SECURING JUDICIAL ACCOUNTABILITY
FREEDOM OF SPEECH VS. CONTEMPT
TOWARDS AN INDEPENDENT JUDICIAL COMMISSION

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The judiciary in the country today has come to enjoy enormous powers. It is not only the arbiter of disputes between citizens, between citizens and the State, between States and the Union, it also in purported exercise of powers to enforce fundamental rights, directs the governments to close down industries, commercial establishments, demolish jhuggis, remove hawkers and rickshaw pullers from the streets, prohibits strikes and bandhs etc. In short, it has come to be the most powerful institution of the State.

Every other institution of the State is accountable to the anti corruption agencies, and to the judiciary which has the power of judicial review over every executive and legislative action. Moreover, the political executive is accountable to the legislature and the legislature is democratically accountable to the people-that at least is the theory of our constitutional scheme.

However, when it comes to the judiciary, we find that it is neither democratically accountable to the people, nor to any other institution. The only recourse against a judge committing judicial misconduct is impeachment, which has been found to be a totally impractical remedy. To initiate the impeachment process one needs the signatures of 100 Lok Sabha or 50 Rajya Sabha M.P.s. This one cannot secure unless two conditions are satisfied. First, one must have conclusive documentary evidence of very serious misconduct against a judge. And second, the evidence and the charges must have been publicized, such that it has assumed the proportions of a public scandal. Till that happens, there are few M.P.s who are willing to put their signatures on an impeachment motion.

Most M.P.s or their parties have cases in court, and nobody wants to invite the wrath of the judiciary. We have learnt this from the experience of several instances where judges were sought to be impeached on compelling documentary evidence of serious misconduct.
However, the media is afraid and unwilling to publicise the charges against judges (even when they have documentary evidence to back the charges) because of the fear of contempt of Court, which constantly hangs as a sword over their necks. Unfortunately, this has not changed even after truth has been specifically incorporated as a defence in the Contempt of Courts Act, as has been starkly demonstrated by the case of Justice Sabharwal.

Mid Day had carried a series of articles in May and June this year showing how Justice Sabharwal passed the orders of sealing commercial properties in residential areas in Delhi after his sons had got into partnerships with at least two of the leading shopping mall and commercial complex developers of Delhi. These orders stood to directly benefit his sons and their partners by pushing the sealed shops and offices to shopping malls and commercial complexes and thus driving up their prices. Mid Day published much of the documentary evidence in support of this huge story exposing what appeared to be a scandalous conspiracy at the Apex of the judiciary. Yet neither any other media organization, nor any judicial, executive nor legislative authority as much as batted an eyelid on this story. Thereafter, on 3rd August, the Campaign for Judicial

Accountability, led by several eminent persons held a press conference and released a detailed chargesheet containing as many as 7 serious charges against Justice Sabharwal, each backed with documentary evidence. The story was still blacked out by the media. It was finally gradually picked up by the mainstream media after the courage shown by Tehelka and Karan Thapar who carried major stories on it. The story however hit the headlines in the mainstream media only after the conviction of 4 Mid Day journalists by the Delhi High Court for contempt.

All this shows the enormous fear in the media of contempt, which has effectively deterred it from investigating, pursuing and publishing stories of judicial misconduct and corruption. If there are few reports of corruption in the higher judiciary, it is not because it is rare, but because it does not get investigated or reported by the media. Thus, if you have evidence of corruption by a judge, there is not much that you can do about it. You cannot get it exposed because of the fear of contempt, in the absence of which, even impeachment is a non starter. You cannot even register an FIR against the judge under the prevention of Corruption Act, because of an embargo created by the Supreme Court in 1991 by means of a judgement where they held that no judge can be subjected to a criminal investigation without the prior written consent of the Chief Justice of India. In the 16 years since that judgement, not even a single FIR has been registered against a sitting judge.

On top of this is the attempt by the judiciary to insulate themselves from the right to Information Act. This they have sought to do by either not appointing public information officers or by framing rules, which effectively deter information seekers. Many High courts such as Allahabad and Delhi ask for an application fees of Rs. 500 as opposed to Rs. 10 in other public authorities. Many have framed rules which prohibit the disclosure of information on administrative and financial matters. Thus, information about appointment of Class 3 and 4 employees by the High Court (which are usually made arbitrarily without issuing any advertisement or following any procedure) was denied by the Delhi High Court by citing their illegal rules which are in total violation of the RTI Act. They are emboldened to make such rules with the realization that a petition to challenge the rules would also come before them.

This has effectively led to a situation of total impunity in the higher judiciary. Not only are corrupt judges effectively insulated from any action against them, they have also protected themselves from public exposure of wrongdoing by using the threat of contempt.

Using contempt power to deter exposure

The law of contempt has often been to punish outspoken criticism and exposure of judicial misconduct. In Arundhati Roy's case, the Supreme Court convicted her and sent her to jail for writing in an affidavit that the Court's earlier contempt notice to her, Medha Patkar and Prashant Bhushan on an absurd contempt petition showed a "disquieting inclination on the part of the court to silence criticism and muzzle dissent". And the bench, which sent her to jail for this totally justified criticism was headed by the same Justice Patnaik at whom her critical remarks were directed. This is one of the problems with the exercise of this totally arbitrary power. It allows a judge to sit in judgment over his own cause. That is another reason why this newly introduced defence of truth does not solve the problem with this jurisdiction of the court. You may have to prove the truth of your allegations against a judge before him!

The Mid Day journalists were convicted despite their offering to prove the truth of all their allegations. The High Court held that the truth of the allegations was irrelevant

since they had brought the entire judiciary into disrepute. It held that: "The nature of the revelations and the context in which they appear, though purporting to single out former Chief Justice of India, tarnishes the image of the Supreme Court. It tends to erode the confidence of the general public in the institution itself. The Supreme Court sits in divisions and every order is of a Bench. By imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfill the ulterior design"

All this underlines the need to do away with this jurisdiction of punishing for "scandalizing the court or lowering the authority of the court". Such a jurisdiction does not exist in the US where only acts, which constitute a "clear and present danger to the administration of justice", are considered to be contempt of Court. Even in UK, as far back as in 1899, the Privy Council had said that courts in England "are satisfied to leave to public opinion, attacks or comments derogatory or scandalous" of their judges and their courts. But since the judges were dealing with a British colony, they added a rider to their opinion, that "in small colonies consisting principally of coloured populations, the enforcement in proper cases for committal of contempt of court for attacks on courts may be absolutely necessary to preserve in such a community, dignity and respect for the court." It is this argument used by the Privy Council for colonies of coloured populations, which is still being used by our judiciary today for seeking to retain this power of punishing for contempt any criticism or exposure of judicial misconduct as "scandalizing the court". It should be obvious to anyone that respect for the courts cannot and does not depend on the existence of this power. It depends entirely on how the actions of the judges and the courts are perceived by the people. It would be fair to say that every exercise of this power to punish a criticism, however fierce, of a judge or court, will only bring the judge and the court to greater contempt and public ridicule. This power can only be used to stifle criticism and exposure of misconduct. The time has therefore come to expressly do away with this power by amending the Constitution and the Contempt of Courts Act.

Towards an independent national judicial commission

The judiciary claims that any outside body having disciplinary powers over them would compromise their independence. They claim that they have set up an "in house mechanism" for investigating and taking action on complaints against judges. It is this "in house procedure" which is sought to be given statutory status by the proposed Judges Inquiry Act Amendment Bill 2006. One major problem with the "In house procedure" is that judges regard themselves as a close brotherhood, and are reluctant to take action against those they regard as their brothers and with whom they sit and interact every day inside and outside the courts. Moreover, they feel that exposing bad apples among them would reflect poorly on the judiciary as a whole. That is why most complaints (even serious ones made with documentary evidence) against judges are just brushed under the carpet and not investigated or inquired into. There are other problems with the bill too.

The complainant is required to disclose the source of information of every part of his complaint. He can also be sent to jail by the judges committee if they feel that the complaint is frivolous or *malafide*. All this will effectively ensure that hardly anyone will summon the courage to make a complaint to this in house body of judges. Morever, even if the in house body find a judge guilty of serious misconduct, they will only recommend impeachment and the matter will again go for voting to Parliament, which can be frustrated by partisan political considerations as happened in the Ramaswami case. Also, the judge has been given a right of appeal to the Supreme court even after Parliament votes to remove him. All this will ensure that no judge will be removed till he

retires.

This underlines the need to have a totally independent constitutional body called the National Judicial Commission, which will have the power to investigate charges against judges and take action against them. The Campaign for Judicial Accountability has suggested that this could be constituted in the following manner: A chairman selected by all the judges of the Supreme Court. Another member selected by all the Chief justices of the High Courts. Another member selected by the Cabinet. Another member selected by a committee comprising the Speaker of the Lok Sabha, the leaders of opposition in the Lok Sabha and the Rajya Sabha. A fifth member to be selected by a committee comprising, the Chairman NHRC, the CAG and the CVC. Once selected, the members of the NJC would enjoy a fixed tenure of 5 years so that they would not be under the control of any authority. This commission would have an investigative machinery under their control through which they could get charges against judges investigated. Thereafter, if they find evidence of misconduct, they would set up a 3 member committee to hold a trial of the judge. If they find him guilty, the NJC could recommend appropriate action against him, which would then be mandatory. The matter need not go to Parliament. Whatever the details of this body, the time has certainly come to put in place a totally independent body, which can investigate and punish judges for judicial misconduct.

The Judicial Commission could also be used to select judges for appointment to the High courts and the Supreme Court. They could also be empowered to transfer judges between the High Courts. This power of appointment and transfer was appropriated by the Supreme Court by an inventive interpretation of the words “in consultation with the Chief Justice of India”. They said that in order to preserve the independence of the judiciary, the primacy in the matter of judicial appointments must remain with the judiciary. Unfortunately however, since then, the process of selection and appointment of judges has hardly improved, and become even more opaque. It is also perceived to be largely arbitrary and nepotistic. We definitely need a much more transparent and credible system of appointments. The National Judicial Commission, being a full time body, could devote the requisite time to select the best candidates by following a fair and transparent system, which methodically examines the merits of possible candidates on some laid down criteria. That would also free the appointment system from the control of the government and the nepotistic influence of the judiciary.

A powerful judiciary without accountability is not only an anathema to our Constitution but also a recipe for disaster for our democracy. The situation needs to be urgently rectified: It is to discuss these important and burning issues of our times that this seminar has been organized. We hope that the political leaders, jurists, journalists and leaders of civil society who participate in this seminar would arrive at a consensus on these issues and would create the public opinion and provide the leadership for bringing about the necessary changes in the Constitution, the laws and our judiciary.