

Judicial accountability:  
Metrics to Judge Judges and Feedback  
Mechanism System

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## **Preface**

Rakshak Foundation is a very dedicated organisation, towards development of the community in pursuance of a better tomorrow. Their public policy research has drawn me towards this internship. The First time I heard about Rakshak Foundation and the work they do, I looked at it as an opportunity to improve my CV as any other student aspiring to get somewhere after 5 years in Law school. But as the days progressed the hard reality of this work struck me. The prospect of addressing an issue like judicial accountability on this scale meant a life's worth of dedication and hard work. The inspiration that I truly got was to focus my attention to the intricacies of the field. Accountability is a persisting problem for our country from the beginning. The chance of impressing upon this area, my beliefs and ideas, is goal and reason enough for choosing to work on this project. The Project is closely based on Constitutional law and Public Administration which are extremely relevant and pertinent subjects to our country. The most important motivation, however, was to realize the potential that I know our country to be capable of and my research is driven with the focus on working and effective mechanisms to make our democracy believable and real.

## Acknowledgements

I would sincerely like to acknowledge some people who are majorly responsible for the work that I am able to do. Firstly, I would like to thank the Rakshak Foundation and Mr. Sachin Bansal to have provided me with this opportunity. I would also like to thank them for giving a stimulus to my own desire to work on social issues such as these. I must acknowledge the untiring support of my mentor, Prof. Rajesh Babu R from IIM, Calcutta, who has been a great inspiration and very steady help. The efforts of all the co-ordinators and the director of the internship, Mr. Rohit to provide for us and attend to us, are to be greatly appreciated. I thank Professor Dr. Edgardo Buscaglia; Director, International Law and Economic Development Centre, the author of a very important paper that I have used in my project to have graciously replied to me on time and provided me with the required papers of his. Prof. Arend Lijphart, Research Professor Emeritus of Political Science, University of California and Prof. John McGarry of Queen's University, Ontario who are Political Scientists and experts in the area of 'consociationalism' are highly appreciated for their prompt and valuable replies for my queries. I heartily thank all my co-interns for their inputs and suggestions to my project. I thank very dearly, my parents who have made sure at every point to provide for my needs and made my stay in IIT, Kanpur quite comfortable.

## **Table of contents**

<b>Executive Summary.....</b>	<b>4</b>
<b>1. Introduction of project.....</b>	<b>6</b>
1.1. Background Information. ....	6
1.2. Main Problems, their scope and impact on the society.....	9
1.3. Goal and Objectives of the project.....	14
<b>2. Methodology.....</b>	<b>15</b>
2.1. Literature Survey.....	15
2.2. Meetings and Interviews.....	16
<b>3. Current NGO, and Govt. Efforts.....</b>	<b>18</b>
<b>4. Results and Discussions.....</b>	<b>20</b>
4.1. Findings from the literature	
4.2. Finding from the discussions and impact on the theoretical focus of the project	
4.3. Gap analysis	
<b>5. Recommendations, Scope and Strategy for Implementation.....</b>	<b>24</b>
<b>6. Suggestions for future work.....</b>	<b>31</b>
<b>7. Conclusion.....</b>	<b>32</b>
<b>8. References .....</b>	<b>33</b>
<b>Appendix:</b>	
<b>A Meetings and Interviews .....</b>	<b>35</b>

## **Executive Summary:-**

This report is titled “Judicial Accountability- Metrics to judge the judges and Feedback mechanism System”. This was born out of the initiative of Mr. Sachin Bansal to ensure lower levels of corruption and better standards in the judiciary by suggesting a merit-based system of salaries. The purpose of judging judges is to bring to light the activities which have been speculative for a long period of time and due to its unclear nature, is slowly eroding public confidence.

Judicial Accountability is a sensitive concept that requires researchers to almost necessarily see it from both the judges as well as the people’s point of view. The misconception of either gives rise to a shabby understanding of democracy. The following paper is a summarisation of the points of view with an eye on the present situation of degrading, judicial and democratic values in the society. The call of the hour is transparency. However, transparency without technique is a breach of right or authority. For the most part of the research efforts were made to singularly understand the very unique position of a judge when compared to any other member of a democratic unit. The result of this, as it is apparent in the paper, is the unbiased basis for analysis and recommendation.

**Scope:** Scope of the research includes appreciation of world views on accountability, while working out means to make judiciary workable in a concept of state as exists in India. It points out those areas of a judicial career which are out of line with the requirements of law and good governance. The government has also the felt the need to take immediate actions and has initiated passing of a very important bill. This project tries to understand the intricacies of this requirement while ensuring that all the proposed ideas are actually enforceable.

**Key Findings:** The key findings are in the realm of principles for application while considering the possibility of judging judges in a country like India where independence of Judiciary is held up very high.

- The concept of Independence of judiciary is given a mistaken notation and is almost always equated to more powers and privileges while excluding the need to make judges accountable within the same concept.

- Extremely low budgetary allocation to judges- 1% of the Union Budget.
- Channels of systemic corruption widened in the country- Judges, Lawyers, Litigants, Prosecutors, Politicians, administrative judicial officers like CBI Judges, etc
- Very unclear basis for removal of judges or any other assessment and low rate of disposal of cases stimulating this practice.
- Contempt laws restricting scope of accountability, making even the expression of doubt a condemned action.
- Close study of the Judicial Standards and Accountability Bill, 2010 and discussions and controversies surrounding it.
- Consociational democracy as an excellent way to approach many of the problems that arise in the judiciary as a result of a highly divided and pluralist society.

**Recommendations:** Recommendations are based on implementable scenarios. Some of them have long-term implications whereas, some are immediately adoptable.

- Judging by judgements instead of the person- by a panel of jurists, to the basic breaches in natural justice, inconsistent reasoning, or rule of law.
- Factors to determine the autonomy of judges, like, rational thought, self-discipline, free from pathological delimitations and free from excessive political will, etc.
- Improvements in budgetary allocations and checks and balances developed within the hierarchical court system.
- Consociationalism as a new form of government and thus, judiciary.

There are areas like education of the judges and law students according to ideals of social justice still open for further research.

## 1. Introduction

### 1.1. Judiciary and Constitutional framework:

The application of law to the ends of justice is the most important function of the state. The position of a judge as an unelected, non-hereditary form of leadership fulfils this requirement or is thus proclaimed. The nature of this office is overarching the entire schematic of the country. Judiciary is not just an aspect of state's sovereign organism but is the very essence of democratic propaganda and illustrious of socio- economic sovereignty. The Indian Judiciary is one of the most powerful judiciaries in the world because the Constitution of India spells out the highest degree of powers and privileges for a judicial officer.

The judiciary is also the central character in securing human rights in the country. The proven injustice of masses is a calculable loss of the integrity to judiciary as a whole. The significant nonchalance with regard to human suffering in the interest of upholding law is the most widely spread view about the judges of this country. The judges are the extremely important threads in the fabric of our constitution which promises to enforce human rights as a part of the fundamental rights. Even historically speaking, the broadening scope of fundamental rights has taken place, every time, due to judicial action. For example, the scope of Article 21, "right to Life" now enrobes the areas of right to livelihood- *Olga Tellis and others v. Bombay Municipal Corporation and others*<sup>1</sup>, right to live with human dignity, free from exploitation- *Bandhua Mukti Morcha v. Union of India* <sup>2</sup>, right to education-*Unni Krishnan v. State of A.P* <sup>3</sup>etc. Moreover, after cases such as *Municipal Council Ratlam v Vardhichand and ors*<sup>4</sup>, *LK Koolwal v State of Rajasthan and ors* <sup>5</sup>, *Goa Foundation v Konkan Railways Corporation*<sup>6</sup>, *M. C Mehta v State of Orissa* <sup>7</sup>, the whole area of environmental law came to be covered under this article. This is the power of the judiciary over law. They are not merely interpreters of stone-carved, unchanging, rigid laws. They are the authority which accepts or rejects these laws into society, so that natural justice and rule of law never have to be compromised in the justice

delivery of a nation which is built so strongly on the sacrifice of its freedom fighters to give democracy its meaning.

However, the issue at hand is one of governance and not judgment making. The problem of political interference and so on persists to wither the response to governance in any political set-up, whether judicial or executive. Speaking of a republican country, Montesquieu, who has first introduced the concept of separation of powers, says, "The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative."<sup>8</sup> He does not include Judiciary in this system of checks and balances. Moreover he later says, "The nearer a government approaches towards a republic, the more the manner of judging becomes settled and fixed."<sup>9</sup> This is a very undesirable trend for a judiciary in any country. In this light, let us examine the first aspect of understanding judicial accountability, i.e. Independence of the judiciary.

**Independence of Judiciary:** Judicial Accountability is a concept which cannot be understood outside that of judicial independence. Judicial accountability is to fix responsibility upon an autonomous body of the government, which is respected, revered and separated from the rest of the state mechanisms. Independence is not merely a state of mind when it comes to the matter of this powerful judiciary. The concept of judicial independence is central to the principles of fair trial. The Human Rights Commission has called it "an absolute right that may suffer no exception"<sup>10</sup>. The "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" has 22 rules prescribed only to ensure the independence of the judiciary. However, it is not this importance of independence of judiciary that is missing in the Indian understanding, but the understanding of the term itself. Many consider that wider rights or privileges lead to independence and that accountability is restrictive of this independence. But judicial independence is not what we understand of independence in the general sense. It does not refer to a privilege of the judge but his obligation. In fact, it is the right of the people. This right gives people who seek justice an assurance of all fairness in any judgment

made by the judge. In this way, public confidence ascribes value to the position of a judge and makes his decision binding. This may not be apparent in the day-to-day understanding of the judiciary because of the excessive powers given to judges, instead of ensuring their independence.

At this point, it becomes necessary to understand the particulars of an independent judiciary. Independence refers to independence; to assess facts, from society in general and the parties of the suit, to apply legal thinking and knowledge of and expertise in legal principles, from beliefs, faith and rituals inconsistent with the law in question or any other law falling under the jurisdiction of the judge. This does not mean that he need not be curious to unravel the truth of the case but this protects him from being influenced by external stimuli. Due to the adversarial nature of courts in the country, the judge's job is restricted to working with the facts presented in front of them.

**Relationship between judge's decision and personal attributes:** In the olden times, the task of decision making is done by the most respected elder as they were thought to be wise, impartial, competent and diligent. Great integrity and dignity was ascribed to them merely by the nature of their work. This meant that, even if the judge is not a man of integrity in his personal life, during the performance of decision making, he would step into the shoes of someone who is adequate to take up this responsibility. Sometimes, this even meant, making an external effort to become a good judge. And according to studies, judgmental accuracy is related to several characteristics including independence, trustfulness, sympathy, and courage, a sense of humour, experience with human nature, maturity, and similarity to the target, intelligence, and social skills.<sup>11</sup>

Despite these expectations from someone in the position of a judge, there have been outrageous allegations from people like Prashant Bhushan that "half of the last 16 Chief Justices have been corrupt."<sup>12</sup> In the last few years, there has been radical increase in the number of judges being alleged of corruption due to their links with politicians and members of the bureaucracy. The following sections are indicative of the efforts to resolve these problems affecting our judicial system and

consequently the people at large. The urgency of this study at this level arises from the fact that since the beginning of the 21<sup>st</sup> century repeated allegations and proclamations of corruption have been done by very important people in the legislature, judiciary and other public services. Some of these cases like that of Justice V.Ramaswamy and former CJI Justice K.G. Balakrishnan, are made out to be isolated acts which can threaten judicial stability in the country.

### **1.2. Main Problems, their scope and need of accountability:**

The judiciary in recent times has been the guardian of its own cause. The constitutional status of any body is the result of entwined suppositions of right, privilege, duty and obligation. The loss or misinterpretation of any of these leads to a situation positively reflecting a need for amendment. All major amendments to the constitution in the past have occurred due to this situation, rather than a failure in machinery. In a report by the International Commission of Jurists (ICJ) it states: "Of all types of corruption<sup>2</sup>, judicial corruption is perhaps the most insidious and odious because this type of corruption gnaws and destroys a most important pillar of a democratic government. Much has been written about the topic of corruption, but judicial corruption tops the list of the condemned. Corruption adulterates clogs, pollutes, perverts and distorts the dispensation of justice."<sup>13</sup> This sums up the urgent need for accountability in our country as well as many others. We will however, look into various problems contributing to this cause in the following paragraphs.

**International issue:** There are numerous international treaties and documents on the impact of loss of judicial accountability and the efforts to restore it, or the sudden emergence of the need for judicial accountability in some cases such as ours. Some of these documents are, The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of

Judges and Lawyers, February 2000, "Bangalore Principles of Judicial Conduct", The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.etc.

According to Justice Clifford Wallace "Judicial corruption certainly exists, I know of no country that is completely free of corruption with its insidious effect of undermining the rule of law"<sup>14</sup>. This emphasizes the vastness of the problem. This is not an issue restricted to the Indian scenario but is a world-wide phenomenon in some way or the other.

**Misinterpretation of independence of judiciary:** As discussed above, independence of judiciary is a very sensitive topic which needs to be addressed only after gaining a clear understanding of the need for independence and its underlying principles. The principle of an independent judiciary derives from the basic principles of the rule of law, in particular the principle of separation of powers. The Human Rights Committee has said that the principle of legality and the rule of law are inherent in the ICCPR. In Algeria judges who are thought 'too' independent are penalized and transferred to distant locations. But the perception is that independence is merely a power. It is discernment from corruption, political influence, executive interference, etc. It is the duty of the judge that he remains independent and the prevalence of contempt law is for this purpose. This is however, now abused by using it against every allegation people make. The understanding of the need to accountability also becomes clear by first analyzing the close inter-relationship between accountability and independence. Accountability as a concept in common law goes along the lines of reprisal for wrong-doings which make justice ineffective. This has however assumed the role of empowering each other in the work of executive and legislative control over judicial role in handing out of justice. The problem or critique of most accountability measures has always been about its encroachment over independence which in return is again a very important principle of natural justice and rule of law. Thus, these concepts have been linked to a great extent with the

evolution of law. Throughout the paper, I have expressed my understanding of this position in the context of corruption in its various forms and channels, as is discussed in the following passage. For now, I do however; want to clarify the position of this concept by emphasizing that judicial independence can only truly work as a correlative of judicial accountability because complete accountability alone can satisfy all the conditions necessary for a judge to assume his authority independent or free of doubt (through ensuring public confidence), conflict of reality or actuality, fear of politicized opinion, and at its core, to secure the worth of judgments passed.

**Types of corruption and channels of corruption:** The nexus between politicians and members of judiciary is the unhealthy trend in any democracy which threatens the rule of law. The nexus includes some from the legal profession as well. These people have developed vested interests in the present status as most of the powerful are happy and not interested to change the system so as to have an independent and incorruptible judiciary. Thus some of them from within, and entire civil society from outside should take initiatives to reform the entire mechanism. Apart from the political interference there is prevalence in the outlook of the judges, the opportunity of retaining money from every stratum of court administration and management. There is a notion of authority that the judge tends to exploit in some cases. This extremely divulges the scope of corruption everywhere in the judiciary.

**The contempt Laws:** The Supreme Court being a 'court of record' is entrusted with a special power to punish for its contempt. After 1991 in *Delhi Judicial Service Association v. State of Gujrat*<sup>15</sup> this power of the Supreme Court was extended to the High Courts and lower courts which means that even sub-ordinate judiciary now had the protection of contempt laws. Article 129 of the Constitution of India gives this power. This is construed to be furtherance of protecting the independence of the judiciary. However, the power is wide and unfettered. From this arbitrary action followed as an obvious consequence. Judges have been misusing this power from time to time. It is an agreed principle that contempt

occurs when criticism about the judicial system or the judges hampers with the administration of justice or interferes with the faith objective approach of the judge. An example of the exercise of this power is after Shri P Shiv Shankar's<sup>16</sup> speech in derogation of the dignity of the Supreme Court in capricious motives for judgments; the Court instituted a suit against him under these provisions<sup>17</sup>.

This status of judges has become increasingly dominant. It was decided in the case of *J R Parashar v. Prashant Bhushan*<sup>18</sup> that a judge should not have to defend his judgement in public which made him immune from all criticism even when it was said that "courts as an institution do not enjoy immunity from criticism as long as the criticism is fair, reasonable and temperate" all of which are extremely subjective terms. After almost half a decade of activism, 'truth as a defence to criticism against judges' was made legal through the Contempt of Courts (amendment) Act, 2006. However, the question still remains if it is at all possible to determine the truth of an allegation when the judges are so strictly protected from all sides excluding any possibility of investigation into these claims and allegations without the fear of facing criminal charges under the contempt law.

In this way the contempt laws of the courts in India have become stronger than in any other country. Absolute and irretrievable rights in the hands of judges which are provided to guard their independence is proving to be counter-productive by ensuring just the opposite. This position is made clear from the explanation to 'misinterpretation of judicial independence' as corruption and lack of accountability is a loss of independence in a democratic form of government.

#### **Uncertain grounds and processes for impeachment, transfer, promotion, etc.:**

The constitution and the Judges (inquiry) Act, 1968, lay down the grounds and mechanism for the removal of judges respectively. This is known as the process of impeachment. Now procedurally, the impeachment of a judge goes through various stages. Firstly, there should be "proven misbehaviour or incapacity" (Articles 124 (4) and (5) and 217 (1) (b) and 218 of the Constitution of India for Supreme Court judge and High Court Judge respectively) which have not been defined or explained anywhere in the constitution of any legislative body. Currently, until the Judicial Standards and Accountability Bill, 2010 is passed; the procedure for

removal of a judge is done through the Judges (inquiry) Act, 1968. According to this Act, a panel of jurists is constituted which investigates into the allegations on the above-mentioned grounds and if the findings prove the allegations to be correct then it goes through the parliament for approval by a 2/3<sup>rd</sup> majority. Only after this extensive process can a judge be removed from his position<sup>19</sup>. Such a tedious procedure is usually perpetrated at some level by corrupt officers or parliamentarians and fails. So, the question is not of false allegations but of the fact that even 'proven' misbehaviour and incapacity cannot easily remove a judge from his position.

**Recent events- Levels of corruption and numbers: number of cases exposed:**

Starting with Justice V Ramaswamy's case on financial improprieties and irregularities, there have been a host of cases regarding the rampant corruption in the judiciary. Provident Fund Scam with Current corrupted Judges in both Supreme Court and High Court became very widely discussed. Very recently, CBI judge Pattabhi Raman Rao, and another retired judge, Chalapathi Rao reportedly took Rs 6 crore from former BJP minister Gali Janardhan Reddy to grant him bail in the illegal mining scam involving the Obulapuram Mining Company and now the anti-corruption bureau on Saturday arrested T Ravi Chandra<sup>20</sup>.

Upon continuous allegations, the judicial community has also retorted back with a criminal contempt case to which effect Petition for suo motu proceedings for contempt enquiry committee Constituted under Judges (Inquiry) Act for removal of a Judge-Letter written by the judge to Committee making certain sweeping allegations against certain Judges and Judiciary-Court expressed unhappiness about the episode-However, Court declined in larger interest to suo motu institute proceedings for contempt against respondent<sup>21</sup>.

The former Supreme Court Chief Justice, K G Balakrishnan had aggressively blocked any attempt to bring judges into purview of declaring their assets<sup>22</sup>. Due to this, there is a constant decline of confidence in the public over the judiciary and thus, the trend in a democratic state is to enter a state of uncertainty.

### 1.3. Goals and Objectives:

One of the primary goals of the project is integrating the cause of accountability with independence of judiciary- a system of continuous awareness of a judge's position in the democratic functioning of the country.

- To clearly understand the workability and efficacy of Indian Judiciary as a law giver and enforcer.
- To observe closely the accountability measures in different countries to analyze workable measures for a country like India.
- To suggest addition or deletion of clauses in the judicial standards and accountability to meet the ends of judicial accountability.
- Ways to assess situations and judges prone to corruption.
- Access to quick disposal of cases while retaining the integrity of law courts.
- Independence accountability equilibrium

## 2. Methodology:

The research is carried out to conduct a comprehensive study of both the theoretical and practical history and future possibilities of the existing problem. To facilitate this, there has been a division of time to read a text and ponder and explore practicable ideas for the same. The requirement of this project is to ultimately suggest mechanisms to justify the position of a judge by "judging" or rating the credit-worthiness of judges of Indian Judiciary. So, the aim is to provide this in a completely well-studied background of historical and technical data regarding the situation. This is the reason for me to have spent a huge amount of time in literature survey.

**Literature Survey-** Case laws, international documents, legislations and the like.

**2.1. Surveys-** case laws and recent events of judicial corruption.

- Economic survey- Theories of corruption containing objective, well-defined indicators of corrupt activities and containing variables able to measure the public sector's capacity to extract illicit rents are an important part of the

dialogue conducted by any institution contemplating reform. An empirical analysis of the micro-causes of corruption within a public agency is essential to the development of an anticorruption policy. Justice G D Khosla says in his book, “I have seen Magistrates and Sub-judges holding Court in surroundings wholly unsuitable for the important and solemn business of dispensing justice. Lack of funds is sometimes pleaded as an excuse, but I fear the real reason is a somewhat short-sighted indifference to the essential needs of judiciary”<sup>23</sup>. This comment is indicative of the motive of this survey. Economic survey of judiciary points out to major indiscretions made by the legislature as well as administrative scheme of the judiciary in accounting for the needs and importance of judges.

- Institutional and organisational survey: Judiciary as an institution is a subject of the doctrine of separation of powers regardless of the form of democracy-parliamentary or presidential. The powers of judicial review and judicial supremacy are highly compromised from country to country depending on their priorities or level of development, but not the concept of its autonomy. Thus, an institutional survey starts from examining the elements in the State which affect this autonomy. One of the first causes of first causes of institutional breakdown of the judiciary is Political fragmentation. This can be understood at different levels, which has lead to a distorted notion of traditional accountability<sup>24</sup>. Political fragmentation is also the cause of political intervention which further promotes systemic corruption. “Administration of Justice; *constitution and organisation* of all courts, except the Supreme Court and the High Courts” has now been transferred from List II to List III under Entry 11A. This means that the Union is now more powerful to enact a law regarding the organisation of the judiciary. A survey of this kind enabled me to bring into focus different aspects judicial conduct.

### 1.1. Meetings and Interviews:

Date	Name	Designation	Institution	Topic of Discussion
16 <sup>th</sup> , 28 <sup>th</sup> , 30 <sup>th</sup> , May; 18 <sup>th</sup> , 25 <sup>th</sup> , Jun; 9 <sup>th</sup> Jul 2012	Prof. Rajesh Babu Ravindran	Assistant Professor, Public Policy and Management; Mentor, Rakshak Foundation Summer internship Program 2012	IIM, Calcutta	Direction, scope and content of research throughout.
12 <sup>th</sup> June 2012	Professor Dr. Edgardo Buscaglia	Director, International Law and Economic Development Center Visiting Professor (2012), UNAM (México) Senior Scholar in Law and Economics	Columbia University (NY, EUA)	Causes of corruption in Judiciary of developing countries

21 Jun 2012	Dr. Arend Lijphart	Research Professor Emeritus of Political Science	University of California	Consociationalism
2 Jul 2012	Prof. John McGarry	Professor of political studies	Queen's University, Ontario	Consociationalism in judiciary of a plural society

**Please refer Appendix A for details\***

### **3. Current NGO and Govt. Efforts:**

The various Acts such as Judges Inquiry Act, Restatement of Values of Judicial Life are in implementation and Judicial Standards and Accountability Bill, 2010 due to be passed, create standards of accountability. This is a conscious effort made by the state to ensure public confidence despite the major pitfalls that they have been experiencing.

There is enormous press coverage not only regarding the corrupt actions and allegations surrounding judges but the various measures being taken by the government and the constant search of better policies. For example: "The Government of India would like to improve quality of the judiciary through reforming the legal education. We need to make India the most preferred destination of investment," Law and Justice Minister M Veerappa Moily said<sup>25</sup>. The Judges Association of India expresses its concern regarding legal education as well and states "legal education for judges for continuing education" as one of the 'aims and objects' of the body. This is an inspiring attitude judges to present interest in improvement of the system.

**Judicial Standards and Accountability Bill, 2010 -The controversy surrounding it:** The Judicial Standards and Accountability Bill, 2010 was introduced in Lok Sabha by Minister of Law and Justice, Mr. M Veerappa Moily. It

contains provisions to fix standards of judicial conduct and establish an accountability mechanism by the setting up of committees such as Judicial Oversight committee and scrutiny panel. A mechanism for the removal of judges thus repealing the Judges (inquiry) Act, 1968 is also set in place.

One of the main objections raised was the fear of misuse of provisions; that “Irresponsible use of provisions pertaining to making complaints against judges by a disgruntled litigant may endanger the Judicial Independence and may cripple down the entire administration of Justice.”<sup>26</sup>

There was also a discussion regarding the accountability of media in case of investigation to avoid unnecessary defamation of judicial workers. The reasoning of many jurists in this Bill has been the legitimisation of judicial requirements through restraining harm caused to the judicial community as a whole by the actions of some. The media interference is reduced by making the proceedings against the judge an internal matter. This again raises the very pertinent question that accountability as a concept is always towards the people and not within itself.

The Judicial Standards and Accountability Bill, 2010 is closely related to 2 other documents. As mentioned earlier, it aims at repealing the Judges (inquiry) Act, 1968 and the Restatement of Values of judicial life. Both of these documents have already been in use for at least a decade- more importantly- the decade of increasing allegations against judges. The misconception was that accountability is born out of voluntary ethical action. But the Judicial Standards and Accountability Bill, 2010 brought an end to this ideology. The values of judicial conduct are more or less a redrafting of the Bangalore Principles of Judicial conduct which have been adapted again by this Bill.

#### **4. Results and Discussions:**

##### **4.1. Findings from the literature:**

The reason for an in depth literature survey is to establish strongly the principles which tend to be over-looked very often in this nature of study.

**Idea of Consociationalism:** Much of the success of the Northern Irish peace process has been attributed to a type of political power sharing inaugurated by the Agreement in 1998 and then subsequently modified in 2006. This power sharing model is commonly called consociationalism: a 'government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy'<sup>27</sup>. Such is the prevailing orthodoxy amongst the international community regarding the potential of consociationalism to build peace and democracy in divided societies, that it has been used or suggested as fit for Bosnia, Lebanon, Burundi, Sri Lanka, Cyprus, Afghanistan, Kashmir and Iraq, amongst numerous other divided societies<sup>28</sup>. This I found relevant because of the vast implication of a culturally divided community and deceptively secular view of the judiciary. There are two views of the counter-majoritarian critique of judicial power and judicial review which we apply in India they are:

- (1) Judicial review counters the will of the democratically elected legislature; and
- (2) Judicial review robs society and public debate of important issues about rights<sup>29</sup>.

These are seemingly very pertinent objections against the idea of consociationalism in judiciary as well. But the application in this regard is that the idea of consociationalism is greatly an answer to this counter-majoritarian view as well. Lijphart said in reference to consociationist countries, "Interestingly, judicial review does not seem to be strong in any of these consociations."<sup>30</sup>The two most important elements in this regime of toleration are power sharing and proportionality. India having a strong judicial review needs to be balanced in power through the action of consociational ideals. Also, there is a strong belief that judicial review has often eroded federalism and Indian judiciary being unitary in nature does not respect the formation of the rest of the democracy in a quasi-federal manner.

**Adhering to social justice principles:** Social justice is a dying principle in the country due to incapacity of the mechanisms in place. Eg: Article 15(1) of the Constitution, "shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them" has not been able to be successfully implemented in the country and the seriousness is not pointing to the success or failure of every other law. It is only social justice that the country is not able to provide. Being a welfare state, India has taken up a responsibility to consciously place the "greatest happiness of greatest number of people"<sup>31</sup> ahead of any other principle in public policy. Social justice or even socialism as a concept was introduced later in the preamble<sup>32</sup>. The constitutional assembly debates regarding this addition point out to the ultimate aim of the parliament was to make laws which would never infringe, restrain or diminish these rights<sup>33</sup>.

According to the Rawlsian model of social justice, there is a need for justice being attributed to the worth of human beings and not the status. This in terms of corruption speaks of equality before law and equal protection of law<sup>34</sup>.

**Scope and power of superintendence:** the principle of superintendence in the court system has a very significant impact in the whole subject of judicial accountability. This jurisdiction is primarily intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law as has been clearly pointed out in *Umaji v. Radhikabai*<sup>35</sup> with regard to Article 227 of the Constitution of India. Looking closely into this section it appears that very wide powers are conferred upon the high courts in order to superintend the subordinate judiciary. The issue of accountability finds its cause in this extraordinary power. Also, when a High Court refuses to exercise its power of superintendence, the Supreme Court may itself exercise the same powers in a suitable case where it is treated as an appeal from the High Court's order<sup>36</sup>. The scope of this provision in view of the current research is that it is integral to the constitution to enable a working model of superintendence on the basis of hierarchy. This goes a long way in keeping the independence of the judiciary untainted and possibility of partiality minimal.

#### **4.2. Finding from the discussions and impact on the theoretical focus of the project:**

The idea of consociationalism has brought into focus the possibility of judicial consociationalism which can impact the need of such accountability and transparency in the functioning of the judiciary. The need for implementing social justice is very apparent all throughout the readings about the country and its judiciary. After a discussion with Prof. John McGarry from Queen's University, Ontario, it was suggested that "on the issue of 'accountability' of judges, a consociationalist view on this would be shaped by the details of the case under consideration. Ideally, a consociational judiciary should be accountable to a consociational legislature and executive." He also shifted my attention from power-sharing mechanism to minority representation in the court system like the family court system in India or the Francophone method of Canadian Supreme Court. This shaped my research into consociational judiciary. The discussions with my mentor were most valuable in providing direction to my research from time to time. The analysis of independence- accountability relation and inclusion of deeper study of Judicial Standards and Accountability Bill, 2010 were hugely influenced by these discussions.

**Gap Analysis:** As discussed earlier, the Government has been dedicated to the cause of fixing accountability upon the judges for a while now, not to mention the huge hue and cry created when Judges of Supreme Court and High Court have not been honest was speculated as a threat to the stability of the nation and various ministers have been forced to take up immediate actions. The apparent loss of worth of the judges and their judgments has serious repercussions to the governing party. However, there has been an inevitable gap created between the legislations or policies and its implementation as described in the following lines.

There has been tremendous economic congestion in courts. In his paper, "Judicial Independence, fiscal autonomy and accountability"<sup>37</sup>, Justice Satya Brata Sinha

says; “More often than not, the (economic) demands of judiciary are not completely met. During the Ninth Plan (1997-2002), the Central Government released Rs. 385 crores (Rupees 38.5 billion) for the judiciary. While this amount may seem rather large, it represents only 0.078% of the Ninth Plan expenditure. During the Tenth Plan (2002-2007), the allocation is Rs. 700 crores (Rupees 70 billion), which is 0.071% of the total Plan outlay. In other words, though the sanctioned expenditure seems to have increased, in terms of the GDP, it has actually got reduced.” In fact, in the *Second All India Judges Case*<sup>38</sup> the Supreme Court observed, “[w]e now understand that judiciary has been included as a plan subject by the Planning Commission.” and that “[t]he alleged financial burden that would be thrown on the State exchequer on account of ... is negligible, considering the enormous advantage that the administration of justice and society derive.” In this way there has been a huge gap created, not only with regard to economic, but operational (institutional and organisational) aspect of the judiciary which is fuelled by the corrupt practices of judges, lawyers, litigants, political parties, private parties, etc. For example, the well known scandal of the Senior Congress leader from Kerala, K Sudhakaran,<sup>39</sup> who has been repeated alleging the corruption of judges, in no small measure but upto 40 lakhs of rupees has caught everyone’s eye. These incidents rose public angst against the judiciary as well as the political framework mainly due to the loss of accountability mechanisms. Hence this gap had to be bridged by making some changes in the system. The Judicial Standards and Accountability Bill, was also introduced for this reason. However, we have already seen the short-comings of that endeavour, and hence there are various public policy research organisations and individual scholars conducting serious research in this area.

## **5. Recommendations:**

These are some of the recommendations that have been come up with to address the problem of failing judicial standards in the country. Most of the

recommendations address the cause of judging the judges and mechanisms to acquire feedback like that of Sweden's Judicial Ombudsman, or Australian performance assessment mechanisms. Though very few direct references are made to these foreign mechanisms due to the vast differences in the court systems, a corollary may be drawn for each of these recommendations in some respect or the other to many working judiciaries in the world. Indian Judiciary is called one of the strongest in the world which is a favourable thing. But the checks and balances recommended bring into focus the areas of disability in the court system of the country.

#### I. Recommendation: Judging by a panel of jurists of the country

Scope: Looking into the cases where the judgments do not adhere to sound principles of law and natural justice. To give assurance that there is no perversion of the law. There is a system of calling jurists and other prominent figures to analyse upon a case to case crisis that the judiciary faces. However, the recommendation is that, instead of assessing the judge on the basis of financial inaccuracies and the like, there be a testing of the motives of the judge through examination of the judgment because ultimately it is the power of delivery of judgment which causes corruption of judges. It is not to tamper with the independence of the judge but to protect it from influences such as bribe-givers, political persons, etc. This argument is made in view of the fact that many people are not being handed out justice due to allegedly corrupt judges and the steps taken cannot deal with one side of the issue while ignoring the other. So, this panel of jurists will concurrently analyse the judgment in the purview of legal principles applied and their understanding and procedure for execution. Although much like an appeal taken cognisance of by a higher court, this process is the examination of intent of judge and not the judgment. The judgment may merely serve as an instrument to disclose the irregularity taking place. The irregularity may only be caused by the loss of autonomy of a judge as we will understand later on, because even a case of lack of competence amounts to loss of autonomy and thus interferes with the independence of the judge. This recommendation thus means that

accountability is ensured by making the judges strictly independent. This also serves as a mechanism to judge judges on a fair level. A judge may only be judged through his judgment.

Flowchart: Secretary of legislative department- Shri V. K. Bhasin, Ministry of Law and Justice ---> asking to prepare a report and address the parliament regarding the need for a panel to perform this specific function. Since the Bill (judicial standards and accountability bill) is yet to be passed, the time to introduce such an amendment is comparatively lesser than a separate motion for amendment of an Act.

## II. Recommendation: To judge upon the autonomy of the judge-

Scope: The majority of rights of a judge are recognised to cast a duty on the society and the state to provide autonomy to their functioning. This autonomy means the sovereignty of reason in the sphere of morals. In this, according to Kant, consists the true nature and only possible proof of liberty. This is a measure of the independence of the judge and can evolve as a very useful method to judge the judges as well. The meaning of autonomy from a philosophical perspective is the capability of one to govern themselves and of the values and criteria set in recognition of their own knowledge and competence. In every frame of this principle, there are at least 4 forms of autonomy. But this section will be restricted to the understanding of a basic standard of assessment of this autonomy. Firstly, there are two broad distinctions made, namely; competence and authenticity conditions. The first deals with rationale and reasoning not provoked by lack of self-control, and other delimiting factors of one's self. These should be incorporated as rounds for selection of judges at the time of appointment. Judicial appointment process can make or break a country's judiciary<sup>40</sup>. The second however is a more comprehensive and abstract idea, for authenticity is more of a theoretical concept than a practical one. The following criteria (apart from the ones already mentioned in the Bangalore Principles of Judicial conduct) of judging the autonomy of judges, have been formulated for this reason:

- Rational thought- to fulfil the demands of legal reasoning while maintaining the precepts of organised behaviour
- Self- discipline- measured through actions and general capacity to govern one's own self.
- Free from pathological delimitations- physical or mental- to ensure practical autonomy.
- Free from excessive political will made clear through the history of the person.
- Internal self-reflection of an autonomous state.

Flowchart: The similar process as above may be followed because this can also be an alteration to the judicial standards and accountability bill.

### III. Recommendation: Hierarchical system of checks and balances within the

judiciary: Scope: The powers of supervision provided to the High Courts are indicative of the general nature of accountability that was assumed by the constitution to possess. This is the inspirational provision for this recommendation. Clause 2 and 3 of Article 227 of the Constitution of India state: “(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make, and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practicing therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.”

This is a very wide power conferred upon the High Courts. This power has been interpreted by jurists to confer upon the courts to look into the working of the

subordinate courts as has already been discussed earlier. Thus, in view of the working of such a hierarchical system, it is recommended:

- To congregate administrative work in this manner so that High Court Judges have a responsibility to supervise the work of the courts- both under the civil and criminal court systems- through monthly reviews of judgments.
- The filing of assets and liabilities should also be made available to the judges of High Courts where the judges have right to order for the inspection or investigation of specific judges based on this report. However, it needs to be incorporated in such a provision that only Judges can do so and not any member of civil society. Also such a direction should be based on adequate reasoning. The inspection may then be conducted by the Scrutiny panel which is going to be established under the Judicial Standards and Accountability Bill, 2010.
- Review of judgments to check for irregularities in adhering to the principles of social justice, rule of law or legal reasoning, should be allowed for the High Court Judges. Judges may take suo motu action to deal with the subordinate-judge through administrative action against him while entertaining the appeal to specific cases.
- At the lower levels, District courts (for civil courts) and sessions courts (for criminal courts) are to take up the same responsibility. In this scenario, The High Court does not only check the actions and judgments of the district court and sessions courts but also looks into the possibility of abuse of the power vested in them. At the apex level, the Supreme Court performs the same function.
- The most important suggestion is probably this that the judge needs to be an administrator for the lower level of judges. There are ample possibilities of corruption at every stage but the responsibility to oversee it reduces the scope of being involved in it themselves. This is the result of a study by transparency international that it is the judge's administrative duty to make sure that all the cases that are supposed to be disposed off in his jurisdiction have been dealt with properly and in a timely fashion. The pertinence of this can be drawn from the provision under the constitution which ensures that "The administrative

expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the Court shall form part of that Fund”<sup>41</sup> This means that administrative responsibility is presumed to be as much a judicial function as the process of delivering judgments. Fixing this responsibility is only in fulfilment of the constitutional intent.

- The additional administrative responsibility should be made an integral function of the courts and must be supported by increase in the remuneration and man-power. This is dealt with in the recommendation for increase in institutional mechanism.

Flowchart: Individual recommendations to any member of the Law Commission of India along with the explanations. Due to the urgency of the matter, recommendations of the Law Commission are likely to be included in the process of getting the accountability bill approved. Also follow up with them on a timely basis regarding the problems faced in getting it approved or the required substantiating of recommendations.

IV. Recommendation: Increase in budgetary allocation to improve the institutional and economic condition of courts.

Scope: The action plan that is proposed for this is a review of all the courts in the lower judiciary and impose a bar upon the maximum limit of cases each court may try. Allocate adequate resources to enable the judiciary to carry out its functions properly and effectively. This includes security, adequate funding for appointments, education, salaries, court administrators and the court service, technical support and communication services as well as fair pensions for judges. There should also be a regular ‘Judicial Impact Assessment’ which measures:

- Judicial congestion of courts
- Inadequacy of judges
- Judicial interpretation

Regularisation of these assessments gives rise to an estimate of required budgetary allocation. The assessment may be made by any governing body because a calculated study of this type looks into the operational impact on judges which can bring changes in governance and thus improving the situation. This governing body is also to take into consideration the increase in burden on state courts as an impact of unitary form of judiciary in a quasi federal country. In India, the judiciary alone is unified institution, though the administrative responsibilities are distributed. The Chief Justice of India (CJI) is *parens patrias* of Indian Judiciary. The pressure on higher judiciary due to the 3 list demarcation of subjects and their separate jurisdiction and application causes an unbalanced sharing of power. Thus, the economic considerations of the court-personnel need to be necessarily of two types:

- Whether the allocation and expectation of judges and other judicial officers is balanced.
- Whether there is a institutional deficit in the court system which in turn effects the performance of courts.

Flowchart: To approach the Ministry of Law and Justice to take the above-mentioned into consideration while making the proposed budget. This will be taken from the consolidated fund of India.

V. Recommendation: Introducing a system of consociational ideals- this is a power-sharing ideal between the different sections of judiciary.

Scope: By this is meant an allocated time frame for the sharing of power between the judges and the people. Action Plan- democratization of judiciary- This does not mean to have an elected judge but the working of a judiciary should depend on the handing out of justice to a people who are all- powerful and all-deserving. This causes a sharing of the power between the people and the judiciary. For this the judges need to submit their powers over common-subject matter jurisdiction. This is the only way a consociation can work in a plural society like ours. This means, like the family courts established to deal with specific matters only, there needs to

be special recognition of minority through different establishment of court mechanisms. A consociational judiciary can only be accountable to a consociational legislature and executive.

Flowchart: Research work in collaboration with public policy research institutes like CPPR (Centre for Public Policy research) which would make suggestions to the legislative department of the Ministry of Law and Justice. The issue is more broad based than the other recommendations and thus needs to be popularised before being brought up for discussion in the parliament. Need to gain the support of academicians and jurists regarding this concept. The Ministry would then submit potential changes in legislation.

## **6. Suggestions for future work**

A recommendation which would require long term planning for immediate implementation is to provide Legal Education inclusive of the judicial work upon the ideals of distributive and social justice. One of the major short-comings in the society with regard to the judiciary is the lack of special education with regard to Socialist aims of the state. This has been an important observation in my research as well which could not gain required attention due to the paucity of time. Another intrinsic aspect of research on the subject of judicial accountability is the social science investigation of judicial conduct. It is important because various questions on judicial conduct, defining misbehaviour and incapacity, for example, have to be worked upon from a socio-political view point to make the study all inclusive and comprehensive. Moreover, extremely less amount of research has been conducted till date in this area and so, even the policy-makers are not strong in answering questions which cause public concern.

There is also ample scope for work in the criminal responsibility of judges which is an area neither touched upon by the earlier legislations on judicial accountability or the Judicial Standards and Accountability Bill, 2010.

## 7. Conclusion

The necessity of a corruption-free judiciary is very apparent for the nation-building process. In the course of the research the most important point noticed was the dire helplessness of the situation. Judicial accountability does not hold at its crux the metrics to judge judges but the impositions of time over a growing organ of the state. Judiciary is as living a body as law and dearth of experiential dynamism has caused a somewhat stagnated atmosphere. There is no doubt that the requirements of courts and judges are neglected but a country like ours needs change rather than facilitation. In such a state, evils of corruption, perversion of the law etc. take place as if it is the natural course of the body.

The recommendations made in this paper are an attempt to bring forth the combination of stability and change. Worth of a constitutional creation is not calculated in relation to the perfect state of nature but with the level of development and future goals of a nation. It is the problem that is encountered with corruption in our country as well. The recent changes in political atmosphere with regard to corruption all over the world cause this contravention even in seemingly stable governments. "CORRUPTION will destroy Papua New Guinea if nothing is done to stop it," Governor-General Sir Paulias Matane said before he launched the 2010 Sir Anthony Siaguru Walk Against Corruption<sup>42</sup>. Threat of destruction is a cause enough to debilitate a nation and the same is with the judiciary, i.e. the threat of loss of confidence in a system which provides justice is enough for the state to crumble down. Thus, the argument through-out this paper was to integrate the concepts which apparently fall on either sides of the plane-control and freedom- to hold an institution like judiciary together.

## 8. References:

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<sup>1</sup> 1986 AIR 180

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<sup>2</sup>1992 AIR 38

<sup>3</sup> 1993 AIR 2178

<sup>4</sup> AIR 1980 SC 1622

<sup>5</sup> AIR 1988 Raj.2

<sup>6</sup> AIR 1992 Bom. 471

<sup>7</sup> AIR 1992 Ori 225

<sup>8</sup> Book XI, Ch. 6 of *De l'Esprit des Loix*

<sup>9</sup> *De l'Esprit des Loix*, VI, 3

<sup>10</sup> Case of *Miguel González del Río v. Peru*, *doc. cit.*, para. 5.2

<sup>11</sup> Adams, 1927; Allport, 1937; Vernon, 1933

<sup>12</sup> "Chief Injustices – Excerpts from a milestone affidavit –". *Tehelka*. 2 October 2010. Retrieved 27 April 2012

<sup>13</sup> Justice S. Peete, Reviewing measures to prevent and combat judicial corruption – The experience of Lesotho, Lesotho Sun International, Maseru - July 29, 2010

<sup>14</sup> N R Madhava Menon, reviewing the book titled: JUDGES AND JUDICIAL ACCOUNTABILITY: Cyrus Das and K. Chandra

<sup>15</sup> AIR 1991 SC 2176

<sup>16</sup> Former Minister for law, Justice and Company affairs

<sup>17</sup> *P N Duda v. P Shiv Shankar* AIR 1988 SC 1212

<sup>18</sup> AIR 2001 SC 3395

<sup>19</sup> For further understanding, read M P Jain on Constitutional law, 2009 Ed.

<sup>20</sup> [http://ibnlive.in.com/news/cashforbail-case-suspended-judges-son-arrested/266380\\_3.html](http://ibnlive.in.com/news/cashforbail-case-suspended-judges-son-arrested/266380_3.html)

<sup>21</sup> Sub-committee on Judicial Accountability v. Justice V. Ramaswamy 1994 (4)Suppl.SCR 639

<sup>22</sup> <http://www.nagrikchetna.com/corruption.pdf>

<sup>23</sup> Our Judicial system with the Constitution of India Ed 1992

<sup>24</sup> Muiris MacCarthaigh and Colin Scott - "A Thing of Shreds and Patches": Fragmenting Accountability in a Fragmented State

<http://www.ucd.ie/geary/static/publications/workingpapers/gearywp200915.pdf>

<sup>25</sup>[http://zeenews.india.com/news/nation/india-to-improve-quality-of-judiciary-moily\\_639956.html](http://zeenews.india.com/news/nation/india-to-improve-quality-of-judiciary-moily_639956.html)

<sup>26</sup>47<sup>th</sup> report on Judicial Standards and Accountability Bill, 2010- laid on the table of Rajya Sabha on 30<sup>th</sup> August 2011

<sup>27</sup> Lijphart 1969: 216

<sup>28</sup> Rothchild and Roeder 2005a: 5

<sup>29</sup>Cindy Skach, *Rethinking Judicial Review: Shaping the Toleration of Difference?*

<http://www.hcs.harvard.edu>

<sup>30</sup> Lijphart 1999: 226

<sup>31</sup>*The Works of Jeremy Bentham*, (ed. John Bowring), London, 1838-1843; Reprinted New York, 1962

<sup>32</sup>The Constitution (forty-second Amendment) Act, 1976

<sup>33</sup>Constituent Assembly Debates, Volume IX, p-1644-1646

<sup>34</sup>Article 14, Constitution of India

<sup>35</sup> AIR 1986 SC 1272

<sup>36</sup> *Hari Vishnu Kamath v. Ahmad Ishaq*, AIR 1955 SC 233

<sup>37</sup> Presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-la Hotel, Makati City, Philippines on 28-30 November 2005.

<sup>38</sup>(1993) 4 SCC 288

<sup>39</sup> <http://www.indianexpress.com/news/kerala-bar-owners-bribed-sc-judge-to-retain-licences-mp/749759/>

<sup>40</sup> <http://www.indianexpress.com/news/kerala-bar-owners-bribed-sc-judge-to-retain-licences-mp/749759/>

<sup>41</sup> Article 146 (3) Constitution of India

<sup>42</sup> <http://www.postcourier.com.pg/20100513/news12.htm>

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## Appendix A

### Discussions with Mentor

**Date:** 16<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup>, May 2012; 18<sup>th</sup>, 25<sup>th</sup>, June 2012; 9<sup>th</sup> July 2012.

**Mode of communication-** E-mails and one phone conversation

**Duration of Discussion:** 20 minutes

### Discussion

1. Mentor suggested me to do some initial background study - Separation of powers, Judges' transfer case, etc.
2. I asked for help in devising the methodology and structure of the project and was advised by my mentor to look into the Operation of theoretical knowledge in situations- need of metrics to evaluate judges.
3. Mentor gave suggestions for progress of the research - To constrain myself to public policy research of the problem and do an intensive study of the same.
4. Mentor suggested me to substantiate my points made in the mid-term report and pointed out to some intricacies such as bringing out the connection between Judicial Accountability and Independence.
5. Mentor asked me to speak about the Judicial Standards and Accountability Bill, 2010 as a separate side-heading and discuss the important contents and issues surrounding the same.
6. Sought mentor's suggestions for future research in the area.

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# RAKSHAK FOUNDATION

**Rakshak Foundation** is a 501(c)(3) non-profit organization headquartered in Santa Clara, California. It partners with Rakshak Foundation NGO, New Delhi, India. It researches different public policy issues and creates awareness about them. Rakshak Foundation sponsors Seminars on public policy matters, sponsors activities to involve the youth in social issues including volunteerism and supports programs to help the needy. Rakshak's Summer Internship Program is aimed at providing an opportunity to highly motivated college students to work on complex real life social/national problems under the mentorship of experts and policy makers.

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