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INDEPENDENCE SANS ACCOUNTABILITY: A CASE FOR RIGHT TO INFORMATION AGAINST THE INDIAN JUDICIARY

SUPRIYA ROUTH*

ABSTRACT

The Indian Supreme Court may be standing at a historic juncture where it could throw open the doors to the public to question its accountability by disclosing information pertaining to the assets and interests of the judges of the higher judiciary. The Supreme Court, however, seems reluctant to bring the higher judiciary under the purview of the Right to Information Act. A tussle has already emerged between the Delhi High Court and the Supreme Court, with the former seeking to bring the higher judiciary under the information law and justifying the need for disclosure of assets of the judges of the Supreme Court and the High Courts. The Supreme Court has been resisting the disclosure of such information on grounds of independence, confidentiality, and possible breach of fiduciary duty.

In this Article, I chart the recent tussle and discuss the present law regarding the Right to Information in the country, specifically the exemptions to the general rule of disclosure, and examine the Supreme Court's position. I analyze whether disclosure of assets and other interests of judges of the higher judiciary adversely affects the independence of the judiciary. I argue that in order to maintain the people's faith in the judiciary and to promote democratically grounded judicial independence, it is imperative for the higher judiciary to adopt transparency in its functioning and salvage its reputation before the people's confidence in it withers away forever.

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I. INTRODUCTION

It is fascinating that the Indian Supreme Court wishes to hear its own case regarding the applicability of the Right to Information Act of 2005 (the RTI Act) to the judges of the Court. The RTI Act empowers an Indian citizen to seek information from public authorities in the country. The Act also mandates public authorities to *suo motu* disclose information available to them. The Act, however, exempts certain information from disclosure, even if it is available with public authorities. Additionally, the RTI Act exempts some public authorities from falling within the legislation entirely. Even though the higher judiciary is not exempted from the purview of the RTI Act, the Supreme Court of India wants to examine the scope of the Act vis-à-vis the higher judiciary. The anticipated hearing attains further significance because a former Chief Justice of India (CJI) expressed reservations while in office about bringing the office of the chief justice and the judges of the Court under the transparency legislation.

The concerned Chief Justice opined, “The Chief Justice is not a public servant. He is a constitutional authority. RTI does not cover constitutional authorities.”¹ The day a three-judge bench of the Delhi High Court upheld the judgment of a single bench, holding that the Supreme Court and the judges come within the purview of the RTI Act, the Supreme Court decided to challenge the judgment of the Delhi High Court.² The judiciary’s attempt to avoid the RTI Act is reminiscent of the executive’s concerted efforts to exclude administrative “file notings” from the purview of the RTI Act in the not-so-distant past.³

The purpose of the RTI Act is to allow citizens to have access to information available to public authorities in furtherance of promoting transparency and accountability, and to limit corruption amongst public

1. *RTI Act Does Not Apply to My Office: CJI*, TIMES OF INDIA (Apr. 20, 2008, 12:34 AM), <http://timesofindia.indiatimes.com/india/RTI-Act-does-not-apply-to-my-office-CJI/articleshow/2964678.cms>. The Chief Judge later clarified his statement on NDTV, stating that it depends upon the interpretation of the RTI Act as to whether the Chief Justice of India office comes within the scope of the law. See NDTV, *RTI Could Extend to Judges: CJI*, YOUTUBE (May 10, 2008), <http://www.youtube.com/watch?v=ASsFMq1zyBg>.

2. *SC to Appeal Against HC Verdict*, INDIAN EXPRESS (Jan. 12, 2012, 8:33 PM), <http://www.indianexpress.com/news/sc-to-appeal-against-hc-verdict/566544>.

3. *Satyapal v. CPIO, TCIL*, (2006) Appeal No. ICPB/A-1/CIC/2006 (Cent. Info. Comm’n, India), available at http://cic.gov.in/CIC-Orders/CIC_Order_Dtd_310106.htm; see also *Centre Backtracks on Information Act*, HINDU (Aug. 20, 2006), <http://www.hindu.com/2006/08/20/stories/2006082015020100.htm>.

officials.⁴ The Supreme Court's stand suggests that either the Court is against the transparency or accountability principles in judicial functioning, or it denies possibilities of corruption in its rank and file. How else can the Court's consistent resistance to the application of the RTI Act be explained? The assertion that the Supreme Court is against principles of transparency and accountability is untenable because, time and again, the Court has preached principles of transparency, accountability, and public participation.⁵ That brings us to the other possibility: is the Court denying corruption within its ranks? It is difficult to sustain such a claim in view of the facts that will emerge in the course of this Article.

I examine the Supreme Court's plea for its exclusion from the purview of the RTI Act and examine the validity of the plea on legal and policy grounds. I argue that the Supreme Court's plea for exclusion from the RTI Act is unsustainable in view of the mandate of the Act, the Constitution of India, and the allegations of misconduct against judges in recent times. These factors call for a sustained application of the information law to ensure prestige and independence in the functioning of the judiciary and to restore public confidence in the institution. I also argue that disclosure under the RTI Act does not impact the independence of the judiciary.

This Article is divided into seven parts. In Part II, I discuss the culmination of the dispute regarding disclosure of assets and other interests of judges, and the decision of the Delhi High Court in that respect. In Part III, I find support in favor of the decision of the Delhi High Court by analyzing the relevant provisions of the RTI Act. In Part IV, I discuss why the higher judiciary in general—and the Supreme Court in particular—is duty bound to disclose information about the conduct of judges. In Part V, I point out that the Supreme Court has gradually insulated the higher judiciary from any democratic outlet in the name of independence of the judiciary. I argue that such insulation is not supported

4. The Right to Information Act, pmbli., No. 22 of 2005, INDIA CODE (2011), *available at* indiacode.nic.in [hereinafter RTI Act].

5. Article 19(1)(a) of the Constitution, which provides the "right to freedom," recognizes freedom of information as a fundamental right in a plethora of judgments of the Supreme Court in different contexts to ensure transparency and accountability in public functioning. INDIA CONST. art. 19. The Supreme Court, in a number of cases, pointed out that the right to "freedom of speech and expression" in article 19 includes the right to information. Prominent cases in this regard are: *State of Uttar Pradesh v. Raj Narain* (1975) 3 S.C.R. 333 (India); *Sec'y, Ministry of Info. & Broad., Govt. of India and others v. Cricket Ass'n of Bengal and others* (1995) 2 S.C.C. 16; *Sheela Barse v. State Of Maharashtra* (1987) 4 S.C.C. 373; *Union Of India v. Ass'n For Democratic Reforms and Another* (2002) 5 S.C.C. 294; *People's Union For Civil Liberties (PUCL) and Another, Petitioner v. Union of India and Another* (2003) 1 S.C.C. 2353; *S. P. Gupta v. Union of India* (1981) 4 S.C.C. 87.

by the Constitution and accordingly, for the promotion of democratically grounded independence of the judiciary, the higher judiciary needs to offer a democratic outlet by sharing information. In Part VI, I justify the right to information on the basis of the democratic underpinning of the Constitution of India. I conclude the Article in Part VII.

II. TUSSELE BETWEEN THE DELHI HIGH COURT & THE SUPREME COURT

It all began with an RTI application filed under the RTI Act with the Central Public Information Officer (CPIO) of the Supreme Court by Mr. Subhash Chandra Agarwal seeking a copy of the 1997 Resolution of the Supreme Court on asset declarations by the judges, and whether such declarations have been made by the judges of the Supreme Court and the High Courts in pursuit of the Resolution.⁶ While the CPIO gave information about the Resolution to the applicant, the CPIO remained silent on the second part of the request, i.e., whether judges have disclosed their assets or not. On appeal under the RTI Act, the first Appellate Authority remanded the issue back to the CPIO, which the latter rejected.⁷ The final Appellate Authority under the RTI Act, the Central Information Commission (CIC), in its decision on January 6, 2009, directed the CPIO to disclose the information about the judges' declaration of assets.⁸ The CPIO and the Registrar of the Supreme Court (who was later added as a party) challenged the Order of the CIC in the Delhi High Court, asking the Court to determine the scope of the RTI Act with respect to its applicability to the judges of the higher judiciary (Supreme Court and the High Courts).⁹ The single bench of the High Court disposing of the petition directed the CPIO to make the information available to the applicant within four weeks.¹⁰ Undaunted by the successive setbacks, the Supreme Court, through the Secretary General of the Court, appealed the judgment of the single bench of the Delhi High Court. A three-judge bench of the Delhi High Court upheld the single bench decision on

6. RTI Applications are not published; hence, information about the Application comes from Shri Subhash Chandra Agarwal, C.I.C. Appeal No. CIC/WB/A/2008/00426 (2009), *available at* http://www.rti.india.gov.in/cic_decisions/FB-06012009-01.pdf.

7. *Id.* ¶ 3.

8. *Id.*

9. The CPIO, Supreme Court of India v. Subhash Chandra Agarwal and Another, W.P. (C) 288/2009, (2009) MANU 1926 (DE), *available at* <http://lobis.nic.in/dhc/SRB/judgement/02-09-2009/SRB02092009CW2882009.pdf>

10. *Id.*

January 12, 2010.¹¹ The bench dismissed the appeal without any interference.¹² The Supreme Court decided to challenge the three-bench judgment of the Delhi High Court.¹³ The full bench of the Supreme Court would consider the logic of the High Court judgment.¹⁴

Why does the Supreme Court think that the decision needs revision? What were the objections of the Supreme Court throughout the proceedings in the CIC, and the consecutive benches of the High Court? An analysis of the High Court judgment(s) would make these issues clear. The single bench of the High Court addressed the following issues:

- (1) Whether the CJI is a public authority;
- (2) Whether the office of CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the RTI Act covers the office of the CJI;
- (3) Whether asset declarations by Supreme Court judges, pursuant to the 1997 Resolution is “information”, under the Right to Information Act, 2005;
- (4) If such asset declarations are “information,” does the CJI hold them in a “fiduciary” capacity, and are they therefore, exempt from disclosure under the Act;
- (5) Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act;
- (6) Whether the lack of clarity about the details of asset declaration . . . , as well as lack of security renders asset declarations and their disclosure, unworkable.¹⁵

Analyzing the definitions of the phrases “public authority”¹⁶ and “competent authority”¹⁷ under the RTI Act, the Court held that the Office of the CJI is a public authority that is duty-bound to provide information.

11. Sec’y Gen., Supreme Court of India v. Subhash Chandra Agarwal, LPA No. 501/2009, (2010) MANU 0013 (DE), available at <http://lobis.nic.in/dhc/APS/judgement/12-01-2010/APS12012010LPA5012009.pdf>.

12. *Id.*

13. *SC to Appeal Against HC Verdict*, *supra* note 2.

14. *SC Full Court to Consider Implication of HC Judgement: CJI*, INDIAN EXPRESS (Jan. 13, 2010, 6:20 PM), <http://www.indianexpress.com/news/sc-full-court-to-consider-implication-of-hc-judgement-cji/566972/>.

15. *The CPIO, Supreme Court of India*, W.P. (C) 288/2009.

16. RTI Act, *supra* note 4, § 2(h).

17. *Id.* § 2(e).

The Court further held that the office of the CPIO is not different from the office of the CJI. The office of the CJI is an integrated office performing a diverse range of functions.¹⁸ Unlike the United States of America (where the Chief Justice is the chief of only the United States Supreme Court), the CJI is the chief of the Indian judiciary—the entirety of the justice system constitutes a public authority. Moreover, the RTI Act does not expressly exclude the office of the CJI from the applicability of the law as it does with some other institutions.¹⁹ Hence the RTI Act applies to the office of the CJI as a public authority.²⁰

The High Court judge further noted that the definition of “information”²¹ under the RTI Act clarifies that the declaration of assets (made to the CJI) by the Supreme Court judges constitutes information, even if no constitutional or statutory law has mandated such disclosure. To hold that the disclosure did not constitute disclosable information under the RTI Act, and that the disclosure was mandated by a non-binding resolution, rather than by law, would amount to a narrow, technical reading, which would defeat the very purpose of the law and thereby undermine the high offices of the CJI and the Supreme Court.²²

Observing that the judges of the Supreme Court hold independent offices, the Court disputed the fact that there can be a fiduciary relation between the CJI and other judges of the Supreme Court.²³ Hence, the Delhi High Court held that asset declaration is not exempted under the exception clause, which excludes information available in a fiduciary relationship from mandated disclosure.²⁴

However, the Delhi High Court further observed that the declaration of assets by the judges constitutes personal information under the law²⁵ and can only be disclosed if the public interest warrants such disclosure, which is to be evaluated on a case-by-case basis. In the present context, the request for information only sought to ascertain whether the judges have filed their asset declarations (and not the substantive declaration of individual assets). The High Court held that such information does not fall

18. See INDIA CONST. arts. 124–47, 214–37. Apart from being responsible for judging disputes and allocating litigation to other judges of the Supreme Court, the CJI acts in administrative and advisory capacities. The CJI also administers oath of office to the President of India. INDIA CONST. art. 60.

19. RTI Act, *supra* note 4, § 24.

20. *The CPIO, Supreme Court of India*, W.P. (C) 288/2009.

21. RTI Act, *supra* note 4, § 2(j).

22. *The CPIO, Supreme Court of India*, W.P. (C) 288/2009.

23. *Id.*

24. RTI Act, *supra* note 4, § 8(1)(e).

25. *Id.* § 8(1)(j).

within the exclusion mandate of section 8(1)(j) of the RTI Act, which exempts disclosure of personal information. Therefore, such information should be disclosed.²⁶ On what constitutes “assets,” the High Court called upon the CJI to develop a working understanding of the term in consultation with other judges of the Supreme Court.²⁷ The High Court noted that in absence of such an understanding, information regarding asset disclosure could be misused.²⁸

Not satisfied with the judgment, the Supreme Court challenged the single bench decision on the counts “that the applicant had no right to information”²⁹ under the RTI Act on matters that are not in public domain (in this case, the asset declaration pursuant to the 1997 Resolution, lacking the force of law);³⁰ that such information is held in a fiduciary capacity by the CJI; and that such information constitutes personal information, the disclosure of which would cause unwarranted invasion of privacy.³¹ The Supreme Court, however, conceded that the Court and the office of the CJI is a public authority and covered by the RTI Act.³² Neither party, however, made submissions on the un-workability of the information regime because of the absence of an appropriate definition of the term “asset.”³³

The three-judge bench considered the constitutional and statutory connotation of the right to information.³⁴ The bench concluded that for any document or record to become information under the RTI Act it is not necessary that the information be “under the legal control of the public authority.”³⁵ It will suffice if the public authority has received, used, or retained such information.³⁶ In this case, since the CJI can receive and retain the asset declarations, it constitutes information under the RTI Act. The bench further noted that the drawback regarding implementation and enforcement does not make the 1997 Resolution any less binding.³⁷ Judges of the High Courts have been acting according to the resolution, and have disclosed their assets upon the belief that the resolution is binding, though

26. *The CPIO, Supreme Court of India*, W.P. (C) 288/2009.

27. *Id.*

28. *Id.*

29. *Sec’y Gen., Supreme Court of India v. Subhash Chandra Agarwal*, LPA No. 501/2009, (2010) MANU 0013 (DE).

30. *Id.*

31. *Id.*

32. *Id.* This understanding of the Supreme Court goes against the initial understanding of the then CJI, who noted that the CJI is not a public servant.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

not enforceable.³⁸ Thus, in essence what the three-judge bench held is that irrespective of whether a judge discloses his or her assets pursuant to the 1997 Resolution or not, if such information is available with the CJI it constitutes information under the RTI Act. Therefore, citizens would have right to information on asset declarations by the judges of the Supreme Court, the High Courts, and the CJI.

Concurring with the single-judge reasoning, the three-judge bench of the Delhi High Court denied the fiduciary and confidentiality claim made by the appellants.³⁹ The Court also concurred with the single judge in holding that assets are personal information, and can only be disclosed when overarching public interest demands such disclosure.⁴⁰ They also noted that the information, whether asset declarations have been made or not (but not the actual content of such declaration), is not covered by the mischief of the exception, clause 8(1)(j) of the RTI Act, which exempts personal information infringing privacy of an individual from being disclosed. Unsatisfied, the Supreme Court decided to appeal the judgment.

III. THE RIGHT TO INFORMATION LAW

The RTI Act lends content to and charts procedures for the effective realization of the fundamental right to information. In 1975, the Supreme Court conclusively held that the right to information is a fundamental right, and an inseparable part of the right to freedom of speech and expression.⁴¹ The RTI Act provides the legal right to information to all citizens of the country.⁴² Such right is available against the public authorities defined under the Act:

“[P]ublic authority” means any authority or body or institution of self-government established or constituted—

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any—

38. *Id.*

39. *Id.*

40. *Id.*

41. *Uttar Pradesh v. Raj Narain* (1975) 3 S.C.R. 333, 360.

42. RTI Act, *supra* note 4, § 3.

- (i) body owned, controlled or substantially financed;
- (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.⁴³

Apart from being established by the Constitution, the legislature, or government notification, any authority substantially financed by the government also qualifies as a public authority, which in simple terms means that wherever public money is involved, people have a right to know about the functioning and other details of such authority. The law has defined the term *information* in such a wide manner that “any material in any form” constitutes information.⁴⁴ Thus, the citizens of India have a right to know anything about an authority that is substantially financed by them (apart from being established by or under the Constitution, law, or notification), if such information is not exempt from disclosure under the law,⁴⁵ or the authority is not exempt from the applicability of the law.⁴⁶

Exemptions from disclosure under the RTI Act can be broadly defined under four general categories: (i) information pertaining to public order, security, and the integrity of the country; (ii) privileged and prohibited documents; (iii) information infringing on intellectual property rights; and (iv) personal information infringing on the privacy of an individual.

The exemptions claimed by the Supreme Court with respect to asset disclosures fall broadly within the fourth category—personal information infringing on the privacy of an individual. The original controversy at issue was whether the fact that asset disclosures have been made is disclosable information. While analyzing this issue, I also consider whether the content of asset declarations should be exempted from disclosure.⁴⁷ The Supreme Court claimed that an *asset* is personal information, the public disclosure of which constitutes invasion of privacy of the individual judges, and therefore should be exempt from disclosure under § 8(1)(j) of the RTI Act.⁴⁸ The Supreme Court also contended that, because the CJI holds such information in a fiduciary capacity, it is exempt from disclosure under § 8(1)(e) of the law.⁴⁹ While the High Court

43. *Id.* § 2(h).

44. *Id.* § 2(f).

45. *Id.* §§ 8–11.

46. *Id.* § 24, 2d sched.

47. In the particular case being analyzed, the High Court also addressed whether the contents could be disclosed under the RTI Act.

48. Sec’y Gen., Supreme Court of India v. Subhash Chandra Agarwal, LPA No. 501/2009, ¶ 109, (2010) MANU 0013 (DE).

49. *Id.* ¶ 95.

denied the fiduciary contention,⁵⁰ it did specify that asset declarations are personal information and could only be disclosed if public interest warrants such disclosure.⁵¹

Even though the High Court has observed that there is no fiduciary relationship between the CJI and other judges of the Supreme Court, for the sake of discussion let us assume that the CJI and the other judges share a fiduciary relationship. Let us also take into account that asset declarations are personal information of the judges. The exception clauses with respect to information available through fiduciary relationships and personal information under the RTI Act read as follows:

8(1) Notwithstanding anything contained in [the RTI] Act, there shall be no obligation to give any citizen, . . .

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; . . .

(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information.⁵²

Thus, what is of utmost significance with respect to these two clauses is that neither is couched in absolute terms, the way some of the other exception provisions are worded.⁵³ Both the above-mentioned exemptions for *fiduciary* and *personal information* are subject to the larger public interest. Even if information is held in a fiduciary relationship or if the information is purely personal, it has to be disclosed under the RTI Act if such information involves the larger public interest. Would assets declared by the judges then become disclosable to the people under the RTI Act, even if it is personal information held in a fiduciary relationship? Does it involve larger public interest? I argue in the next two parts of this Article

50. *Id.* ¶ 102.

51. *Id.* ¶ 116.

52. RTI Act, *supra* note 4, §§ 8(1)(e), (j).

53. For example, § 8(1)(c) exempts from disclosure “information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature”; § 8(1)(h) exempts “information which would impede the process of investigation or apprehension or prosecution of offenders.” RTI Act, *supra* note 4, §§ 8(1)(c), (h).

that asset declarations of the judges of higher judiciary involve the larger public interest. Therefore, irrespective of the personal nature of the information or the fiduciary relationship, such information must be disclosed.

Before embarking on the substantive issue of the larger public interest, we also need to be aware at the outset that the Parliament had the option of excluding the higher judiciary or the Supreme Court, and the office of the CJI in particular, from the scope of the transparency law, as it did with seventeen organizations placed in Second Schedule under § 24.⁵⁴ Since the Parliament chose not to do so, it must have thought the exemptions sufficiently safeguarded against any misuse of information available from the judiciary.

The Parliament instead provided for a rights-based information regime, equally binding the higher judiciary as any other public authority. The statutory right to information regime is a far more efficacious instrument in the sense that it entrusts a corresponding duty on the public authorities to disclose information. In other words, for the enforcement of a fundamental right to information, a petitioner must resort to articles 32 and 226 of the Constitution of India, which provide for remedies for the enforcement of fundamental rights.⁵⁵ On the other hand, the right-based

54. *Id.* § 24, 2d sched.

55. Article 32 reads:

Remedies for enforcement of rights conferred by this Part:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

INDIA CONST. art. 32. Article 226 reads:

Power of High Courts to issue certain writs:

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within whose territories directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the

information regime mandates a duty on the public authorities to disclose information.⁵⁶

IV. DUTY OF THE SUPREME COURT OF INDIA

The Supreme Court of India, as a public authority (established by the Constitution), is bound to disclose information in its possession. Does this also mean that the Court is bound to disclose personal information of the judges, obtained and held in a fiduciary relationship? One way to look at it is that the judiciary in the country is run by public money; judges are paid from the Consolidated Fund of India;⁵⁷ judges of the higher judiciary enjoy enormous power that is largely unrestricted; and therefore, information about their assets involves the larger public interest.

The Supreme Court has recognized that the term “public interest” is self-explanatory.⁵⁸ In *Janata Dal v. H.S. Chowdhary and Others*,⁵⁹ Justice S. R. Pandian discussed the meaning of the term “public interest.” In doing so, he referred to its lexical definitions.⁶⁰ He referenced the definition of the term in *Black’s Law Dictionary*:

exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party and opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

INDIA CONST. art. 226.

56. Such information disclosure can be *suo motu* under section 4 of the law, or a request-based disclosure under section 6 of the law. RTI Act, *supra* note 4, §§ 4, 6

57. The Consolidated Fund of India is constitutive of all revenues received and all loans raised by the Government of India. INDIA CONST. art. 266.

58. *Balco Employees Union v. Union of India*, (2002) 2 S.C.C. 333 (India) (stating therein that public interest litigation was merely what the words said: litigation in the interest of the public).

59. A.I.R. 1993 S.C. 892 (India).

60. *See id.* ¶ 53.

Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government⁶¹

Justice Pandian also referenced the definition in *Stroud's Judicial Dictionary*, which states that a matter of public interest “does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.”⁶² The term seems to be defined and its meaning and import discussed contextually, rather than independently. In the present context, since the functioning of the higher judiciary does affect legal rights and liabilities of the people, and it involves pecuniary interest at a general level, it is in the public's interest that information involving the judiciary be disclosed.

The Supreme Court influences every aspect of the lives of the citizens (and non-citizens) in the country.⁶³ The Court is asked to make determinations on a variety of issues, ranging from validation of the election of the Prime Minister⁶⁴ to ordering the displacement of communities.⁶⁵ Decisions such as these immediately affect the lives of the approximately one billion people of the country.⁶⁶ Despite enjoying such enormous power and influence there is no built-in accountability mechanism for the Supreme Court.⁶⁷ It is largely an elite enclosure

61. *See id.* ¶ 52.

62. *See id.* ¶ 51.

63. *See* Prashant Bhushan, *Misplaced Priorities and Class Bias of the Judiciary*, 44 *ECON. & POL. WKLY.*, Apr. 4, 2009, at 32; *see also* S. P. Sathe, *Appointment of Judges: The Issues*, 33 *ECON. & POL. WKLY.* 2155 (1998); *see also* Prashant Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*, 42 *ECON. & POL. WKLY.*, Oct. 27, 2007, at 14.

64. *See* *Smt. Indira Nehru Gandhi v. Sri. Raj Narain and Another*, A.I.R. 1975 S.C. 2299.

65. *Narmada Bachao Aandolan v. Union of India and Others*, A.I.R. 2000 S.C. 3751.

66. *See id.* For example, the construction of the Sardar Sarovar Dam on the Narmada River alone left an estimated 200,000 people displaced. *Id.*; *see Narmada: The Facts*, *NEW INTERNATIONALIST MAG.* (July 1, 2001), available at <http://newint.org/features/2001/07/01/facts/>; *see also* Nisha Kapadia, *India's Greatest Planned Environmental Disaster: The Narmada Valley Dam Project*, *U. MICH. ENVT'L JUST. CASE STUD.*, <http://www.umich.edu/~snre492/Jones/narmada.html> (last updated June 17, 2004); *see also* Walter Fernandes, *Sixty Years of Development-induced Displacement in India*, in *INDIA SOCIAL DEVELOPMENT REPORT 2008: DEVELOPMENT AND DISPLACEMENT 90–91* (Hari Mohan Mathur ed., 2008).

67. Prashant Bhushan, *The Lack of Judicial Accountability in India*, Address at Princeton University Department of South Asia Studies (Mar. 10, 2009) (transcript available at <http://bharatiyas.com>).

separated from the masses of the Indian Republic. Such separation gives the Supreme Court an inviolable status of unquestionable righteousness. Additionally, the Supreme Court has also built its status with the help of contempt jurisdiction. But, increasingly, the high moral standards of the judiciary, including the Supreme Court, are being questioned by the people. Unaccounted assets are allegedly one such corrupting factor that is denigrating the moral status of the higher judiciary, which I discuss in the following paragraphs.

In one instance, it is alleged that thirty-three judges of different standing (including one then-sitting judge of the Supreme Court, and eight High Court judges) embezzled Rs. 34.56 crore (345,600,000) a year in a scam that continued for almost eight years, where annual payment for each judge was in the nature of Rs. 96 lakh (9,600,000).⁶⁸ This embezzlement happened at the cost of the Provident Fund of Class III and Class IV of the court employees.⁶⁹ Beneficiaries of the embezzlement included the relatives of the judges.⁷⁰ In another alleged instance, a judge of a High Court received Rs. 15 lakh (1,500,000) from a businessman through the Additional Advocate General.⁷¹ Beneficiaries again included the judge's relatives.⁷² A former CJI allegedly issued judgments on more than one occasion that benefitted his son's business.⁷³ Primary documents allegedly exist that implicate the judge.⁷⁴ He also allowed his son to conduct business from his official residence, which was his son's declared business address.⁷⁵ Incidentally, the 1999 Restatement of Values of Judicial Life by the higher judiciary prohibits use of a judge's official residence for any

in/cjarold/files/the_lack_of_judicial_accountability_in_india.pdf); see also Prashant Bhushan, *Failing the Common People*, D+C DEV. & COOPERATION (May 25, 2009), <http://www.dandc.eu/en/article/campaign-judicial-accountability-india>.

68. Chandrani Banerjee, *Bench Weaknesses*, OUTLOOK MAG. (Nov. 10, 2008), <http://www.outlookindia.com/article.aspx?238908>.

69. *Id.*

70. *Id.*

71. Chander Suta Dogra, *A Sack Full of Cash*, OUTLOOK MAG. (Aug. 29, 2008), <http://www.outlookindia.com/article.aspx?238264>.

72. *Id.*

73. See Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*, *supra* note 63, at 15; see also Prashant Bhushan, *Contempt of Judicial Power*, OUTLOOK MAG. (Sept. 19, 2007), <http://www.outlookindia.com/article.aspx?235601>; see also Arundhati Roy, *Scandal in the Palace*, OUTLOOK MAG. (Oct. 1, 2007), <http://www.outlookindia.com/article.aspx?235689>; Rajinder Puri, *Judges, Journos, Justice*, OUTLOOK MAG. (Oct. 17, 2007), <http://www.outlookindia.com/article.aspx?235797>.

74. Vinod Mehta, *Order! Order!*, OUTLOOK MAG. (Oct. 1, 2007), <http://www.outlookindia.com/article.aspx?235691>.

75. Roy, *supra* note 73.

other professional work by the judge's family members.⁷⁶ This prohibition is only applicable for those members of the family who are also members of the Bar.⁷⁷

In another instance, two retired chief justices, of the Supreme Court and a High Court respectively, accepted Chairmanships of Committees for which a home minister nominated them; they had earlier heard and ultimately decided a dispute in favor of the home minister.⁷⁸ Favored chairmanships, however, is a less alarming conduct on the misconduct scale. On the high end of the scale, a judge forged a signature for the mutation of his flat.⁷⁹ Another judge of a High Court misappropriated funds that he received as a court-receiver and then gave a false explanation to the High Court about the transaction.⁸⁰ Impeachment proceedings were initiated against him, and the Upper House of the Indian Parliament voted in favor of impeachment.⁸¹ He resigned, however, before the lower house of the Parliament could vote on the motion.⁸² Further, a judge in the lower judiciary was not hesitant to issue warrants even against the President of the country when he was paid Rs. 40,000.⁸³ A High Court judge allegedly secured appointment because of proximity to politicians.⁸⁴ There have also been allegations of disproportionate asset accumulation against the same judge.⁸⁵

Although there are other instances of alleged corruption among Indian judges, the point here is not to identify as many as possible. What I want to illustrate is that there are allegations of corruption, and sometimes these allegations are proved, which has forced some judges to resign. However, many of these allegations have not been proven beyond reasonable doubt. Even though corruption allegations against judges are not always proven, public confidence in the judiciary takes a beating because of these

76. Sec'y Gen., Supreme Court of India v. Subhash Chandra Agarwal, LPA No. 501/2009, (2010) MANU 0013 (DE).

77. *Id.*

78. Puri, *supra* note 73.

79. Prashant Bhushan, *Judging the Judges*, OUTLOOK MAG. (Jan. 21, 2009), <http://www.outlookindia.com/article.aspx?239534>.

80. *Id.*

81. *Timely Resignation Saves Justice Sen from Untimely Ouster*, HINDU (Sept. 6, 2011, 2:26 AM), <http://www.thehindu.com/news/national/timely-resignation-saves-justice-sen-from-untimely-ouster/article2426007.ece>.

82. *Id.*

83. Darshan Desai, *Be in the Wig*, OUTLOOK MAG. (Feb. 9, 2004), <http://www.outlookindia.com/article.aspx?222897>.

84. Outlook Bureau, *Judge Dread*, OUTLOOK MAG. (May 12, 2003), <http://www.outlookindia.com/article.aspx?220086>.

85. *Id.*

allegations. These allegations are regularly pointed out and debated in the media, which excludes possibilities of judicial participation in clarifying or challenging the reports. These one sided allegations and reporting severely damage the independence of the judiciary and derogate the judiciary in people's perceptions. By the disclosure of assets and other interests of the judges of the higher judiciary, the judiciary can counter these allegations and (sometimes) speculations to a certain extent, thereby gaining public trust and confidence in furtherance of their democratically grounded independence. Moreover, if widespread allegations are a reason for knowing the antecedents of the electoral candidates, as has been held by the Supreme Court in *Union of India v. Ass'n for Democratic Reforms*,⁸⁶ by analogy, widespread allegations is a reason serious enough to know the antecedents of the judges of the higher judiciary.

Disproportionate assets, more often than not, come in exchange for disproportionate favors. Is it not, therefore, a matter of larger public interest that asset declaration by the judges be made public? Is it not proper to identify the corrupt, rather than sharing the suspicion collectively? In all the above mentioned instances there have been pecuniary interests involved in one form or another, direct or indirect, personal or kin-oriented. Publication of asset declaration is, therefore, the key to unearth much of the misconduct of the judges. From another perspective, publication of asset declarations would act as a deterrent from misconduct. Though the necessity of deterrence casts implications unbecoming of a judge in the highest institution in the country, even so, if the not-so-distant past has taught us something about judges' conduct, the people need to demand their right against the judiciary as a whole, and the higher judiciary in particular. The judiciary can deny the right only to its own peril. Such citizens' right to information necessarily casts a duty of transparency on the greatest institution in India. If not for anything else, the judiciary should disclose information at least in the interest of its independence. In the next Part, I examine whether asset disclosure by judges adversely influences the independence of the higher judiciary, as the former CJI has claimed.⁸⁷ I argue that transparency and disclosure of information about the judges is not only important for the citizens' sake; they are also necessary for the sake of independence of the judiciary as a whole.

86. (2002) 3 S.C.R. 696 (India).

87. *RTI Act Does Not Apply to My Office*, *supra* note 1.

V. INDEPENDENCE OF THE JUDICIARY

The Indian Constitution is based on the idea of separation of power, where judicial function is separated from executive function in rendering public services.⁸⁸ Independence of the judiciary is one of the constitutive pillars of the Constitution of India. It is part of the *basic structure* of the Constitution, which means that even through constitutional amendment, independence of the judiciary cannot be undermined.⁸⁹ Independence of the judiciary is guarded and promoted by the Constitution through the selection, appointment, transfer, and termination of judges of the higher judiciary, non-interference of the legislature in judicial functions, and financial independence.

The President of India appoints judges of the Supreme Court after consultation with the CJI (except when the Chief Justice is to be appointed), other judges of the Supreme Court, and the judges of the High Courts.⁹⁰ It is the CJI, however, who makes ad hoc appointments to the Supreme Court with the consent of the President.⁹¹ Supreme Court judges hold their office until the age of sixty-five years or their resignation to the President.⁹² A Supreme Court judge may, however, be removed from office on the grounds of proven misbehavior or incapacity.⁹³ Such removal can be executed only through proceedings wherein each house of the Parliament addresses the misbehavior or incapacity of the concerned judge, and votes to impeach the judge with two-thirds of the members of each house present and voting.⁹⁴ Upon receipt of the report of this Parliamentary deliberation and impeachment by both the houses of the Parliament, the President can remove the judge from the Supreme Court.⁹⁵ Supreme Court judges are barred from pleading in any court or tribunal in India.⁹⁶

88. INDIA CONST. art. 50.

89. See *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 S.C.R. 225, wherein the Supreme Court developed the idea of basic structure of the Constitution. The Court decided that some characteristics of the Constitution of India are basic to the functioning of the Republic of India, and accordingly, these characteristics cannot be altered even by constitutional amendments. *Id.*

90. INDIA CONST. art. 124(2).

91. *Id.* arts. 127–28.

92. *Id.* art. 124(2).

93. *Id.* art. 124(4).

94. *Id.*

95. *Id.*

96. *Id.*

While the salaries, allowances, and privileges of the judges are to be decided by law enacted by the Parliament, the conditions of service of the judges cannot be modified to the disadvantage of the judges.⁹⁷ The expenses of the Supreme Court and salaries of the judges, officers, and servants of the Court are charged to the Consolidated Fund of India.⁹⁸ The Supreme Court decides the rules and procedures for the conduct of the Court's business.⁹⁹ The CJI, or any other judge she designates, appoints the officers and servants of the Court and determines their service conditions.¹⁰⁰

The President of India also appoints the judges of the High Courts in the different states after consulting with the CJI, the governor of the state, and the Chief Justice of the concerned High Court (except when a Chief Justice of the High Court is to be appointed).¹⁰¹ High Court judges hold office until they are sixty-two years old, until they resign, are removed, or had been appointed in an ad hoc manner.¹⁰² The Chief Justice of the High Courts, with the consent of the President, makes ad hoc appointments of retired High Court judges.¹⁰³ The Chief Justice of a High Court is also entitled to appoint officers and servants of the Court.¹⁰⁴ The impeachment procedure is the same for the removal of the judges of the High Court on grounds of misbehavior or incapacity as is followed for the judges of the Supreme Court.¹⁰⁵ The President of India, upon consultation with the CJI,¹⁰⁶ can transfer a High Court judge to any other High Court or appoint her to the Supreme Court.¹⁰⁷ Once a judge has held a permanent office in a High Court, she cannot plead in any court in India except for the High Courts and the Supreme Court.¹⁰⁸ Like the Supreme Court judges, salaries and conditions of service of the judges of the High Courts cannot be modified to their disadvantage,¹⁰⁹ and their pensions are to be charged to the Consolidated Fund of India.¹¹⁰

97. *Id.* art. 125.

98. *Id.* art. 146; *see also id.* art. 112. The Consolidated Fund of India is free from any legislative and executive interference.

99. *Id.* art. 145.

100. *Id.* art. 146.

101. *Id.* art. 217.

102. *Id.* arts. 217, 224.

103. *Id.* art. 224A.

104. *Id.* art. 229.

105. *Id.* arts. 217–18, 124.

106. *Id.* arts. 124, 222.

107. *Id.* art. 217, 124.

108. *Id.* art. 220.

109. *Id.* arts. 221–22.

110. *Id.* art. 112.

Thus the Constitution of India secures judicial independence by insulating judicial appointment, transfer, termination, and funding from executive interference. However, in *S.P. Gupta v. Union of India*, the Court held that the opinion of the CJI need not have primacy in matters of appointment of judges to the higher judiciary, despite the fact that judicial independence is a basic feature of the Constitution.¹¹¹ The Court noted that the “ultimate power of appointment rests with the Central Government.”¹¹² This power rests with the executive because the executive is accountable to the legislature, and, through the legislature, to the people of India. The people of India, therefore, are the ultimate arbiter of judicial independence and executive accountability.¹¹³

However, in *Supreme Court Advocates-on-Record Association v. Union of India*,¹¹⁴ the Supreme Court overruled *S.P. Gupta* so far as the priority of the executive in judicial appointments is concerned.¹¹⁵ The Court noted that in cases of conflicting opinions during the appointment process of judges, the opinion of the CJI is to be given primacy because the Chief Justice is better placed to ascertain and suggest the appropriateness of the possible candidates for appointment.¹¹⁶ However, the Court added a nuance to the idea of primacy of the Chief Justice’s opinion. According to the Court, it is not the personal opinion of the Chief Justice that should enjoy primacy. Rather, what matters is the collective

111. *S.P. Gupta v. Union of India*, (1982) 2 S.C.R. 365, ¶¶ 26, 29 (P. N. Bhagwati, J.).

112. *Id.* ¶ 29.

113. *Id.*

114. A.I.R. 1994 S.C. 268.

115. *Id.* ¶ 41.

116. *Id.* Justifying its decision of prioritizing the opinion of the Chief Justice of India over the executive branch of the state, the Court noted:

There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by . . . the Constitution. Experience has shown that [appointment of judges] also does not form a part of the manifesto of any political party, and is not a matter which is, or can be, debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled [sic] by the ever vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the real accountability in the matter of appointments of superior Judges is that of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive

Id. ¶ 44.

opinion of the highest judiciary expressed through the Chief Justice,¹¹⁷ because for appointment matters, the Chief Justice needs to form her opinion after consulting her senior colleagues.¹¹⁸ The Chief Justice is also responsible for the transfer of judges of the higher judiciary.¹¹⁹

In *In Re. Appointment and Transfer of Judges*,¹²⁰ the Supreme Court, on a Presidential reference (made under article 143 of the Constitution) confirmed the law¹²¹ on primacy of the opinion of the CJI on matters of appointment and transfer of judges as laid down in the *Supreme Court Advocates-on-Record Association* case. The Court also specified the number of judges to be consulted and the justification for consulting the respective judges.¹²² The Court pointed out that the bases for the formation of the collegium of judges for consultation purposes are seniority of the judges, knowledge of the candidates, and familiarity with the court where the possible candidates are based.¹²³

Thus, in furtherance of judicial independence, the judiciary has gradually insulated itself from executive interference and popular democratic outlets.¹²⁴ The Supreme Court changed the law prioritizing the executive in the appointment of judges as laid down in *S.P. Gupta in Supreme Court Advocates-on-Record Association*, which prioritized the CJI. However, in order to ensure internal accountability and appropriateness of the selection process, the Court in *In Re. Appointment and Transfer of Judges* clarified that the opinion of the CJI must be based on a consultation process involving senior puisne judges of the Supreme Court.¹²⁵ In *S.P. Gupta*, the Supreme Court, quoting B. R. Ambedkar, Chairman of the Drafting Committee of the Constitution of India, showed that the Constituent Assembly, while promoting independence of the judiciary, did not envisage primacy of the Chief Justice in appointment

117. *Id.* ¶ 46.

118. *Id.* ¶¶ 46, 56, 68.

119. *Id.* ¶ 61.

120. (1998) 7 S.C.C. 739.

121. As per Article 141 of the Constitution of India, law declared by the Supreme Court is binding throughout the territory of India. INDIA CONST. art. 141.

122. *Shanti Bhushan and Another v. Union of India and Another*, (1998) 7 S.C.C. 739, at ¶¶ 10, 19.

123. *Id.*

124. See Robert Moog, *Judicial Activism in the Cause of Judicial Independence—The Indian Supreme Court in the 1990s*, 85 JUDICATURE 268 (2002); see also Neeraj Tiwari, *Appointment of Judges in Higher Judiciary: An Interpretational Riddle* (LL.M. Student Working Paper, Indian Law Institute, New Delhi, Jan. 26, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485395.

125. (1998) 7 S.C.C. 739, at ¶¶ 10, 18.

matters.¹²⁶ Interestingly however, quoting the same passage from Ambedkar's speech, the Court in *Supreme Court Advocates-on-Record Association* noted that the Constituent Assembly was against primacy of the CJI in her *individual capacity*, and therefore, the Chief Justice needed to form her opinion after consultation with other puisne judges, and then the CJI's opinion would attain primacy.¹²⁷

The Supreme Court thus transferred the executive power of appointment of judges to the judiciary. The Constitution of India categorically states that the judges of the Supreme Court and the High Courts are to be *appointed and transferred* (for High Court judges) *by the President* after consultation with judges as the *President may deem necessary*.¹²⁸ The Constitution, however, empowers the CJI and the Chief Justices of the High Courts to appoint ad hoc judges to the Supreme Court and the High Courts with the prior consent of the President.¹²⁹ Given the unambiguous meaning of these constitutional provisions, it seems logical to conclude that the President of India has the power to appoint and transfer judges of the higher judiciary, and that the consultation process is the prerogative of the President.

From the unambiguous and categorical constitutional provisions it seems likely, as the Supreme Court in *S. P. Gupta* delineated, that the power of appointment and transfer of judges of the higher judiciary rests primarily with the executive. However, in negating the primacy of the executive and establishing the primacy of the judiciary, the Supreme Court in *Supreme Court Advocates-on-Record Association* and *In Re. Appointment and Transfer of Judges* offered a two-pronged justification. First, the Court noted that since the Chief Justice and other senior judges are better placed to know the antecedents of the possible candidates for appointments, their opinion should have priority over the executive.¹³⁰ Second, the Court asserted that the idea of democratic accountability of the executive for judicial appointments is misplaced because political parties and election manifestoes do not make judicial appointments electoral issues.¹³¹ On the contrary, according to the Court, judges are accountable

126. (1982) 2 S.C.R. 365, ¶ 29.

127. *See generally* Supreme Court Advocates-on-Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268.

128. INDIA CONST. arts. 124, 126, 217, 222–24.

129. *Id.* arts. 127–28, 224A.

130. In spite of knowledge about a candidate, the collegiums of judges sometimes make mistakes in recommending a candidate for appointment. *See* Prashant Bhushan, *The Dinakaran Imbroglia: Appointments and Complaints against Judges*, 44 ECON. & POL. WKLY., Oct. 10, 2009, at 10.

131. *See Supreme Court Advocates-on-Record Ass'n*, A.I.R. 1994 S.C. 268, ¶ 44.

to the Bar for judicial appointments, and, therefore, judges should be the ones with the final word on appointments and transfers.¹³² This latter observation of the Court is contrary to its stand in *C. Ravichandran Iyer v. Justice A. M. Bhattacharjee*, where the Supreme Court categorically noted that “[j]udges are not to be judged by the Bar.”¹³³

Yet, in the abovementioned cases, the Supreme Court did not address whether it is possible to take any action against the judges for bad appointments, an avenue that is open against the executive through the electoral process and legislative scrutiny. Even though legislative scrutiny into judicial functions and conduct of judges *in the discharge of their duties* is prohibited (except for impeachment purposes),¹³⁴ there is no bar on legislative scrutiny of executive action regarding appointment and transfer of judges. Thus, while executive action can be scrutinized, judicial action cannot be scrutinized in the same manner.

It is useful here to note that the RTI Act prohibits disclosure of information that cannot be discussed in the Parliament and state legislative assemblies.¹³⁵ Accordingly, it is possible to argue that since the Parliament and the state legislative assemblies cannot discuss the conduct of judges in the discharge of their duties, the RTI Act prohibits disclosure of such information. A careful examination of the constitutional provision, however, would suggest that such a sweeping prohibition on disclosure is highly unlikely, because the Constitution only prohibits discussion of judges’ conduct so far as it relates to the *discharge of their duties*. Specifically, the legislature cannot debate notes, orders, and judgments delivered by the judiciary, or the administrative functioning of the judiciary. However, this constitutional prohibition does not bar legislative scrutiny of misconduct of judges, or of aspects that might undermine the independence and impartiality of the judiciary. Hence, the declaration of assets and other interests could be made public as per the RTI Act because these interests can undermine the independence and impartiality of the judiciary.

As discussed above, the Constitution provides for adequate safeguards in furtherance of the independence of the judiciary in a democratic republic. It separates the judiciary from the executive and prohibits the Parliament and the state legislatures from questioning the conduct of judges of the higher judiciary in furtherance of their judicial duties. It

132. *Id.*

133. (1995) 5 S.C.C. 457, ¶ 3.

134. INDIA CONST. arts. 121, 211.

135. RTI Act, *supra* note 4, Proviso to § 8(1)(j).

disqualifies members of Parliament and members of legislative assemblies from holding any office of profit, including the offices of judges of the higher judiciary.¹³⁶ It also provides for an arduous and elaborate process for the impeachment of judges. However, through judicial activism, the Supreme Court of India has completely insulated the judiciary from any democratic deliberation, thereby sacrificing accountability and transparency in the functioning of the judges. There is an argument that the judiciary has made itself an elite club, armed with contempt jurisdiction that undermines the democratic framework of the Constitution.

Accountability and transparency are not only necessary for upholding the democratic underpinnings of the Constitution, but are also necessary for the independence of the judiciary itself, because if public trust and confidence in the judiciary cannot be maintained, the judiciary is destined to lose its independence. In spite of the differences of opinion in the Supreme Court cases discussed above, the Court agreed on one aspect: that honesty, integrity, impartiality, moral vigor, ethical firmness, non-corruptibility, humility, good behavior, emotional stability, objective and fearless approach, social acceptability, and endurance are essential personal characteristics of the judges if the judiciary aspires to remain independent.¹³⁷

As discussed earlier, however, the conduct of the judges of the higher judiciary is not always beyond doubt, which contributes to the erosion of public confidence in the judiciary. The problem is complicated by the fact that there is no easy way to address the problem of judges of dubious and questionable character. Judges can be removed only through the process of impeachment on the grounds of proven misbehavior or incapacity. However, as the history of the impeachment proceedings in India shows, such proceedings are highly unlikely to remove judges from their office. Instead, judges will resign from their office when they are reasonably certain of the outcome of the impeachment proceeding.¹³⁸

Moreover, because of the complicated and cumbersome nature of the proceedings, impeachment proceedings are only reserved for the rarest of rare cases of misconduct,¹³⁹ as it is difficult to implicate judges for

136. See INDIA CONST. arts. 102, 191; see also M. P. Singh, *Securing the Independence of the Judiciary—The Indian Experience*, 10 IND. INT'L & COMP. L. REV. 245, 251 (2000).

137. See generally Supreme Court Advocates-on-Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268; see generally S.P. Gupta v. President of India and others, (1982) 2 S.C.R. 365.

138. See *supra* note 81 and accompanying text.

139. See Prashant Bhushan, *Judicial Accountability or Illusion?*, 41 ECON. & POL. WKLY. 4847 (2006); see also Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*, *supra* note 63, at 14–15.

relatively minor misconduct. In *C. Ravichandran Iyer v. Justice A. M. Bhattacharjee*,¹⁴⁰ the Supreme Court made it clear that there is no other recourse against minor aberrations of judges except for “self-regulation through inhouse procedure.”¹⁴¹ The Court categorically pointed out that misconduct of judges of the higher judiciary can only be dealt with through the impeachment proceedings.¹⁴² But, as the counsels in *C. Ravichandran Iyer* point out, in view of the recent allegations of corruption and misconduct, it is necessary to develop a mechanism through which minor aberrations of the judges could be dealt with.¹⁴³

For the sake of independence of the judiciary and retaining public faith in the high judicial office, the insulated judicial framework needs to integrate democratic outlets. One democratic outlet could be attained through lifting of the veil of secrecy from judicial appointments, transfers, disclosure of assets and asset sources for the judges and their close relatives, disclosure of their affiliations and interests, and disclosure of any other information that might conflict with their official duties. In *S.P. Gupta*, the Supreme Court noted:

No Chief Justice or Judge should be allowed to hide his improper or irresponsible action under the cloak of secrecy. If any Chief Justice or Judge has behaved improperly or irresponsibly or in a manner not befitting the high office he holds, there is no reason why his action should not be exposed to public gaze. We believe in an open Government and openness in Government does not mean openness merely in the functioning of the executive arm of the State. The same openness must characterise the functioning of the judicial apparatus¹⁴⁴

It is interesting to note that even though the Supreme Court overruled *S. P. Gupta* so far as the primacy of the executive in the appointment of judges is concerned, the Court has not altered the disclosure requirement for misconduct of judges.¹⁴⁵ Accordingly, it could be argued that the consecutive benches of the Supreme Court agree with this observation made in *S. P. Gupta*. From this observation, it logically follows that the important aspects in establishing the character, personality, behavior,

140. (1995) 5 S.C.C. 457.

141. *Id.* ¶¶ 15, 20, 34, 40–42.

142. *Id.* ¶ 20.

143. *Id.* ¶¶ 6, 8.

144. (1982) 2 S.C.R. 365, ¶ 84.

145. *See generally* Supreme Court Advocates-on-Record Ass’n v. Union of India, A.I.R. 1994 S.C. 268.

soundness, endurance, and social acceptability of the judges need to be brought to light in order to strengthen people's faith in the judiciary and its independence. Thus releasing information about assets, affiliations, and interests of judges should not be seen as impairing independence of the judiciary. Rather, it should be seen as a step toward the promotion of a more democratically grounded independent judiciary.

VI. WORKING A DEMOCRATIC CONSTITUTION

Despite the constitutional civil and political rights based on the United States' Constitution, the framing fathers of the Indian Constitution thought it prudent not to follow the U.S. model for the appointment of judges of the higher judiciary.¹⁴⁶ Article II, § 2 of the U.S. Constitution provides, "[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."¹⁴⁷ The appointment of the judges involves the people's participation, albeit in an indirect manner. Any nomination made by the President has to be confirmed by the Senate.¹⁴⁸ The President's nomination is however, not a *de facto* selection. Among the 130 nominations made by the President in U.S. history, thirty have failed in the Senate.¹⁴⁹ The nomination process is televised, not secretive, and often involves significant emphasis on political considerations apart from judicial merit.¹⁵⁰

146. See Testimony of Dr. B.R. Ambedkar on May 24, 1949, CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, available at <http://parliamentofindia.nic.in/ls/debates/vol8p7b.htm>.

147. Article II, Section 2 reads:

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

U.S. CONST. art. 2, § 2.

148. *Id.*

149. Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 INT'L J. CONST. L. 652 (2006).

150. *Id.*; see also Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L.

Conversely, the Indian President appoints Supreme Court judges after consulting with the judges of the Supreme Court and the High Courts.¹⁵¹ In India however, after the decision of the Supreme Court in *In re Appointment and Transfer of Judges*,¹⁵² nominations made by the judges constitute the *de facto* selection on behalf of the President. Unlike the U.S. proceedings, nomination proceedings happen behind closed doors without any public knowledge.¹⁵³ Once an appointment is made, it is extremely difficult to remove a judge through the cumbersome impeachment proceedings. In fact, there has not been any instance of impeachment of a judge in India so far. The purported reason for the non-political appointment procedure is to do away with any (partisan) political considerations in the appointment process, and give primacy only to the merit, thereby preserving the independence of the judiciary and insulating it from executive interference.¹⁵⁴ But the appointment of judges by judges has shown that the elite enclosure is incapable of considering merit outside its brethren. Despite non-lawyer (and non-judge) Indian jurists being respected, consulted, and appointed internationally, the judges of the Supreme Court have failed to appoint a single non-lawyer (and non-judge) judge in the Supreme Court even though the Constitution provides for the same.¹⁵⁵ On the other hand, there are numerous instances where law professors and non-lawyers have been appointed to the U.S. Supreme Court on merit.¹⁵⁶ Judges also seem to ignore their sisters in appointment matters, as there is a significant lack of female judges on the higher judiciary in India.¹⁵⁷

Judges selected to the higher judiciary in such a non-transparent and undemocratic process often overrule democratic policy and shape the lives of more than one billion people, who have no voice in the judges'

REV. 315 (1999) (analyzing the importance of and balance between judicial independence and judicial accountability in the context of the United States).

151. INDIA CONST. art. 124.

152. (1998) 7 S.C.C. 739.

153. See Sathé, *supra* note 63, at 2155; see also Sec'y Gen., Supreme Court of India, LPA No. 501/2009.

154. *Supra* note 137.

155. INDIA CONST. art. 124(3)(c). Some jurists also point out the oligarchic class-structure of the higher judiciary in India. See Bhushan, *Misplaced Priorities and Class Bias of the Judiciary*, *supra* note 63, at 37.

156. Dorsen, *supra* note 149.

157. Kounteya Sinha, *Less-than-Equal Status for Indian Women: Report*, TIMES OF INDIA (Dec. 4, 2012), http://articles.timesofindia.indiatimes.com/2012-12-04/india/35593606_1_women-judges-indian-women-urban-women; see also *Just 45 Women as HC Judges, Not One in SC*, TIMES OF INDIA (Aug. 3, 2009), <http://timesofindia.indiatimes.com/india/Just-45-women-as-HC-judges-not-one-in-SC/article-show/4849980.cms?referral=PM>.

appointments. If the Supreme Court's judgments are to be believed, even the Court itself should not like such secretive, non-democratic elitism. In *State of Uttar Pradesh v. Raj Narain*,¹⁵⁸ the people's right to receive information was conclusively recognized. The Court notes:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries.¹⁵⁹

Further, in *People's Union for Civil Liberties (PUCL) v. Union of India*,¹⁶⁰ the Supreme Court reiterates that "[p]eople of this country have a right to know every public act, everything that is done in a public way, by the public functionaries."¹⁶¹

Delineating the scope of the fundamental right of freedom of speech and expression, the Court in *Indian Express Newspapers (Bombay) Private Ltd. and Others v. Union of India and Others*¹⁶² observes:

Freedom of expression . . . assists in the discovery of truth . . . [and] strengthens the capacity of an individual in participating in decision making In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should therefore, receive a generous support from all those who believe in the participation of people in the administration.¹⁶³

In another decision, justifying the declaration of assets by the electoral candidates, the Court reasoned:

[T]here are widespread allegations of corruption against the persons holding post and power. In such a situation, [the] question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruption by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not miscondacted himself in collecting wealth after being elected. This information could be easily

158. (1975) 3 S.C.R. 333.

159. *Id.* ¶ 74.

160. (2003) 1 S.C.C. 2353.

161. *Id.* ¶ 35.

162. A.I.R. 1986 S.C. 515.

163. *Id.* ¶ 12.

gathered only if prior to election, the assets of such person are disclosed.¹⁶⁴

The Court further observed:

[W]here there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets immovable, moveable and valuable articles it would have its own effect.¹⁶⁵

Thus the Court, while justifying its executive role, emphasizes the significance of asset declarations in limiting corruption in public life by public servants.

The Court held that a public servant is a “person who holds an office by virtue of which he is authorised or required to perform any public duty.”¹⁶⁶ The Court asserts:

Not only, therefore, must the person hold an office but he must be authorised or required by virtue of that office to perform a public duty. Public duty is defined by Section 2(b) of [The Prevention of Corruption] Act, 1988 to mean “a duty in the discharge of which the State, the public or that community at large has an interest.”¹⁶⁷

From this delineation of the Supreme Court, it is undoubtedly clear that the judges of the higher judiciary, especially the Supreme Court, are public servants. The Constitution of India explicitly specifies that judges perform public service.¹⁶⁸ Since judges are also public servants, why should the duty to disclose assets and antecedents not apply to them as well? There cannot be two rules of democracy—one to preach, and one to practice. A two-rule democratic framework is bound to draw allegations of hypocrisy, which is not healthy for the functioning of one of the most significant democratic institutions of a democratic republic. There are signs that the judiciary does not practice what it preaches. The inviolable fundamental

164. *Union of India v. Ass'n for Democratic Reforms & Another & People's Union for Civil Liberties (PUCL) v. Union of India*, (2002) 5 S.C.C. 294, ¶ 47.

165. *Id.* ¶ 52.

166. *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 S.C.C. 626, ¶ 162.

167. *Id.*

168. INDIA CONST. art. 50.

right to speech and expression is met with contempt of court jurisdiction, if such expression happens to criticize the judiciary or highlight alleged misconduct of a retired CJI.¹⁶⁹

The *suo motu* contempt cognizance by the Delhi High Court against journalists reporting misconduct of a retired judge¹⁷⁰ shows how the higher judiciary is increasingly insulating itself from any kind of criticism. The higher judiciary is becoming overly sensitive in contempt proceedings. Contempt proceedings against the *Mid-Day Newspaper*¹⁷¹ and *Arundhati Roy*¹⁷² have only undermined the judiciary's respectability. A survey of the judiciary's use of contempt jurisdiction suggests that any issue that offends the judiciary or the judges can constitute contempt of court as determined by the judiciary.¹⁷³ There is no clear and categorical domain of contempt of court jurisprudence. Voices not suiting the inviolable status of the institution are muted. The Court's preaching of freedom of expression and right to information becomes irrelevant in contempt of court proceedings.

With respect to the right to information, the Supreme Court will possibly decide its own case—a dispute where a former CJI has already expressed his apparent bias (he was the CJI when the Delhi High Court decided the disclosure dispute).¹⁷⁴ The then-Attorney General G.E. Vahanvati proposed that the Supreme Court finally decide the RTI Act issue.¹⁷⁵ The full Supreme Court decided to take up the appeal.¹⁷⁶ The Court has therefore appealed to itself to reconsider the Delhi High Court judgment,¹⁷⁷ which is a clear and substantial violation of the cardinal principle of judicial propriety—*nemo iudex in re sua*, i.e., no man should judge his own cause. A judge is disqualified from deciding any issue in

169. Mriganka Shekhar Dutta & Amba Uttara Kak, *Contempt of Court: Finding the Limit*, 2 NAT'L U. JURID. SCI. L. REV. 55 (2009).

170. Court on its own Motion v. M.K. Tayal and Others, 2007 (98) D.R.J. 41.

171. *Id.*

172. In re Arundhati Roy, A.I.R. 2002 S.C. 1375.

173. Dutta, *supra* note 169.

174. The 1999 Restatement of Values of Judicial Life further mandates the judges not to express opinions in public: "A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination." Judicial Standards and Accountability Bill, Bill No. 136 of 2010, available at <http://www.prsindia.org/uploads/media/Judicial%20Standard/Judicial%20standard%20and%20accountability%20bill.%202010.pdf>. But the CJI has already made his reservations on RTI applicability to his office. See *RTI Act Does Not Apply to my Office*, *supra* note 1.

175. J. Venkatesan, *Vahanvati: It's for Supreme Court to Decide on RTI Applicability to CJI*, HINDU (Jan. 16, 2010), <http://www.hindu.com/2010/01/16/stories/2010011660981300.htm>.

176. J. Venkatesan, *Supreme Court Appeals to Supreme Court over RTI*, HINDU (Mar. 9, 2010), <http://www.hindu.com/2010/03/09/stories/2010030959500100.htm>.

177. *Id.*

which there might be a possibility of bias.¹⁷⁸ The threshold is exceedingly high, so much so that only a mere possibility of bias can vitiate a judgment; it is not necessary to prove actual exercise of bias.¹⁷⁹ However, in cases of necessity, the threshold could be diluted.¹⁸⁰ One such necessity could be staring at the Supreme Court when the Court sits to decide its own appeal on the RTI Act. But, goodwill and prudence could have triumphed over the necessity had the full Supreme Court decided not to appeal the Delhi High Court decision.

Even after the Supreme Court judges, and some High Court judges, voluntarily disclosed their assets after the single-bench decision of the Delhi High Court,¹⁸¹ the Supreme Court appealed the single-bench decision. The Supreme Court further prefers to appeal the three-bench judgment of the Delhi High Court. Now, since the Court has decided to appeal the three-bench High Court decision, it takes upon itself a tremendous responsibility of upholding the democratic principles of the Indian Republic. The Court would decide the matter at a time when the future of asset disclosures seemed certain. The Upper House of the Parliament had once rejected passing the Judges (Declaration of Assets and Liabilities) Bill 2009 because it did not mandate asset disclosures by the judges.¹⁸² After asset disclosure was mandated under the Bill, the Lower House of the Parliament passed the Judicial Standards and Accountability Bill 2010.¹⁸³ This law mandates judicial accountability through disclosure of assets, empowers an individual to institute a complaint against the judiciary, and promotes close scrutiny of the conduct of the judges.¹⁸⁴ The Supreme Court would have an opportunity to review the constitutionality of the 2010 law when it decides the appeal against the Delhi High Court judgment. One hopes that the Supreme Court takes note of these developments while deciding its own cause. The history of the

178. WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 471 (7th ed. 1994); *but see* Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*, *supra* note 63, at 15–16 (where a judge decides a case of contempt of court, in which a criticism against his own previous action was held to be a contempt of the court).

179. WADE & FORSYTH, *supra* note 178, at 471–93.

180. *Id.* at 476–79.

181. *See* Prashant Bhushan, *Judicial Accountability: Assets Disclosures and Beyond*, 44 *ECON. & POL. WKLY.*, Sept. 12, 2009, at 8.

182. *See* Sujay Mehdudia, *Opposition Forces Deferment of Judges' Assets Bill*, *HINDU* (Aug. 4, 2009), <http://blogs.thehindu.com/delhi/?p=27258>; *see also* Bhushan, *supra* note 181, at 9.

183. *Lok Sabha Passes Judicial Accountability Bill*, *HINDU* (Mar. 31, 2012), <http://www.thehindu.com/news/national/lok-sabha-passes-judicial-accountability-bill/article3263673.ece>; *see also* The Judicial Standards and Accountability Bill, No. 136 of 2010, *supra* note 174.

184. *See generally* The Judicial Standards and Accountability Bill, No. 136 of 2010, *supra* note 174.

Court shows that it is capable enough in protecting the basic structure of the nation. The proverbial “little man with a little pencil” hopes that the Supreme Court is infallible this time.

VII. CONCLUSION

According to the RTI Act, no public authority is under any obligation to generate information for the purpose of the law. It is only when information is already available with a public authority that the authority is under an obligation to disclose such information, if such information is not exempted under law. As I have argued in this Article, however, the higher judiciary in India should proactively generate and disclose information about assets and interests of the judges under the RTI Act in order to promote democratically grounded independence of the judiciary.

The Supreme Court argued in the Delhi High Court that if the Supreme Court is required to disclose information under the RTI Act, then the Court would have to disclose draft judgments, notes, and other communications between judges in furtherance of their duties, which will adversely affect the independence of the judiciary. Yet such apprehension is unfounded because the Constitution prohibits the legislature from discussing matters pertaining to the duties performed by the judiciary, and accordingly, the RTI Act prohibits such disclosure. Moreover, if a court or tribunal forbids a disclosure, such disclosure cannot be made under the RTI Act.¹⁸⁵ The Supreme Court also contended that the RTI Act only mandates disclosure of information that is in public domain, but, as the Delhi High Court pointed out, the RTI Act, which mandates disclosure whenever information is available to public authorities if it is not barred under the Act, does not support such a contention. Thus it is difficult to conceive that disclosure of information under the RTI Act would adversely affect the independence of the judiciary.

The aftermath of this dispute is an opportune moment for the Supreme Court to uphold the dignity of the higher judiciary before people’s confidence withers away, as has happened with politicians. Right to information is a fundamental right, which the RTI Act realizes. At the High Court stage, the Supreme Court came up with many technical arguments to undermine its duty to disclose. In the process, the Supreme Court also undermined the 1997 Resolution, on which the judges of the Supreme Court and High Courts have relied in a *bona fide* manner. Some

185. RTI Act, *supra* note 4, § 8(1)(b).

High Courts also resolved to make asset declarations public under the Resolution. The Supreme Court also argued that the Resolution declares the information confidential. The RTI Act specifies that any law, rule, or regulation that is in conflict with the RTI Act shall be subservient to the RTI Act, meaning that the transparency law overrides any confidentiality clause in the 1997 Resolution. The essence of the transparency law lies in the fact that any information that is of public interest shall override the exceptions mentioned in the law or restrictions put in place by other legislation. As the Supreme Court observed in 1975,¹⁸⁶ the public interest in disclosure has to be weighed against the public interest in non-disclosure; only after balancing these two conflicting interests can a decision be rendered regarding disclosure. As I have argued in this Article, the public interest in disclosure far outweighs the public interest in non-disclosure of assets and interests of the judges.

Therefore, instead of looking for loopholes in the law and ascertaining an escape clause to avoid disclosure, the Supreme Court should interpret the law in its true spirit, and embrace disclosure of information as a matter of law. The Court should take this opportunity to reestablish itself as the doyen of Indian democracy, especially when the entire Court is going to decide the future of the right of information. It is time to abandon the imperial baggage of judicial elitism and conspicuous secrecy. The Supreme Court should begin practicing what it preaches. While allowing the judiciary to be controlled and regulated by the executive or the legislature might be fraught with danger,¹⁸⁷ it is also dangerous to allow the judiciary to function without any semblance of accountability and public scrutiny.

186. *Uttar Pradesh v. Raj Narain* (1975) 3 S.C.R. 333.

187. *Burbank*, *supra* note 150; *see also Sathe*, *supra* note 63.