be considered void. In this sense, judiciary is merely acting in the capacity of an executive[130], but it is the function of judiciary in its judicial capacity that still remains a debatable area.

The *locus classicus* related to this issue is *Naresh Sridhar Mirajkar v. State*[131], where the validity of an interlocutory order passed by the High Court was challenged for being violative of Article 19 of the Constitution, through a writ petition under Article 32 of the Constitution. In the majority decision written by Justice Gajendragadkar it was observed that, "it is singularly inappropriate to assume that a judicial decision pronounced by a judge of competent jurisdiction can affect the Fundamental Rights of the citizens", and formed a non-rebuttable

[124] Reddy Chinnappa, The Court And The Constitution Of India: Summit And Shallows 73, Oxford University Press (2010).
[125] Kesavananda Bharati v. State Of Kerala, (1973) 4 SCC 225.
[126] State of Kerala v. N.M. Thomas. (1976) 2 SCC 310.
[127] *Id.*
[128] Smt Ujjambai v. State of Uttar Pradesh and Anr AIR 1962 SC 1621; Prem Chand Garg vs Excise Commissioner, 1963 AIR 996.
[129] H.M Seervai, Constitutional Law of India: A Critical Commentary, (4th ed., 2019).
[130] *Id.*
[131] Gajendragadkar, C.J, AIR 1967 SC 1.

presumption of sorts that its adjudicatory function can't contravene Fundamental right. Further, they observed validity or propriety of a judicial order can be questioned only under Article 136 by invoking the appellate jurisdiction and not under Article 32 of the Constitution on the ground that it violates the Fundamental Rights[132]. In a most recent judgment the court in *Rupa Ashok Hurra vs Ashok Hurra*[133] directly addressing the issue held that "courts of justice do not fall within the ambit of "State" or other authorities"[134] under Article 12 of the Constitution.

Multiple courts while answering the issue whether Judiciary comes under the purview of Article 12 of the Constitution, have tied it to another question, whether an action performed by a judge of appropriate jurisdiction, be challenged under Article 32 of the Constitution. Many courts have started with the second limb as unless it is answered in the positive, the first issue will automatically fall out of examination. When a tax liability determined by a sales officer in Quasi-judicial authority was challenged under Article 32, the court held that except in cases where, (a) the action is ultra vires to a statue (b) the action taken is without jurisdiction (c) the action is procedurally ultra vires, remedy under Article 32 is not maintainable[135].

The court in *Parbhani Transport Co-operative Society Ltd. V. Regional Transport Authority*[136], reiterated that a proper remedy for correcting an error in an order is to take the route of appeal or if it is an error apparent on the face of the record, then by an application under Art 226 of the Constitution, as Article 32 doesn't empower the apex court with an appellate jurisdiction. Almost persistently courts have dismissed the petitions filed under Article 32 challenging judicial orders and decisions on similar grounds[137], which indicates that the courts refuse to fathom a possibility of judicial orders or decisions rendered in application of its judicial authority, in an undoubted exercise of its jurisdiction pursuant to the provisions of law, can violate fundamental rights. These observations seem to be in stark contradiction to other opinions of the court where they have held that, Article 136 of the Constitution "can't be substituted to the guaranteed right under Article 32"[138] and a petition can't be rejected on a mere ground that the aggrieved has alternative remedy available to them[139]. The courts have

[132] *Id.*
[133] Rupa Ashok Hurra vs Ashok Hurra, (2002) 4 SCC 388.
[134] *Id.*
[135] Ujjam Bai v State of Uttar Pradesh, AIR 1962 SC 1621.
[136] Parbhani Transport Co-operative Society Ltd. V. Regional Transport Authority 1960 AIR 801.
[137] See also Smt. Ujjam Bai vs State Of Uttar Pradesh, 1962 AIR 1621; Surya Dev Rai v. Ram Chander Rai and ors., (2003) 6 SCC 675; Mohd Aslam v. Union of India 1995 AIR 548; Khoday Distilleries Ltd v. Registrar General, Supreme Court of India 1996 (3) SCC 114.
[138] Hidayatullah J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[139] Das J., Kavalappara Kottarathil Kochunni Moopil Nayar v. The State of Tamil Nadu, 1960 AIR 1080.

even gone to the extent of observing that "a court has jurisdiction to decide wrong (emphasis added) as well as right".

To the contrast, in *Prem Chand Garg v. Excise Commissioner, U.P., Allahabad* [140], observed that, "an order which this court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws". Justice Mathew in *Keshavananda Bharti v State of Kerala*[141], observed that judicial process should be considered State action as "Article 20(2) which provides that no person shall be prosecuted and punished for the same offence more than once is generally violated by judiciary and a writ under Article 32 should lie to quash the order*"*. On a similar vein it is important to note that, there are guaranteed fundamental rights such as, right against self-incrimination under Article 20 (3) of the Constitution [142], right against conviction as per an *ex post facto* law under Article 20 (1) of the Constitution[143], protection against double jeopardy under Article 20 (3) of the Constitution[144], adherence to "procedure established by law" under Article 21 of the Constitution [145], which are specifically designed and designated against the functions of judiciary and would be rendered "nugatory"[146] if remedy under Article 32 against the decision of the court doesn't exist.[147]

Further, judiciary has both the function of "creating (emphasis added) and applying law"[148] and not bringing the rule making function of court under the scrutiny of Article 13 of the Constitution would create gross injustices. Judicial decisions, opinions and order have precedential value by becoming a general norm. If judiciary doesn't fall under the purview of "State" under Article 12, it would mean that the judges have a free ticket to enact laws that "take away or abridge fundamental rights"[149]. However, a basic interpretation of Article 13 would reveal that, for judicial decisions to be considered as "law"[150], compliance with Part III

[140] Gajendragadkar J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[141] AIR 1973 SC 1462; Reiterated in State of Kerala v NM Thomas, (1976) 2 SCC 310.
[142] INDIA CONSTI. Part III: Fundamental Rights.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Seervai, Supra note 63.
[147] *Id.*
[148] Seervai, *Supra* note 63.
[149] INDIA CONSTI. Part III: Fundamental Rights, Article 13(2); Hidayatullah J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[150] INDIA CONSTI. Article 13(2), Part III: Fundamental Rights.

of the constitution is prerequisite. In this sense, Judiciary while pursuing its judicial function must adhere to the fundamental rights.

Moreover, Article 36[151] in Part IV of the Constitution provides that the definition of State for the purpose of embarking the duty to enforce DPSP would have the "same meaning as in Part III", that is the definition of "State" under Article 12. And as we have seen before, "*Part IV of the Constitution is as much a guiding light for the judicial organ of the state as the executive and legislative*"[152], that judiciary does have the duty to advance the goals of DPSP. Hence, it would create a paradox in judicial approach if it were to be deemed that judicial action has to be in pursuance of DPSP by being "State" under Article 36 but should be excluded from the interpretation as "State" under Article 12.

A comparison between U.S jurisprudence and the Indian position on this grey area would aid in our enquiry, as the framers of the Constitution adopted Part III from the U.S Bill of Rights[153] and it is crucial that precedents and the intention of U.S law are considered while clarifying the parameters of Fundamental Right.[154] The U.S Supreme Court held in the case of *Commonwealth of Virginia v Rives*[155] that, a judicial action would fall under the purview of State action as, a judicial decision too, must be in "due process of law"[156] and not violate "equal protection"[157]guaranteed in the fourteenth amendment. Instances where, a conviction of contempt was struck down for violating freedom of expression[158], a judicial restraint order being quashed for being violative of freedom of discussion[159], indicates that Superior Courts in U.S are empowered to issue the writ of certiorari if a judicial action is inconsistent with the guaranteed fundamental rights[160]. What we can gather from the comparison is two-fold: firstly, it is not a "fanciful speculation"[161] to contemplate that the judicial officers can act in

[151] INDIA CONSTI. Article 36: "Definition in this Part, unless the context otherwise requires, the State has the same meaning as in Part III".
[152] Common Cause v. Union of India, 2015 7 SCC 1.
[153] Basheshaar Nath v. CIT, AIR 1959 SC 149 (138).
[154] Krishan S. Nehra, The Impact of Foreign Law on Domestic Judgments: India, (2010) available at: https://www.loc.gov/law/help/domestic-judgment/india.php. (Last visited on March 11, 2021)
[155] (1880) 100 U.S. 313.
[156] U.S CONSTI, 1868, 14th Amendment.
[157] *Id.*
[158] Bridges v California, (1941) 314 US 252.
[159] American Fed. Of Labor v Swing (1941) 312 US 321; Amalgamated Food employees v Logan (1968) 391 U.S. 308.
[160] Moore v Dempsey (1923) 261 U.S 86; Griffin v Illinois, (1995) 351 U.S 12.
[161] Seervai, *Supra* note 63.

contravention to the fundamental rights; secondly that if court's decision in violation fundamental rights, U.S courts provide due recourse to remedy such injustice.

In a limited sense, a judicial order or decision in violation of Part III could be considered void[162]. This is a significant change in the perspectives of the court, as through this observation, the courts have implied that judiciary doesn't have jurisdiction to issue decision in contradiction to the fundamental rights. However, the judges limited its application by restricting the claim of "denial of equal protection of law" against a judicial action to be acceptable, only when there is "wilful and purposeful discrimination"[163]. The same can be challenged only through invoking appellate jurisdiction[164]. Contradistinguishing from the above contention, Justice Shah noted that "... denial of equality before the law or the equal protection of the laws can be claimed against executive or legislative process, but not against the decision of a competent tribunal"[165].

Justice Hidayatullah in his dissenting judgment in *Naresh Sridhar Mirajkar v. State of Maharashtra*[166], whose opinion is considered "preferable"[167], notes that the attempts to restrict the remedy available to the aggrieved party ignores the fact that "Article 32 is an overriding and additional constitutional remedy" irrespective of the other remedies available. As he notes, for instance, if a judge were to arbitrarily bar the entry of an individual on the basis of his social background, then, "must an affected person in such a case ask the Judge to write down his order, so that he may appeal against it?"[168] Therefore, this limited application leaves the affected individual with no other remedy to evade the arbitrary discrimination meted against him.

Going back to the contention that it was the intention of the drafters to explicitly exclude judiciary from Article 12 of the Constitution [169], this argument becomes problematic to accord after our analysis. As firstly, the intention of framers were also to "make sure that every citizen

[162] Bhudhan Choudhry v. State of Bihar, 1955 AIR 191.
[163] *Id.*
[164] *Id.*
[165] Sahibzada Saiyed Muhammedamirabbas Abbassi & Ors v. The State of Madhya Bharat& Ors 1960 AIR 768; See also Ratilal v. State of Bombay 1954 AIR 388; Triveni Ben v. State of Gujarat 1989 AIR 1335.
[166] Naresh Sridhar Mirajkar v. State of Maharashtra, 1966 SCR (3) 744.
[167] Basu, Supra note 48; Accepted in Hans Raj Mathew J., Bharati vs State Of Kerala, (1973) 4 SCC 225; Kerala v. N.M. Thomas (1976) 2 SCC 310.
[168] Naresh Sridhar Mirajkar v State, AIR 1967 SC 1, (as per Hidayatullah J dissenting opinion).
[169] Yellosa, *Supra* note 4.

is in a position to claim those Rights"[170] from those bodies which have the "authority" to "make law or the power to have discretion vested in it"[171] and judiciary being excluded from it wouldn't converge with this intention. Secondly, even if the intention of the drafters were to ensure independence by excluding judiciary from the definition of "State", the role of this branch has evolved over the past 70 years from the incorporation of Constitution. The newly transformed operative role calls for higher standards of accountability.

There seems to be no justifiable reason why the judiciary shouldn't be a "State" and there seems to be multitude of justifiable reasons for its inclusion. The only counter-contention raised is the effect it would create on application of Article 32[172] by creating infinite mode of redressal against a decision by courts and this issue has not been sufficiently addressed by any benches. Maybe a reasonable restriction in terms of number of times Article 32 can be invoked in the same matter to challenge a decision or judgment or decree by court for violating fundamental rights can be stipulated. However, this sole issue can't negate the need for considering judiciary as "State". Though the reasons for inclusion of judiciary seems to be obvious and necessary, the question that becomes relevant to the thesis is, would such an inclusion prove to be a sufficient and efficient form of check and balance. One of the short fallings of this constitutional check is that the role of deciding whether the judicial decision has violated a fundamental right, if it is challenged under Article 32 or Article 226, falls yet again in the hands of the judiciary themselves. This calls for looking into other modes available for upholding accountability.

EXISTING MODES OF ACCOUNTABILITY

INTERNAL ACCOUNTABILITY

Lord Cooke of Thorndon argued that "[j]udicial accountability has to be mainly a matter of self- policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised"[173]. Theorizing this idea, both the Supreme and High Courts have self-monitoring provisions and power to supervise inferior courts. It is an accepted international norm for senior

[170] Dr. Ambedkar, Constituent Assembly Debates, Volume 7, (November 25, 1948), available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25. (Last visited on March 11, 2021)
[171] *Id.*
[172] INDIA CONSTI. Part III: Fundamental Rights.
[173] Robin Cooke, Empowerment and Accountability: the Quest for Administrative Justice, 18(4) Commonwealth Law Bulletin 1326 (1992).

members of judiciary to monitor and regulate the function of judges[174]. It is through the various provision for internal accountability such as appeal, review, revision etc., the higher echelons of judiciary keep a check on the functions of courts. The scope and extent to which such provisions can successfully act as check and balance system which is both sufficient and efficient, has been examined below.

THE WRIT OF CERTIORARI AND PROHIBITION

The Writ of Certiorari and Prohibition, can be issued when there has been an "error in jurisdiction", "lack of jurisdiction", "excess of jurisdiction", "abuse of jurisdiction" and "error of law apparent on the face of the record"[175]. If the decision of any inferior judicial or quasi-judicial authority passes these standards, the High Court or the Supreme Court has the authority to quash the proceeding. By quashing the judgment or order or decree, on the above mentioned grounds, the court simply sets aside the decisions but doesn't substitute it with its own opinion or direction by reviewing or reweighing evidences and facts[176]. It is important to note that, by empowering the High Court and Supreme Court through this "corrective jurisdiction", they act in the capacity of a "supervising authority" and not as a court with appellate jurisdiction[177]. As it empowers them with a supervisory authority, it becomes relevant to understand the scope and extent of its power and determining "who can issue the writ of certiorari and against whom?"

If we trace back the origin of *Certiorari*, in England the king had a universal jurisdiction[178]. Later the king's prerogative to issue writ was transferred to the High Court of England through a statue[179]. However in India, we don't have a court of universal jurisdiction and formulation of a test to identify an "inferior court" becomes necessary, which is also challenging. If the test is that of "appealability", whether an inferior court is the one against which the appeal can lie to another Court, the test would fail. There are tribunals from which no appeal can lie with the High Court, but High Court enjoys the power to issue Certiorari against them[180]. If the test is

[174] Law Commission of India, The Judges (Inquiry) Bill, 2005, Report No. 19510 (January 2006).
[175] Syed Yakoob v. K.S. Radhakrishnan 1964 AIR 477; State of Kerala v. N.M. Thomas (1976) 2 SCC 310.
[176] T. C. Basappa v. T. Nagappa 1955 1 S.C.R 250.
[177] M.P JAIN, Indian Constitutional Law 8, Lexis Nexis (2003).
[178] T. C. Basappa v. T. Nagappa 1955 1 S.C.R 250.
[179] *Id.*
[180] Sarkar J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.

based on the existence of a supervisory jurisdiction, this test would also fail as the Constitution doesn't stipulate any supervisory jurisdiction for Supreme Court but it has the power to issue certiorari. As Justice A. K Sarkar notes "the question is of haziness"[181]. This has been partly dealt by courts when they observed that, the Supreme Court can't issue a writ of Certiorari to High Court[182], that an order of the Supreme Court is not amenable to correction by issuance of a writ of Certiorari under Article 32 of the Constitution[183] and it cannot lie from a bench of one court to another bench of the same High Court[184]. It is important to keep in mind that the power to issue the writ, carries with it the power to supervise[185], but this "haziness" is one of the reason why the power to issue Certiorari falls short from being an efficient mode to create accountability.

APPELLATE JURISDICTION

The Supreme Court with a multi-jurisdictional power enjoys appellate jurisdiction under Article 132, 133 and 134 of the Constitution in all matters and is the highest court of appeal[186]. A judgment, decree or final order, that involves a "substantial question of law"[187] and in civil matters after a receipt of certificate of fitness from the High Court under Article 132(1), 133(1) or 134 of the Constitution that "the question needs to be decided by the Supreme Court"[188], can be appealed to the Supreme Court. This means that the petitioner is barred from challenging the propriety of the decision appealed against on any other ground than the ones approved by the High Court. Further, the appeal must be made within 60 days from the date of grant of such certificate. As we can see, the appellate jurisdiction is not an absolute power conferred on the Supreme Court. A decision of court can't be challenged on the ground of simple being "erroneous or unjust", as the High Court wouldn't issue a certificate to appeal against its own decision on these grounds. If the High Court rejects an application for issuing certificate of

[181] *Id.*
[182] *Id.*
[183] Rupa Ashok Hurra v. Ashok Hurra, AIR 2002 SC 1771.
[184] Hidayatullah J., Naresh Sridhar Mirajkar v State, AIR 1967 SC 1.
[185] *Id.*
[186] INDIA CONSTI.1949, Part V: The Union.
[187] Darshan Singh v. State of Punjab, AIR 1953 SC 83; Thansingh Nathmal v. Supdt. Of Taxes, AIR 1964 SC 1419, 1422; State of Mysore v. Chablani, AIR 1969 SC 325; Supreme Court of India, Jurisdiction of the Supreme Court, available at: https://main.sci.gov.in/jurisdiction. (Last visited on March 11, 2021).
[188] *Id;* See also Law Commission Report, The Appellate Jurisdiction Of The Supreme Court In Civil Matters, Report No. 44 (1971): "It is true that a certificate of fitness for appeal to the Supreme Court is not to be granted lightly, as the Supreme Court has repeatedly pointed out. That is precisely how we think it should be."

fitness, the only remedy available to the aggrieved is to challenge the petitions through a special leave petition.

SPECIAL LEAVE PETITION (SLP)

Over and above the appellate provisions provided above, Article 136 of the Constitution provides judiciary with plenary power in the form of SLP, characterized as an "untrammeled reservoir of power incapable of being confined to definitional bounds"[189]. The power is plenary in the sense that there are no restrictions placed under Article 136, qualifying the authority. Unlike the appeal provisions, "any court('s)"[190] and not just the High Court's, decisions, decree or order, even if it hasn't reached finality, can be challenged under this provisions. However, it must be "exercised sparingly and in exceptional cases only" as reiterated in *Pritam Singh v. the state*[191], as it is not a sweeping power. To avoid floodgates of petitions the Constitution has mandated it to be only a "special or residuary powers" [192] and even if the SLP is granted, the court does not take into cognizance all the relevant factors and decide them on merits as in an appellate jurisdiction.[193]

REVIEW

A decision or order of the Supreme Court can't be challenged through invoking an appellate jurisdiction of Supreme Court. To fill this gap, the drafter of the Constitution, under Article 137 of the Constitution empowered the Supreme Court to review its decision or order pronounced subject to the rules under Article 145 of the Constitution, the inherent philosophy being, and acceptance of human fallibility to which the judges are not an exception to. The power of review can be exercised only when there is a discovery of important and new matter of evidence or there "exists a grave error or mistake apparent on the face of the record[194] which manifestly is illegal or leads to "palpable injustice"[195]. This provision can't be employed to

[189] Kunhayammed v. State of Orissa, (2000) 6 SCC 359; See also Mahendra Saree Emporium II v. G.V. Srinivasa Murthy (2005) 1 SCC 481.
[190] INDIA CONSTI. Article 136.
[191] Pritam Singh v. the state, 1950 AIR 169.
[192] Durga Shankar v. Raghu Raj, AIR 1954 SC 520.
[193] Taherkhatoon v. Salambin Mohammad, AIR 1999 SC 1104.
[194] Lily Thomas & Ors. V. Union of India & Ors. 2000 (6) SCC 224.
[195] S.Nagaraj & Ors. V. State of Karnataka & Anr. 1993 Suppl. (4) SCC 595; Ramdeo Chauhan v. State of Assam 2001 (5) SCC 714; Lily Thomas & Ors. V. Union of India & Ors. 2000 (6) SCC 224.

"seek a review of a judgment delivered by this Court merely for the purpose of a rehearsing"[196] to uphold the principle of "*stare decisis"*. Such a petitions has to be filled within 30 days from the date of final decision and has been. This power to re-examine is a discretionary right of the Court on limited grounds and is circumscribed[197].

CURATIVE PETITION

As the Supreme Court is considered to be the court of last resort, the court in *Rupa Ashok Hurra V. Ashok Hurra and Anr*[198] formulated the provision of curative petition which could be invoked in rarest of rare cases as a final remedy, as it is not legally obligatory but also morally to hold justice in a Higher pedestal than the principle of finality of its judgment (*stare decisis*). However, a curative petition would be allowed by the court only in a circumstance where there has been a "genuine violation of principle of natural justice"[199]and must be accompanied with a certification from a senior lawyer. This provision has been invoked very sparingly by courts that out of 98 curative petition filled in the year 2019, none of them were allowed by the Supreme Court[200]. Though one of the reason is the sheer number of frivolous petitions filed, the major reason is the high standards of requirement set by the court for admission of a curative petition. Further, this provision has been criticised as "an old wine in a new bottle" for being simply a second form of review petition[201], rather than being a new jurisprudential ground.

Similarly the High Courts too, have the power to review its decisions on the ground of error apparent on the face of the record. Apart from the appellate jurisdiction and provisions for reference[202], revise[203] and review[204], the High Court also enjoys power of superintendence over all lower tribunals and courts except military tribunals and court under Article 227(1) of the Constitution. By virtue of this power, the court can make and issue general rules and regulations for the regulation of proceedings, can call for returns from such courts[205] and make decisions

[196] M/s. Northern Indian Caterers (India) Ltd. V. Lt. Governor of Delhi, 1980 AIR 674.
[197] Maganlal Chhaganlal (P) Ltd. V. Municipal Corporation of Greater Bombay & Ors, 1974 (2) SCC 402.
[198] Rupa Ashok Hurra V. Ashok Hurra and Anr, AIR 2002 SC 1771.
[199] Rupa Ashok Hurra V. Ashok Hurra and Anr, AIR 2002 SC 1771.
[200] Collected from Supreme Court Registry, available at: https://main.sci.gov.in/registry-officers. (Last visited on March 11, 2021).
[201] Muteti Mutisya, The Indian Supreme Court and Curative Actions, 10, injiconlaw, 202, 211 (2007).
[202] The Code of Civil Procedure, 1908, § 113; The Code of Civil Procedure, 1908, Order XLVI.
[203] The Criminal Procedure Code, 1973, § s 399 & § 401; The Code of Civil Procedure, 1908, § 115.
[204] The Code of Civil Procedure, 1908, Order XLVII, Rule 1(1).
[205] INDIA CONSTI. art. 227(2).

of both administrative and judicial nature. Yet, these provisions too, face the same deficiencies by being limited in the scope of application.

IN-HOUSE PROCEDURE

Apart from the provisions to examine judicial decisions, an In-house procedure in the form of "*peer review"*[206], was developed to deal with complaints of misconduct, incapacity or misbehaviour against the judges and has the power to impose *"minor measures*"[207]. The purpose being that the process doesn't threaten the independence of judiciary and to create an alternative to the complex and limited scope of impeachment process, which would be discussed in the later § of the paper. The complaint could be made to the president or the CJI and a committee of three member would be constituted to investigate the complaint[208]. However, the process has multiple shortcoming. There are no statutory provisions or guidelines to ensure an unbiased and fair procedure. A critical look into the In-House procedure employed to enquire the sexual harassment allegations against former CJI Ranjan Gogoi would showcase the glaring issues of the process. There were no representation from other staff members as the committee solely comprised of members from judiciary which creates an asymmetry of power. The allegations against the leader of an institution were investigated by his subordinates[209]. There is still ambiguity about the different roles and powers of the gender sensitisation and internal complaints committee and the in-house procedure[210]. Further, a complainant doesn't have the right to have an advocate during proceedings to represent their interests fairly and there is no transparent statutory provision that governs the same[211]. All this cumulatively contributes to this coarse provision being an inefficient mode of self- governance, where the

[206] C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, 1995 SCC (5) 45.

[207] *Id.*

[208] K.Venkataraman, How Supreme Courts judges to be probed, The Hindu, April 28, 2019, available at: https://www.thehindu.com/news/national/how-is-a-Supreme-Court-judge-to-be-probed/article26967323.ece. (Last visited on March 11, 2021)

[209] A Vaidyanathan, Sex Harassment Charges Against Chief Justice Baseless, NDTV, May 6, 2019 available at: https://www.ndtv.com/india-news/sex-harassment-charges-against-chief-justice-baseless-finds-supreme-court-in-house-panel-2033721 (Last visited on March 11, 2021); SC gives clean-chit to CJI; woman complainant "disappointed, dejected", Deccan Chronicle, May 6 2019 available at: https://www.deccanchronicle.com/nation/current-affairs/060519/sc-finds-sexual-harassment-charge-against-cji-baseless.html. (Last visited on March 11, 2021)

[210] Gender Sensitization and Sexual Harassment of Women at Supreme Court (Prevention, Prohibition and Redressal) Guidelines, 2015, Supreme Court, available at: https://main.sci.gov.in/pdf/GSICC/GSICC%20Guidelines%202015-SC.pdf. (Last visited on March 11, 2021)

[211] Shruti Rajagopalan, Justice Is Dead, Long Live the Justices, The Wire, May 6, 2019 available at: https://thewire.in/law/supreme-court-cji-allegations-justice. (Last visited on March 11, 2021)

committee has a complete discretion to admit a complaint and initiate an investigation or reject it.

Any form of external intervention gets the knee jerk reaction of it being dangerous to independence of the organ, as it did in the case of CJI Ranjan Gogoi. Therefore, it becomes even more important to make sure that the internal checks and balance are adequate. However, through this analysis of the various internal modes we can come to conclusion that they are limited in its application making it inefficacious to ensure judicial accountability. As DD Basu observes, there is no provision to correct a "mere wrong decision"[212] which doesn't involve a substantial question of law or full-fill the requirements for an appeal. It has been condemned at multiple instances that the Supreme Court being the highest court of the land, shouldn't be restricting the scope of these provision for "buckling under pressure for expediency and convenience"[213]. As Justice Robert H. Jackson, the courts are "not final because we are infallible, but we are infallible only because we are final[214].

EXTERNAL ACCOUNTABILITY

In this section the checks and balances that the other two branches create and the need ensure democratic accountability to the people as another mode, would be discussed. The principle of judicial independence has an "intimate relationship"[215] with doctrine of separation of powers[216]. In fact, only with the expansion of judicial independence, did the concept of judiciary as a separate branch of the government originate[217]. Separation of power doesn't symbolise a barrier that prevents any contact or connection between the organs, in fact, it creates a "reciprocal supervision"[218] by balancing the power through an appropriate level of intervention by following the ideology that "power alone can be the antidote to power"[219]. The drafters of the Constitution recognised that providing for a system in which the powers of State are distinct from and independent of each other, would enable one branch to usurp power from

[212] Basu, *Supra* note 48.
[213] Mutisya, *Supra* note 135.
[214] Brown v. Allen, 344 U.S. 443 (1953).
[215] Honorable John Doyle AC, Chief Justice of the Supreme Court of South Australia, Judicial independence and judicial accountability in the coalface of the Australian judiciary, July 2016, available at: https://localcourt.nt.gov.au/sites/default/files/judicial_independence_and_judicial_accountability_at_the_coalface_of_the_australian_judiciary_.pdf. (Last visited on March 11, 2021)
[216] Charles De Montesquieu, The Spirit Of Laws, The Colonial Press (1748).
[217] Forrest Mcdonald, Novus Ordo Seclorum: The Intellectual Origins of The Constitution 80-86, University Press of Kansas (1985); M.J.C. Vile, Constitutionalism And The Separation Of Powers 54, Liberty Fund (2nd ed., 1967).
[218] Aaron Barak, A Judge on Judging; The Role of the Supreme Court, 116 Harvard Law Review 19, 25 (2003).
[219] Montesquieu, *Supra* note 150.

the other two. As contended by Attorney General Mukul Rohatgi "the Constitution has devised a structure of power relationships with checks and balances wherein limits are placed on the power of every authority or instrumentality under the constitutional scheme"[220]. This is reflected in the power to appoint the heads and members of different organs. As a result, few powers in the hands of executive and legislature acts as a checks and balances for the judiciary, their efficiency and sufficiency are discussed below. Further, while discussing this form of accountability it is important that these modes do not affect the decisional independence, that is, judiciary shouldn't be considered as subservient to legislature while creating checks and balances. Resting such excessive power would lead to replication of the legislature overreach in Ecuador, where through the judicial reform programme, hundreds of judges were removed by the parliament in the name of misconduct, to intimidate the judges[221].

APPOINTMENT OF JUDGES

Appointment of judges is a crucial aspect in the function of judiciary as the right appointment "would go a long way towards securing the right kind of judges who would invest the judicial process with significance and meaning, for the deprived and exploited sections of humanity"[222] and it has also become a central pillar in the debate around judicial independence. Tracing the changes in the procedures of judicial appointment would expose a ghost of deep suspicion between the executive and judiciary and the reasons why the government organs are at loggerhead. The process of judicial appointment was for the first time challenged in the *first judges' case*[223], the Court held that the executive must play the major role in judicial appointment. Further they also observed that, under Article 217 of the Constitution, the suggestions of none of the constitutional functionaries "was entitled to primacy"[224]. The Court through this judgment reiterated Dr. Ambedkar's view that "the Chief Justice of India is also human being after all, liable to err and vesting such power singularly on him would not be desirable"[225]. A tectonic shift in this perception was in the second *judge*[226] case where the court

[220] Attorney General Mukul Rohatgi, Supreme Court Advocates-on-Record. V. Union of India, (2016) 5 SCC 1.
[221] HRW, Ecuador: Political Interference in the Judiciary, HRW, April 20, 2018, available at: https://www.hrw.org/news/2018/04/20/ecuador-political-interference-judiciary. (Last visited on March 11, 2021)
[222] Bhagwati, J., S.P. Gupta v. Union of India, AIR 1982 SC 149.
[223] S.P. Gupta v. Union of India, Supreme Court Registry, AIR 1982 SC 149.
[224] *Id.*
[225] Dr. Ambedkar, Constituent Assembly Debates, Volume 8, May 24th 1949, available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-24. (Last visited on March 11, 2021)
[226] J.S. Verma J., Supreme Court Advocates on Record Association v. The Union of India, AIR 1994 SC 868.

established the primacy of the chief justice of India, in case any disagreement in the process of consultation arises. The court also formed the collegium system by observing that the authority to appoint is "within the judicial family and the executive cannot have an equal say in the matter"[227] and that the pro-executive model would lead to "germs of indiscipline"[228]. However, as the function of the judiciary is to adjudicate and process of appointment being purely an administrative function, concerns of it creating a "double responsibility"[229] were raised. The *third judge*[230] case reiterated the same principles and cemented the supremacy of judiciary with regards to appointment and transfer of judges. The judgment received multiple criticisms for violating the intention of drafters and for giving raise to nepotistic tendencies and favouritism. To reclaim the control, the legislature enacted the 99th constitutional amendment, the National Judicial Appointments Commission Act of 2014[231] and inserted Article 124 C of the Constitution[232] to empower the parliament to enact statutory provisions with regards to appointment process and set up a "legislative supremacy". § 4 of the National Judicial Appointments Commission Act, 2014[233] transferred the power of initiating the proceedings for appointment, to the commission from the CJI. However, the Act gained condemnation for its ambiguous and vague provisions, including lack of standards to evaluate an "eminent person" who would be part of the Commission and lack of criterions to bestow the "veto power" to two members of the Commission. The Act was criticized as an "evil absurdity"[234] which would lead to a Constitutional Crisis[235]. The culmination of the tussle between the organs was the judgment in *Supreme Court Advocate on Record Association v Union of India*[236], where the court struck down the 99th Constitutional Amendment by upholding that judicial primacy in the appointment process by considering it a basic structure of the Constitution[237]. Though the court held that the President had the power to object, in case of a stalemate, the final decision

[227] *Id.*
[228] *Id.*
[229] Dr. Anurag Deep, Shambhavi Mishra, Judicial Appointments, In India and The NJAC Judgement: Formal Victory Or Real Defeat, 3 Jamia Law Journal, 49 (2018).
[230] AIR 1999 SC 1.
[231] The CONSTI. (Ninety-Ninth Amendment) Act, 2014.
[232] INDIA CONSTI. Part V: The Union.
[233] The National Judicial Appointments Commission Act, 2014, Act No. 40 Of 2014 (December 31, 2014)
[234] Ram Jethmalani calls NJAC an "evil absurdity", Live Mint, July 7, 2015 available at: https://www.livemint.com/Politics/haghpkzvaqip7d7biwnm7n/Ram-Jethmalani-calls-NJAC-an-evil-absurdity.html. (Last visited on March 11, 2021)
[235] C Raj Kumar, Reasons why the NJAC Act is bad in law, Economic Times, May 3, 2015, available at: https://economictimes.indiatimes.com/news/politics-and-nation/reasons-why-the-njac-act-is-bad-in-law/articleshow/47133370.cms?From=mdr. (Last visited on March 11, 2021)
[236] Supreme Court Advocates-on-Record Assn. V. Union of India, (2016) 5 SCC 1.
[237] *Id.*

fell in the hands of the Collegium[238]. This system of "judges appointing judges" was condemned for forming an "extra constitutional device" with aim to meet judiciary's own ends rather than accepting a system lawfully enacted by an elected Parliament"[239]. Yet, the Collegium system of appointment remains law of the land. It shouldn't be construed that the executive based model was free from criticisms, the possibility that it could throttle judiciary by suffocating its independence still remains, for instance, in the past the executive and legislature have exploited the power by applying "committed judges theory"[240] where seniority is overlooked to support their "favourite" judges. Justice A.N Ray was made CJI, superseding three senior most judges[241], and Justice H.R Khanna was denied appointment as CJI due to his dissenting remark in ADM Jabalpur, against the Government.

IMPEACHMENT OR REMOVAL OF JUDGES

Impeachment or removal of judges, embodies the concept of sacrificial accountability that was discussed before. The Constitution through Article 124 (2) 124 (4)[242], Article 217[243] and Article 218[244] of the Constitution, as well as the Judges Inquiry act, 1968 governs and empowers Legislature to "remove"[245] the judges. The procedure is extremely tedious as firstly, a motion must be passed on the support of a minimum two-third members in either house and if the motion is admitted the speaker would set up an Inquiry Committee[246]. This committee doesn't constitute of external members but only members from judiciary, a Supreme Court, a High Court chief justice and an eminent jurist[247]. The committee will frame the charges and examine

[238] *Id.*
[239] Suhrith Parthasarathy, An Anti-Constitutional Judgment, The Hindu, October 30, 2015, available at: https://www.thehindu.com/opinion/lead/njac-verdict-an-anticonstitutional-judgment/article7819287.ece. (Last visited on March 11, 2021)
[240] M.P Singh, Securing, The Independence Of The Judiciary-The Indian Experience, 10(2) IND. INT"L & COMP. L. REV 245 (2000).
[241] R Prasannan, Wars of the robes: Executive asserts; judiciary counterattacks, The Week, January 28, 2018, available at: https://www.theweek.in/theweek/cover/executive-asserts-and-judiciary-counterattacks.html (Last visited on March 11, 2021); See also Tahir Mahmood, When Judges Got It Wrong, Indian Express, June 28, 2016, available at: https://indianexpress.com/article/opinion/columns/emergency-india-1976-adm-jabalpur-case-supreme-court-hr-khanna-column-2879952/. (Last visited on March 11, 2021)
[242] INDIA CONSTI.1950, Part V: The Union.
[243] *Id.*
[244] *Id.*
[245] INDIA CONSTI.1950, Part V: The Union, Article 124.
[246] Idhika Agarwal, Judicial Impeachment In India: Features, Drawbacks And Suggested Changes 2(3) Fast forward Justice's Law Journal 2581 (2020).
[247] Judges Inquiry act, 1968, § 3, Consideration of report and procedure for presentation of an address for removal of Judge.

the witnesses and have the authority to determine the validity of the charges and then submits the report[248]. If the inquiry committee finds the judge not guilty, there would be no further action taken[249]. The findings of the inquiry committee is not subject to judicial review as it is not envisaged in the "constitutional scheme"[250]. If the committee finds the judge guilty, the parliament would have to pass the impeachment order in two third majority in both houses and later it would be sent for the assent of the President[251]. It must be noted that, though the finding of the committee are not subject to review, the order of removal under Article 124(4) of the Constitution can be scrutinized under judicial review[252], which again leaves it in the hand of the judiciary to make the final pronouncement. As can we can see through the analysis, the procedure is not independent of involvement from members of judiciary itself[253]. Further, the grounds of impeachment must be only on the grounds of "proved misbehaviour"[254] or "incapacity"[255] which are not defined either under Article 124 of the Constitution or any other statutes. As a result, the function of interpreting the scope and extent of these ground is also the prerogative of judiciary. In *Krishna Swami vs. Union of India*[256], the court observed that "misbehaviour" is not "every act or conduct or even error of judgment or negligent acts by Higher judiciary", which means that minor allegation don't warrant impeachment of judges as the scope is limited. As we can see, the procedure onerous and tedious, as a result, out of the six Supreme Court judges who have faced impeachment proceedings, none of them have been removed, making it a mere parchment tool[257]. Case in point is the impeachment process initiated against Justice V. Ramaswami, who was found guilty of gross misbehaviour by three eminent inquiry committees but the impeachment motion failed due to the overwhelming support from one political party in the parliament[258]. Another way in which this form of creating sacrificial accountability lacks is that, if a judge wilfully gives a judgment in guilty

[248] Judges Inquiry act, 1968, § 4, Report of Committee.
[249] Judges Inquiry act, 1968. § 6, Consideration of report and procedure for presentation of an address for removal of Judge.
[250] Mrs. Sarojini Ramaswami v. Union of India, AIR 1992 SC 2219; Id.
[251] *Id.*
[252] *Id.*
[253] Sub-Committee on Judicial Accountability v. Union of India, AIR 1992 SC 320.
[254] INDIA CONSTI.1950, Article 124 (4).
[255] *Id.*
[256] K. Ramaswamy. J., AIR 1993 SC 1407.
[257] See also K. G. Kannabiran, Selection and Impeachment of Judges: Issues for Debate, 39(49) Economic and Political Weekly, 5221-5225 (2004); Prashant Bhushan, A Historic Non-Impeachment, (June 4, 1993), available at: http://www.judicialreforms.org/files/cover_story_ramaswami.pdf . (Last visited on March 11, 2021)
[258] Z. Agha, India Today, Justice V. Ramaswami-survives-impeachment motion due to abstention of Congress mps, India Today, August 7, 2013 available at: https://www.indiatoday.in/magazine/indiascope/story/19930531-justice-v.-ramaswami-survives-impeachment-motion-due-to-abstention-of-congressi-mps-811113-1993-05-31. (Last visited on March 11, 2021).

mind they "may be removed or punished even though the judgements which they have rendered stands"[259].

POWER TO OVERRIDE JUDICIAL DECISIONS

Further, legislature also has the power to override the judgment of the court, in some circumstance. It is a settled principle that the function of making law falls in the hand of the legislature, but the principle of separation of powers allows for overlap in the function within the co-equal branches too. The overlap commonly referred to as doctrine of overlapping functions[260], is not considered as a violation of doctrine of separation of powers and it is through the internalisation of this concept the judiciary also has the authority to make laws through its decision and orders. Though legislature doesn't have the power to make judicial order or decisions or judgments inoperative, it still has the authority to change the basis of law that the judgment was founded on. In *Commissioner of Customs v Sayed Ali*[261], the Supreme Court struck down duties imposed by custom officials who weren't authorized to take such action. However, by passing the Customs Bill, 2011 the parliament retrospectively authorised, the custom duties collected and thus, struck down the court's decision[262]. Another such instance was in , *Mahalakshmi Mills v Union of India*[263], where the court held that the State should follow the Statutory Minimum Price (SMP) while purchasing sugar to ensure that Fair and Remunerative Price (FRP). Subsequently, the Parliament enacted Essential Commodities (Amendment) Ordinance, 2009, to do away with the requirement of paying SMP. Hence, if the judiciary were to make a decision that is arbitrary, prejudiced or violative of fundamental right, the legislature still has the power to legislate or alter laws that are the foundation of the judgment. This form of check and balance is limited in scope as, firstly, the error in the judgment should be of a nature that an amendment or enactment of law would make it stand corrected. Secondly, this mode doesn't bestow the aggrieved individual with any remedy as it is the legislature who has the right to take *Suo Moto* cognizance of the issue in a decision or order. Lastly, the Supreme Court in a recent judgment held that, court's decisions can't be

[259] Benjamin N.Cardozo, The Nature of the Judicial Process 129, Yale University Press (1921).
[260] N.W Barber, Prelude to the Separation of Powers, 60(1), The Cambridge Law Journal, 59, 63 (2001).
[261] Commissioner of Customs v Sayed Ali, (2011) 3 SCC 537.
[262] *Id.*
[263] Mahalakshmi Mills v Union of India, (2009) 16 SCC 569,

overruled retrospectively with legislative action as "judicial pronouncements must be respected"[264], which has further restricted the scope.

POWER TO PARDON, COMMUTE, REPRIEVE, RESPITE AND REMISSION

Lastly the power to pardon,[265] commute,[266] reprieve,[267] respite[268] and remission[269] envisaged under Article 72[270] and Article 161[271] of the Constitution are entrusted to the President and the Governors of various states under. When this power enjoyed by the Executive was challenged in *Kehar Singh v. Union of India*[272], the Court acknowledged that even a supremely legally trained mind is not precluded from human shortcoming, as result it recognised the need to provide remedy to such an error through another degree of protection which can "scrutinize the validity of the threatened denial of life or the continued denial of personal liberty"[273]. However, this power is limited in nature and is an act of grace in the discretion of the authorities and is not a "right"[274]. Further, there are few other significant endeavours including, the introduction of the lapsed Judicial standards and Accountability bill, 2010[275], the Restatement of Judicial Values issued in 1997[276] and the Bangalore principles on Judicial Conduct issued by Judicial Integrity Group in 2002[277] which are significant measures but fell short in fulfilling the needs.

[264] State Of Karnataka v. Karnataka Pawn Brokers Assn, (2018) 255 Taxman 12 (SC).
[265] Means completely absolving the person of the crime and letting him go free.
[266] Means changing the type of punishment given to the guilty into a less harsh one, for example, a death penalty commuted to a life sentence.
[267] Means a delay allowed in the execution of a sentence, usually a death sentence, for a guilty person to allow him some time to apply for Presidential Pardon or some other legal remedy to prove his innocence or successful rehabilitation.
[268] Means reducing the quantum or degree of the punishment to a criminal in view of some special circumstances, like pregnancy, mental condition etc.
[269] Means reducing the quantum or degree of the punishment to a criminal in view of some special circumstances, like pregnancy, mental condition etc.
[270] INDIA CONSTI. Part V: The Union.
[271] INDIA CONSTI. Part VI: The states.
[272] Kehar Singh v. Union of India, 1989 AIR 653.
[273] Kehar Singh v. Union of India, 1989 (1) SCC 204.
[274] *Id.*
[275] The Judicial Standards and Accountability Bill, 2012, Bill No. 136-C of 2010, (March 29, 2012), available at: https://164.100.47.4/billstexts/lsbilltexts/passedloksabha/Judicial%20136C%20of%202010%20eng.pdf. (Last visited on March 11, 2021)
[276] Restatement of Judicial Values, Rajasthan Judicial Academy, (1997) available at: https://rajasthanjudicialacademy.nic.in/docs/3_s1.pdf . (Last visited on March 11, 2021)
[277] The Bangalore Principles of Judicial Conduct, United Nations, (2002) available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. (Last visited on March 11, 2021)

DEMOCRATIC ACCOUNTABILITY

Our opening page of our Constitution declares India as a democracy, which gives life to the fundamental postulate that the ultimate political sovereignty is vested with the people. This notion is premised on the belief that the constitutional instrumentality submits to the broad supervision of the sovereign people, only then, it can achieve dynamic viability and social reality. Further, the reinvented "new judiciary" has to be beholden to more public accountability and public control which necessitates to reinvent tools to ensure the same becomes significant. Though the masses don't and can't exercise a direct control to monitor the functions of judiciary, through the right to dissent and right to provide reasonable criticisms against judicial action they can keep them in check. The explanatory form of accountability, discussed above, opines that the judiciary must give reasoned judgement to enable people to exercise their right to dissent and comment as, "there can be no democracy without dissent"[278]. However, there are many hurdles for the people to ensure democratic accountability of the organ. One of them is the contempt jurisdiction envisioned under Article 129[279] and 215[280] of the Constitution which empowers the court of record to punish acts that "scandalises"[281] or "lowers" the authority of the Court"[282]. It is claimed that the aim of Contempt of Courts act, 1971 is to secure public confidence[283] and respect in judicial process[284]. Often, this provision with its origins rooted in the monarchic rule of England, is criticized for being archaic and for excessively sacrificing freedom of speech[285]. Though the provision was enacted to secure "not the judges as persons but for the function which they exercise"[286], many at times it has been misused to revive and safeguard the esteem of individual judges. For instance, Praja Rajyam, a Telugu Weekly, published an article under the caption: "is the Sub-Magistrate, Kovvur, corrupt?" with cited instances when the alleged judge had taken bribe. But they were prosecuted for contempt and were found guilty[287]. Judiciary's own functionaries too have had to face the rigours of contempt law. Former Supreme Court judge Markandey Katju was subject

[278] Supreme Court Justice Deepak Gupta, Outlook India, February 24, 2020, available at: https://www.outlookindia.com/newsscroll/right-to-dissent-is-essential-to-democracy-criticism-cant-be-termed-antinational-sc-judge/1743096 (Last visited on March 11, 2021); see also Kranti Associates Pvt. Ltd. V. Masood Ahmed Khan, (2010) 9 SCC 496.
[279] INDIA CONSTI. Part V: The Union.
[280] INDIA CONSTI. Part VI: The states.
[281] The Contempt of Courts Act, 1971, § 2: Definition.
[282] *Id.*
[283] Re: Arundhati Roy, AIR 2002 SC 1375.
[284] Dr. D.C. Saxena v. Hon'ble The C.J.I., J.T., 1996 (6) S.C. 529.
[285] Prof. G.C.V.Subbarao, Commentary on Contempt of Courts Act 70 of 1971, 2, Lexis Nexis (1988).
[286] Pennekamp v. Florida, (1946) 90 Led 1295.
[287] District Judge v. Ravindra Pai, ILR 1991 KAR 124.

to contempt charge for calling out the "fundamental flaws"[288] and "grievous error"[289] that a bench headed by Justice Gogoi made, Justice C S Karnan's was imprisoned for sending a list of Madras High Court judges who were accused for being discriminatory and corrupt, to the Prime Minister[290] and very recently, Advocate Prashant Bhushan was found guilty for criticising CJI S.A. Bobde and the top court for functioning in "lock down mode"[291] by not upholding fundamental rights and protect dissent.[292]. In another instance, when a bench lead by CJI Gogoi didn't hear senior advocate Sanjay Hegde as he made a "very, very derogatory"[293] statement against the judiciary in an another matter, showcases how the criticisms against the organ may not aid in keeping it in check. When the communist leader, E.M.S. Namboodiripad, made a statement publicly that the "judiciary was an engine of class oppression"[294], the Courte convicted him by holding that, "an attack upon judges [...] which is calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions [...] weakens the authority of law and law Courts"[295]. However, the courts fail to consider this "general dissatisfaction"[296] against the judiciary would be caused even if the fundamental right to freedom of speech and expression is violated in the name of contempt law. Justice Krishna Iyer, captured the inherent issues with contempt law by claiming that "a vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to publish regardless of truth and public good and permits a process of *brevi manu* conviction"[297]. To further intensify the disable the masses from keeping the judiciary in check, the court held that right to information, a guaranteed

[288] Harish V Nair, Is there anyone to escort Katju out of Court, SC asks after ex-judge stirs drama, India Today, November 12, 2016 available at: https://www.indiatoday.in/mail-today/story/markandey-katju-Supreme-Court-contempt-justice-ranjan-gogoi-351612-2016-11-12 (Last visited on March 11, 2021); Samanwaya Rautray, Supreme Court issues contempt notice to ex-judge Markandey Katju, Economic Times, November, 12, 2016 available at: https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-issues-contempt-notice-to-ex-judge-markandey%20katju/articleshow/55374152.cms?Utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on March 11, 2021)

[289] *Id.*

[290] Justice C.S. Karnan v. The Hon'ble Supreme Court of India & Others, (2012) 6 SCC 491.

[291] Harish Nair, Times Now, Prashant Bhushan contempt case: Here's what happened in SC, (August, 31, 2020) available at: https://www.timesnownews.com/india/article/prashant-bhushan-contempt-case-here-s-what-happened-in-sc/645378#:~:text=New%20Delhi%3A%20Noted%20advocate%20and,apex%20court%20and%20destabilized%20the. (Last visited on March 11, 2021)

[292] In Re: Prashant Bhushan And Anr, Suo Motu Contempt Petition (Crl.) No.1 Of 2020 (Reportable)

[293] AAP MP made "derogatory" remarks on courts, won't hear his Rafale plea: SC, Hindustan Times, March, 6, 2019, available at: https://www.hindustantimes.com/india-news/aap-mp-made-derogatory-remarks-on-courts-won-t-hear-his-rafale-plea-sc/story-ezmheaqytwjejg7cnh4twl.html. (Last visited on March 11, 2021)

[294] E. M. Sankaran Namboodiripad v. T. Narayanan Nambiar, 1970 AIR 2015.

[295] *Id.*

[296] *Id.*

[297] Justice V.R Krishna Iyer, Contempt of Court (6th ed., 2016)

fundamental right, can be invoked against the office of CJI only in exceptional circumstances as "RTI can't be used for as a tool of surveillance"[298]. With regards to appointment of judges, only the names of the judges recommended can be disclosed through RTI and not the reason for those suggestion[299]. Even if the restrictions are to protect the independence of judiciary, the public have a right to know the true processes of administration of justice in a democratic State[300] and it raises the predicament as to whether judiciary should be independent from the people it seeks to protect, by creating an opaque system? Further, even if an aggrieved individual were to file a complaint against the conduct of a judge or a judgment in the department of justice, the ministry merely has the authority to guide the individual to judicial remedies that are available[301]. There are no other bodies that are accessible to ensure that a fair enquiry, without violating the principle of *nemo judex in causa sua*. Free speech and expression is considered as the "fountain-head"[302] of democracy, even though it is subject to reasonable restrictions, *bonafide* critique on institution cannot be challenged on any pretext, be it according to the constitutionally conferred power or statutory contempt law. In fact "if a country has to grow in a holistic manner where not only the economic Rights but also the civil Rights of the citizen are to be protected, dissent and disagreement have to be permitted, and in fact, should be encouraged"[303]. Removing judiciary from public scrutiny and accountability, through the provisions that were discussed above, detaches the organ from the society that it was set up to serve.

CONCLUSION

The following conclusions could be made through the above analyses:

Firstly with regards to judiciary as "State", we can see that there is a justifiability and the need for recognising judiciary under Article 12 to ensure scrutinisation by fundamental rights on judicial action. However, a recognition of judiciary as "State" and a bar against the remedy under Article 32 in instances of miscarriage of justice would render it inefficient.

[298] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, 2019 SCC online SC 1459.
[299] *Id.*
[300] Iyer, *Supra* note 231.
[301]Guidelines on Grievances Received in the Department of Justice, available at: https://doj.gov.in/sites/default/files/GUIDELINES.pdf. (Last visited on March 11, 2021)
[302] Iyer, *Supra* note 231.
[303] Right to dissent is essential to democracy, criticism can't be termed anti-national: SC judge, The Outlook, February 24, 2020, available at: https://www.outlookindia.com/newsscroll/right-to-dissent-is-essential-to-democracy-criticism-cant-be-termed-antinational-sc-judge/1743096. (Last visited on March 11, 2021)

Secondly with regards to the internal forms of accountability, the different provisions discussed are narrow in scope as they are time bound, discretionary in nature which could be invoked only on limited grounds to uphold the doctrine of *stare decisis*. As a result, these modes are not sufficiently efficacious. It shouldn't be misconstrued that this analyses and critique on the limited application of these various provisions discussed above, are arguments to widen their scope. The need for restricted scope of application to ensure principles of *stare decisis*, separation of power and judicial independence are upheld, is recognised. However, the analysis is to point out the lack of efficient and sufficient forms of checks and balance.

Thirdly with respect to the external forms of accountability, it is important to note the significance of the tussle between the organs which has existed since the internal emergency in India. Is the tension a necessity? Inter-branch conflict arising out of trust deficit between these organs of the government, has made the creation of checks and balances very complex and also makes the need to ensure that the bodies don't transgress upon each other's function pertinent. Therefore, judicial accountability has being rendered as a mere faddish chronicle due its inadequate mechanisms.

As "power tends to corrupt, and absolute power corrupts absolutely"[304], we have come to understand that excessive power in the hands of the judiciary may result in catastrophic outcomes, which showcases the need for judicial accountability. The challenge is in analysing the cost and benefit of judicial accountability at one hand and its independence in the other. The true goal would be to ensure "Judicial neutrality"[305]. Transparency in judicial functions becomes important as "sunshine is the best disinfectant"[306] and the understanding that the principle of independence is to protect the public and not for self-protection of judges becomes pertinent. In India, conventionally, we have had only what are best termed as hard accountability tools, such as the impeachment process. Perhaps we need to re-think about the alternative tools that could be employed, which may not warrant impeachment but requires some other form of disciplinary action. There is a need for the disciplinary procedures to be transparent, unbiased and most importantly, trusted by all.

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[304] John Emerich Edward Dalberg Acton, first Baron Acton.

[305] A.P. Shah, A Manifesto for Judicial Accountability in India, The Wire, July 29, 2019, available at: https://thewire.in/law/cji-ranjan-gogoi-supreme-court-judiciary. (Last visited on March 11, 2021)

[306] David Ridpath, Sunshine is the best Disinfectant--It is Time to Recognize that in Sports Gambling, Forbes, September 16, 2015, available at: https://www.forbes.com/sites/bdavidridpath/2015/09/16/sunshine-is-the-best-disinfectant-it-is-time-to-recognize-that-in-sports-gambling/#676f35414636.(Last visited on March 11, 2021)