

**LAW COMMISSION OF INDIA**

**195<sup>TH</sup> REPORT**

**ON**

**THE JUDGES (INQUIRY) BILL, 2005**

January, 2006

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M. JAGANNADHA RAO  
Chairman  
001

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2006

31<sup>st</sup> January,

Dear Shri Bharadwaj ji,

Perhaps, it is not an exaggeration to state that no other earlier reference to the Law Commission in the last fifty years has been as important as the reference by the Hon'ble Minister of Law and Justice dated 2<sup>nd</sup> November, 2005 asking the Commission to make a study and give its suggestions on the proposed draft of the "Judges (Inquiry) Bill, 2005" (hereinafter referred to as the Bill of 2005) prepared by the Law Ministry which deals with procedures for removal of Judges of the Supreme Court and High Courts. It is my pleasure to forward this voluminous 195<sup>th</sup> Report on 'Judges (Inquiry) Bill, 2005' which, it gives me some degree of satisfaction to say, was prepared in less than 90 days.

I may briefly explain, by way of a background to the present Report, the procedure for removal of a Judge of the superior Courts under the Judges (Inquiry) Act, 1968, the Motion and the judgments of the Supreme Court and the procedure in the proposed draft Bill of 2005.

Procedure under the Judges (Inquiry) Act, 1968

A procedure for removal of Judges of the High Court and Supreme Court by way of address of the Houses of Parliament to the President is contained in Art. 124(4) of the Constitution of India, read with proviso (b) to Art. 124(2) and proviso (b) to Art. 217(1), for 'proved misbehaviour or incapacity'.

Earlier, the Judges (Inquiry) Bill, 1964 was formulated laying down the procedure as contemplated by Art. 124(5) and the Bill was referred to a Joint Committee of the Houses. After a very elaborate discussion before the Committee in which eminent Members of Parliament and the then Attorney General, Sri C.K. Daphtary and Sri M.C. Setalvad, former Attorney General, gave their evidence, the Joint Committee gave its Report on 13<sup>th</sup> May, 1966. The recommendations of the Committee were taken into account and the Judges (Inquiry) Act, 1968 was passed providing for procedure for the investigation and proof of misbehaviour and incapacity of Judges of the Supreme Court (including the Chief Justice of India), the Chief Justices and Judges of the High Courts, where reference is made by the Speaker or the Chairman to a three-Member Committee after admitting a Motion initiated by a specified number of Members. This is the 'reference procedure'.

Motion and Case law under the 1968 Act:

The first case which went up to the Supreme Court in connection with an inquiry under that Act was the case of Justice V. Ramaswami, former

Judge of the Supreme Court. In that case, there was a Motion in the House of the People (Lok Sabha) on 28<sup>th</sup> February, 1991 and the Speaker of the House appointed Justice P.B. Sawant Committee on 12<sup>th</sup> March, 1991 after admitting the Motion. The Committee gave its Report on 20<sup>th</sup> July, 1992, holding some charges proved. Before the Committee started functioning, the 9<sup>th</sup> Lok Sabha was dissolved and it was contended that the Motion in the House lapsed. This plea was rejected by the Supreme Court in Sub-Committee of Judicial Accountability v. Union of India, 1991 (4) SCC 689. After the Committee prepared the Report, a plea was raised that the Judge was entitled to a copy of the Report before it was submitted to the House. This was rejected by the Supreme Court in Mrs. Sarojini Ramaswami v. Union of India, 1992 (4) SCC 506. It was held that the Judge can question the Report only in case an order of removal was passed by the President. Thereafter, there were two other judgments of the Supreme Court in connection with the same learned Judge as reported in Krishna Swami v. Union of India, 1992 (4) SCC 605 and Ms. Lily Thomas v. Speaker, Lok Sabha, 1993 (4) SCC 434. However, when the Report of the Justice Sawant Committee came up finally for discussion and voting in the House of the People (Lok Sabha), the Motion for removal did not secure the requisite majority and, therefore, it failed.

Subsequently, in the case of certain allegations against Justice A.M. Bhattacharjee, the then Chief Justice of Bombay High Court, the Supreme Court held, in a public interest litigation case, that In-House “peer review”

procedure can be laid down by the judiciary for correcting misbehaviour or deviant behaviour and that where the allegations do not warrant removal of a Judge by address of the Houses, it is permissible for the in-house mechanism to impose “minor measures” (C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, 1995 (5) SCC 457). In this very decision, the Supreme Court underscored the need for imposition of certain minor measures in the event of the proved misbehaviour or incapacity not warranting removal.

The Law Commission has examined the proposed draft of the Judges (Inquiry) Bill, 2005 in light of the law declared by the Supreme Court in its judgments in relation to Arts. 121, 124 and 217 of the Constitution of India, the Justice Sawant Committee Report and the comparative statutory as well as precedent law in several countries.

#### Procedure under Draft Bill of 2005

The present Bill of 2005 proposes introduction of ‘complaint procedure’ in addition to the earlier ‘reference procedure’ contained in the 1968 Act. In a ‘complaint procedure’ a complaint can be made by any person to Judicial Council against Judges of the Supreme Court (except the Chief Justice of India), Chief Justices and Judges of High Courts. In the ‘reference procedure’, if there is a Motion by Members of Parliament in either House, the Speaker/Chairman can make a reference to Judicial Council for inquiry not only against the above Judges but also against the Chief Justice of India. There is provision for preliminary scrutiny and verification

by the Judicial Council in the ‘complaint procedure’ though not in the ‘reference procedure’. In the place of the three-Member Committee under the 1968 Act, the Bill of 2005 proposes the constitution of a Judicial Council of five Judges consisting of the Chief Justice of India, two seniormost Judges of the Supreme Court and two seniormost Chief Justices of the High Court and they will investigate and inquire into allegations arising out of a complaint or a reference. Where the allegations are proved, in the case of a ‘complaint procedure’, the Council shall submit its report to the President of India who has to forward the same to Parliament and in the case of a ‘reference procedure’, the Council shall submit its report to the Speaker/Chairman who made the reference.

Some importance issues which require to be dealt with in the Bill of 2005:

(A) Absence of power in Council to impose ‘minor measures’ under the ‘complaint procedure’:

In the view of the Law Commission, one of the serious omissions in the Bill of 2005 is the absence of a power in the Council to impose ‘minor measures’ under the ‘complaint procedure’, where the charges which have been proved do not warrant removal but amount to “deviant or bad behaviour” which warrant only ‘minor measures’. (Of course, in the case of a reference by the Speaker/Chairman on a Motion for removal, the Judicial Council cannot impose or recommend any ‘minor measures’) In such cases, in UK, USA, Canada and Germany, the Judicial Council or similar bodies

have been empowered to impose a variety of ‘minor measures’ such as (i) issuing advisories, (ii) request for retirement, (iii) stoppage of assignment of judicial work for a limited time (iv) warning, (v) censure or admonition (public or private).

‘Minor measures’ were also advocated in the Report of 2001 by the National Commission for Review of the Constitution of India headed by former Chief Justice of India, Justice M.N. Venkatachaliah.

Imposition of ‘minor measures’ held constitutional in other countries even though not provided in the Constitution:

A question has arisen in the U.S and Canada whether in the absence of a constitutional provision permitting imposition of ‘minor measures’, imposition of such measures by a Judicial Council would be constitutionally valid? The federal judiciaries in US and Canada in their judgments have upheld the imposition of such ‘minor measures’ by a Judicial Council (notwithstanding the absence of any express provision therefor in the US or Canadian Federal Constitutions) as part of a general power of the Judiciary for ‘self regulation’. They have also held that entrustment of such a power to the Judicial Councils does not amount to abdication of any part of impeachment power of the federal legislature, inasmuch as the Judicial Councils can impose only ‘minor measures’ but cannot direct removal. They can only recommend removal.

In Chandler v. Judicial Council, (1970) 398 US 74, Harlan J laid the legal foundation for upholding the validity of minor measures (in that case, it was withdrawal of judicial work under the provisions of the U.S. Act of 1939). He laid down that judicial self-regulation or in-house measures were part of the “administration of justice” and derive force from the general power of the Judicial Branch to improve its efficiency. Any statute permitting such action is therefore valid, though there is no express provision for imposing such minor measures in the US Constitution. The US Act of 1939 was replaced by US Act of 1980 and this was again replaced by the US Act of 2002. The 1980 and 2002 statutes of US contain express provisions for imposing ‘minor measures’. So far as removal is concerned, the Judicial Council of the circuit and the Judicial Conference of U.S. can only make a recommendation. (The UK Act of 2005 and the Canadian Bye laws issued under the Canadian Act of 1985 and the German Constitution, also provide for imposing minor measures).

In John H. McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of US, (2001) 264 F. 3d. 52, in a very elaborate judgment, it was held by the US Court of Appeals that, in spite of absence of express provisions in the Constitution, such in-house or intra-judicial correctional mechanisms for imposition of ‘minor measures’ were valid and could be imposed by a Judicial Council, even though there is no such provision for imposing ‘minor measures’ in the U.S. Constitution. In this connection, the judgments in Hastings v. Judicial Conference of US,

(1987) 829 F. 2d 91 and In the Matter of Complaints under Investigation, (1980) 783 F 2d. 1988; Mackeigan v. Hickman, 1989 (2) SCR 796, Justice Paul Cosgrove v. AG of Ontario, 2005 FC 1954; Gratton v. Canadian Indian Council, 1994 (2) FC 769 are relevant.

No doubt, in several States in U.S., such as California, Idaho, Connecticut and Texas etc., the State Constitutions which provide for impeachment or Address, have been amended to provide for an additional procedure of removal by the Judicial Council itself or by the State Supreme Court, without reference to a parliamentary procedure. Surely, such a power of removal, if it were to be vested straightaway in the State Judicial Councils or in the State Supreme Courts, it required amendment to the State Constitutions. No doubt, in the same amendments to the State Constitutions, the Judicial Councils have also been empowered to impose ‘minor measures’ but it is clear, in view of the law laid down in Chandler upto McBryde by the U.S. federal judiciary that the amendments of the State Constitutions became necessary because of the vesting of the additional power of removal on the State Judicial Councils or the State Supreme Courts but not because the vesting of such power to impose ‘minor measures’ required amendment of the said Constitutions.

For all these reasons, elaborated in the Report, the Law Commission recommends that there should be a provision in the proposed Bill of 2005

investing the Judicial Council with power, in a complaint procedure, to itself impose minor measures where the proved misbehaviour or incapacity does not warrant removal. Such minor measures would include (i) issuing advisories, (ii) request for retirement, (iii) stoppage of assignment of judicial work for a limited time (iv) warning, (v) censure or admonition (public or private). Of course, in the case of a reference by the Speaker/Chairman on a Motion for removal, the Judicial Council cannot impose or recommend any ‘minor measures’.

(B) Judicial Council consisting only of Judges, as in the Bill of 2005, is a norm in most countries:

The Law Commission is of the view that the draft Bill of 2005, in proposing in s.3 that the National Judicial Council should consist of five senior members of the judiciary takes the correct and proper stand. There is abundant authority and precedent globally that the body must comprise only of Judges. Peer review is the international norm and is covered by several resolutions of international bodies and is supported by the views of eminent jurists. In this connection, the Law Commission has referred in this Report to the fact that such Judicial Councils or similar bodies consisting only of Judges have been constituted in several countries such as USA, UK, Canada (federal) and States, Hong Kong, Germany, Sweden, Pakistan, Bangladesh, Malaysia, Singapore, Israel, Zambia, Trinidad and Tobago, New South

Wales, Victoria, etc. The National Commission for Review of the Constitution in its Report (2001) also suggested a Judicial Commission consisting only of senior Judges for the purpose of imposing ‘minor measures’.

(C) Composition of Judicial Council to be modified in certain cases:

When the Judicial Council is conducting investigation or inquiry into allegations against the Judges of the Supreme Court (in a complaint procedure) or against the said Judges or the Chief Justice of India (in a reference procedure), the Judicial Council should not consist of the senior Chief Justices of the High Courts. All the members of the Council should be Judges of the Supreme Court.

(D) Withdrawal of judicial work pending proceedings (validity of section 21 of the Bill) and withdrawal as a ‘minor measure’(distinction):

Withdrawal of Judicial work can be of two types, (i) withdrawal pending proceedings and (ii) withdrawal of work as ‘minor measure’ at the end of the inquiry.

(i) The Law Commission has given reasons as to why sec. 21 of the Bill of 2005 which permits withdrawal of judicial work, pending investigation or inquiry, is constitutionally valid. It has explained certain observations of the Supreme Court in Justice V. Ramaswami’s case and pointed out that a provision like sec. 21 did not fall for consideration in Justice V. Ramaswami’s case. Sec. 21 would be valid as it serves the

purposes of achieving the objects of investigation and proof of misbehaviour much better.

(ii) On the question of suspension or withdrawal of judicial work of a Judge as a 'minor measure', if it is for an indefinite period, several judgments including that of Lord Slynn in the Privy Council in Rees v. Crane, 1994 (1) All ER 833 have held that it may amount to removal and the Judicial Council by itself cannot impose 'removal'. However, in the U.S. both in the federal as well as States, the withdrawal of the work by the Judicial Council is only for a limited period. The Law Commission has therefore recommended that one of the minor measures that can be imposed by the Council is 'withdrawal of judicial work for a limited period'. That will be valid.

(E) Appeal to Supreme Court to be provided:

As laid down by the Supreme Court in Justice V. Ramaswami's cases, the order of removal of a Judge, if passed under the 1968 Act by the President after reference to the Judges' Committee and its recommendation, can be challenged on the judicial side. In order to preclude such a challenge under Article 226 of the Constitution in the High Court and in view of the judgment of the Supreme Court in L.Chandra Kumar's case that Article 226 is part of the basic structure of the Constitution, it is necessary to incorporate a provision for appeal to the Supreme Court against (i) the orders of removal passed by the President in the case of a complaint procedure or reference

procedure and (ii) the orders of Judicial Council imposing ‘minor measures’ in a complaint procedure.

Other recommendations made by the Law Commission on a clause by clause analysis of the proposed Bill of 2005:

The Law Commission has recommended in the Report that there are several other clauses in the proposed Bill of 2005 which require to be either amended or incorporated. Important among these are:

- (i) A clear distinction has to be drawn between a ‘reference procedure’ as envisaged in the 1968 Act and the ‘complaint procedure’ as recommended in the Bill of 2005. A new definition of these terms has been proposed.
- (ii) The Bill of 2005 uses the word ‘investigation, ‘scrutiny’ while the title of the 1968 Act uses the word ‘inquiry’. Art. 124 (4) uses the words ‘investigation and proof’. The Law Commission is of the view that there should be a clear delineation of the different stages of the entire process of removal of a judge on a ‘complaint procedure’. The procedure being quasi-criminal as held by the Justice Sawant Committee, the different stages viz., the complaint/allegations, preliminary investigation by the Judicial Council, framing of charges on the basis of the allegations, and inquiry should be clearly spelt out in the proposed Bill of 2005.

The manner in which this should be done has been indicated in detail in our Report.

- (iii) (a) There is need to incorporate a definition of the words 'misbehaviour' and 'incapacity' so as to take in serious types of misbehaviour as also deviant or bad behaviour. In all countries, a Judge cannot be guilty of misbehaviour if the allegations relate to the merits of a judgment or order. In the case of Justice Chase of U.S. in 1805, even impeachment failed on this ground. (b) Violation of the Code of Conduct should also be treated as misbehaviour. So far as publication of Code of Conduct is concerned, the Judicial Council should publish the same in the Gazette of India and until such publication the 'Restatement of Values of Judicial Life' as per the Resolution of the Supreme Court dated May 7, 1997 shall hold good. The Council should also be delegated with power to amend the Code of Conduct from time to time.
- (iv) There should be a definition of the word 'proved' as 'proof beyond reasonable doubt' (as observed by the Justice Sawant Committee). In this context the word 'substantiated' used in the Bill has to be omitted.
- (v) As regards the complaint procedure, a 'whistleblower's provision' has to be incorporated in the proposed Bill of 2005. If a complainant under the 'complaint procedure' is apprehensive of reprisals, he should have the right to request the Counsel that his name to be kept confidential. The recommendations made by the

Law Commission for protection of ‘whistle blowers’ in its 179<sup>th</sup> Report, are relevant in this context and may be adopted.

- (vi) There should be confidentiality of the entire complaint proceedings, starting from the complaint, till ‘minor measures’ are imposed by the Council or in case the Council recommends removal till its recommendation as to removal is placed in the Parliament. The complainant and the witnesses should also be prohibited from giving publicity about the allegations in the complaint, name of the complainant or witness or the name of the Judge. Any breach of confidentiality should amount to an offence. It is further recommended that the above provisions as to confidentiality, shall be notwithstanding anything contained in the Right to Information Act, 2005.
- (vii) The proposed Bill of 2005 should be allowed to take into consideration allegations of ‘misbehaviour’ which would have occurred before the commencement of the new law but that it should not relate to a period beyond two years from the date of commencement of the new law.
- (viii) There are several other amendments recommended by the Law Commission in its report. In all, there are 33 recommendations.

The Report considers exhaustively a variety of legal and constitutional issues and, in fact, starts on the premise that while judicial independence is

one of the basic fundamentals of our Constitution but that it is not absolute and both judicial independence and judicial accountability are inseparable.

Chapter I is Introductory, Chapter II deals with the formulation of points for discussion, Chapter III deals with Judicial Accountability and Limitations on Judicial Independence, Chapter IV with International Traditions with regard to Judicial Independence and Accountability, Chapter V with Joint Committee of Parliament and Judges (Inquiry) Act, 1968 and Chapter VI with Constitutional Principles laid down by the Supreme Court in Justice V. Ramaswami's case. Chapter VII deals with Removal Procedure in UK, Chapter VIII with difference between Impeachment and Address Procedure, Chapter IX, X, XI, XII, XIII, XIV, XV, XVI, XVII with the Procedures in Canada, Australia, Hong Kong, Germany, Sweden, Trinidad and Tobago, Singapore, New Zealand, Israel, Zambia, Bangladesh, Pakistan, Malaysia, US Federal and State Courts. Chapter XVIII deals with Supreme Court Resolution of 1997 on Restatement of Judicial Values and In-House Procedure; Chapter XIX with A.M. Bhattacharjee's case.

Chapter XX contains an elaborate discussion on the points listed in Chapter II and the recommendations thereon. Chapter XXI contains the summary of recommendations (33 in number).

The Law Commission earnestly believes that the 33 recommendations made by it will be found useful in making the necessary changes in the draft Judges (Inquiry) Bill, 2005.

We place on record our appreciation for the extensive research and help rendered by Dr. S. Muralidhar, Part-time Member, in the preparation of this Report and in particular in regard to Chapters II, XX and XXI.

With regards,

Yours sincerely,

Sd./-

(Justice M. Jagannadha Rao)

**Shri H.R. Bharadwaj**

Hon'ble Minister for Law and Justice

Government of India

Shastri Bhawan

New Delhi.

Justice  
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February 8, 2006

Dear Shri Bharadwaj ji,

Reference:- 195<sup>th</sup> Report on “Judges(Inquiry) Bill, 2005”

We are thankful to you for having referred the above subject to the Law Commission for its views. We are also grateful to you for having given us an hour’s time to discuss our recommendations contained in Chapter XXI of our report.

With regard to recommendation No. 32 in Chapter XXI, though we have stated that the proposed Act should be made applicable to ‘misbehaviour’ which occurred two years before the commencement of the Act, this is a matter of governmental policy on which you may take final view before the Bill is finalized. As mentioned by me during our meeting, it would perhaps be appropriate to make the Act apply prospectively only to such ‘misbehaviour’ which might have occurred after the commencement of the Act.

Another aspect about which we discussed was about the period of limitation for making a complaint as to ‘misbehaviour’. On this, we did not make any recommendation and therefore, you may take a policy decision whether a complaint should be limited so that a complaint cannot be allowed to refer to a ‘misbehaviour’ which occurred beyond six months from the date of the making of the complaint.

You may kindly take a policy decision on these matters without being in any way inhibited by what is recommended in the Report.

This letter has the concurrence of the Member Secretary, Dr. K.N. Chaturvedi.

With regards,

Yours sincerely,  
Sd./-  
(Justice M.

Jagannadha Rao)  
Sri H.R. Bharadwaj  
Hon'ble Minister for Law and Justice  
Government of India  
Shastri Bhawan  
New Delhi.

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## CHAPTER- I

### INTRODUCTION

By letter dated November 2<sup>nd</sup>, 2005, the Hon'ble Minister for Law and Justice, Sri H.R.Bhardwaj, sent the draft of the proposed Judges (Inquiry) Bill, 2005 (**Annexure I to this Report**) for the 'examination and suggestions' of the Law Commission. It was requested that a study be made and suggestions forwarded at an early date.

It may at the outset be stated that proviso (b) to Article 124(2) and Article 124(4) of the Constitution of India deal with the removal of a Judge of the Supreme Court and proviso (b) to Art.217(1) with removal of Judges of the High Court for 'proved misbehavior or incapacity' by orders of the President passed after 'an address by each House of Parliament' supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members of the House present and voting. Article 124(5) requires Parliament to make a law in this behalf. Such a law was made in 1968, by enactment of the Judges (Inquiry) Act, 1968 (Act 51 of 1968) (**Annexure II to this Report**). Rules were also made under the said Act called the Judges (Inquiry) Rules, 1969.

The long-title of the 1968 Act reads as follows:

“ An Act to regulate the procedure for the investigation and proof of the misbehavior or incapacity of a Judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters connected therewith”

PROCEDURE UNDER THE JUDGES (INQUIRY) ACT, 1968:

The 1968 Act contains seven sections. Section 3 lays down the procedure for “Investigation into misbehavior or incapacity of Judge by Committee”. ‘Judge’ here means a Judge of the Supreme Court or of a High Court, including the Chief Justice of India and the Chief Justice of a High Court. The procedure is by way of a notice of Motion in either House of Parliament for presenting an address to the President praying for removal of a Judge, signed by a certain number of Members of the House of Parliament where the notice of Motion is given. Thereafter, the Speaker or the Chairman, as the case may be, may, after consulting such persons, ‘as he thinks fit’, admit the motion and if it is so admitted, he shall refer the matter to a Committee consisting of three members, one each from the categories of

- (a) Chief Justice and other Judges of the Supreme Court,
- (b) Chief Justices of High Courts, and
- (c) a distinguished jurist.

That Committee would frame definite charges on which an investigation could be held during which the Judge concerned would be heard. In case of allegations of incapacity, physical or mental, which are said to render him unable to discharge the duties of his office effectively, and where the Judge denies the allegations, the Act provides a procedure for medical examination of the Judge.

The Committee, after investigation, would send a Report to the Speaker or the Chairman, as the case may be, stating its findings. The Report is then laid in both Houses. Section 6 provides for consideration of the Report and refers to the procedure for presentation of an address for removal of the Judge. Section 7 enables the making of Rules by a Joint Committee of both Houses.

It will thus be seen that the procedure under the 1968 Act was for the “removal” of a Judge by address of the Houses to the President after receiving the Report of a Committee of three members of whom two are Judges and one is a Jurist.

The Rules made under the 1968 Act provide for other details in the said procedure.

PROCEDURE UNDER THE PROPOSED JUDGES (INQUIRY) BILL, 2005

The present draft Bill of 2005, like the 1968 Act, contemplates procedure for investigation and ‘removal’ by address of the Houses to the President. However, in addition to a reference on a Motion, it also envisages the procedure of filing of a “complaint” by any person against a Judge and refers to the procedure for investigation by the National Judicial Council (NJC) in pursuance to that complaint. It is proposed that the Council will consist of five Judges.

(For convenience, instead of using the word ‘clause’ of the Bill, we shall use the word ‘section’).

Sec.3(1) of the draft Bill states that the NJC shall consist of

- (a) Chief Justice of India (Chairperson)
- (b) Two Senior most Judges of the Supreme Court, to be nominated by Chief Justice of India (Members)
- (c) Two Senior most Chief Justices of the High Courts, to be nominated by Chief Justice of India (Members)

Section 2(d) defines ‘Judge’ and makes it clear that the investigation may be against a Judge of the Supreme Court or a High Court and includes the Chief Justice of a High Court. In this ‘complaint procedure’, the Bill

does not expressly include the 'Chief Justice of India' in this definition of 'Judge' but this is subject to the proviso to Sec 3(2) where it is provided that a 'reference' from the Speaker or Chairman to the Judicial Council may concern allegations against the Chief Justice of India also.

Section 5 refers to 'complaint' against the Judge, ( i.e, other than the Chief Justice of India) by any person. Section 6 refers to the power of the Council to conduct investigation into the complaint against any other person other than a Judge, in certain cases. Section 7 refers to preliminary scrutiny and section 8 to procedure for inquiry before the Council on the basis of the complaint or reference.

Sections 9 and 10 are on the same lines as section 3 of the 1968 Act and retains the procedure by motion in either of the Houses of Parliament with the difference that the investigation will be now before five Judges of the Council rather than before a three Member Committee contemplated under sec.3(1) of the 1968 Act.

Section 11 deals with the physical or mental incapacity of a Judge and corresponds to Section 3(5) to 3(8) of the 1968 Act with the difference that the investigation will be now by the Judicial Council instead of by the Committee contemplated under Section 3(5) of the 1968 Act.

Section 12(1) provides that every investigation shall be conducted in camera by the Chairperson and the Members sitting jointly.

Section 13 says that the Judicial Council shall have power to regulate its own procedure in making the investigation. However, the Judge concerned shall be given reasonable opportunity to cross examine the witnesses and shall be allowed to adduce evidence in his defence. This corresponds to section 4(1) of the 1968 Act.

Section 15 gives power to the Judicial Council to authorize any officer to conduct search and seizure.

Section 16 says that if it is proved before the Judicial Council that there is no substance in the complaint, the Judicial Council shall inform the President accordingly and the President may close the case. If all or any of the allegations are substantiated, then the Judicial Council shall communicate its findings and recommendations to the President, to the complainant and to the Judge concerned, the President shall place the same before both Houses of Parliament.

Section 17 deals with the disposal of a reference from the Speaker/Chairman and submission of findings by the Judicial Council to the Speaker/Chairman. Section 18 deals with impeachment by address and corresponds to Section 6(3) of the 1968 Act.

Section 21 proposes that during the pendency of the investigation or impeachment, the Judicial Council may recommend stoppage of assigning Judicial work to the Judge concerned if it appears to the Judicial Council that it is necessary in the interest of fair and impartial investigation. Section 24 states that any investigation before the Judicial Council will not affect the criminal liability of the Judge in respect of the allegations under investigation.

Section 22 empowers the Judicial Council to designate one or more of its Members to constitute an investigation Committee, for the purpose of conducting investigation into the matter.

Section 28(1) refers to the power for the Judicial Council to issue a Code of Conduct for Judges, and Section 28(2) deals with the need for Judge to declare assets and liabilities.

Section 29 refers to rule making by Joint Committee of both Houses and corresponds to Section 7 of the 1968 Act.

The Law Commission proposes to examine the draft Bill of 2005 and offer its suggestions which include the deficiencies in the Bill, the need to delete certain provisions and the need to add some more provisions. The various points that arise for consideration are set out in Chapter II.

We place on record our appreciation for the extensive research and help rendered by Dr. S. Muralidhar, Part-time Member, in the preparation of this Report and in particular in regard to Chapters II, XX and XXI.

## CHAPTER II

### SALIENT POINTS THAT ARISE FOR DISCUSSION IN THIS STUDY\_

The Law Commission finds that under the Draft Bill of 2005, the only remedy available for any kind of ‘misbehavior’ is one of ‘removal’. The only difference is that instead of a 3-Member Committee contemplated under Section 3(1) of the 1968 Act, the present draft Bill of 2005 contemplates investigation by a 5-Judge National Judicial Council. If the Investigation is made pursuant to a complaint, the Chief Justice of India is not included but if it is by way of reference from the Speaker/ Chairman, the Judicial Council has to inquire into the misbehavior, or incapacity if any, of the Chief Justice of India also.

There are various aspects on which the Law Commission would offer its suggestions. In this Chapter, we shall make a brief reference to these aspects. They will be discussed in detail after reference to the comparative law in other countries. The following are the salient features which require study:

- (I) Is judicial independence absolute and are not judges accountable?

This question gains importance in view of the fact that the provisions of the Bill of 2005 directly impinge on the doctrine of checks and balances enshrined in the Constitution and if the balance is not maintained as envisaged it might directly impact on the concept of judicial independence. At the same time the concept of judicial accountability, which has been implicitly recognized in the pronouncements of our Supreme Court has also to be kept in view. The 1968 Act provides for an inquiry by a three-member committee on a reference from the Speaker/Chairman upon a Motion by a requisite number of Members of Parliament seeking removal of a judge for alleged misbehaviour or incapacity. The present Bill of 2005 provides for an additional procedure by which any person can file a complaint before a Judicial Council comprising five senior judges including the Chief Justice of India and enables the Council to recommend to the House that the proved misbehaviour or incapacity warrants removal.

A question arises whether apart from removal by address as provided at present under our Constitution it is constitutionally and legally permissible for Parliament to make a law to enable the Judicial Council to recommend removal on a complaint to it by any person. Further, in view of the proposals the Law Commission to enable the Judicial Council to itself impose minor measures where

the charges do not warrant removal, the question naturally arises whether the proposals in the Bill of 2005 as well other proposals recommended by the Law Commission for imposition of minor measures by the Judicial Council are in any way inconsistent with judicial independence or in excess of any measures to make the judiciary accountable?

This aspect is considered in a separate Chapter, viz., Chapter III and also as the first item in Chapter XX.

- (II) What are the principles of Constitutional law laid down by the Supreme Court in the cases relating to Justice V. Ramaswami?

The second aspect is the need to summarise the principles of Constitutional law as laid by the Supreme Court in the various cases relating to Justice V. Ramaswami as to the interpretation of Articles 121, 124, 125 and 217 of the Constitution of India and their impact on the provisions of the Judges (Inquiry) Act, 1968.

- (III) What are the points arising out of the Report of the Justice Sawant Committee?

It may be noticed that in the case of Justice V. Ramaswami a Motion was moved by a requisite number of Members of Parliament and

consequent thereto the Speaker appointed an Inquiry Committee under the Chairmanship of Justice P.B. Sawant under section 3 of the 1968 Act to inquire into the allegations contained in the Motion. The Inquiry Committee in its Report explained several important constitutional principles. In that context, it is necessary to refer to the said principles which have a bearing on the validity of several provisions of the proposed Bill of 2005. In addition it is necessary to refer to the views of the Joint Committee of Parliament (1966) on the Judges (Inquiry) Bill, 1964 which led to the Act of 1968.

- (IV) Are the proposed provisions in the Bill of 2005 for establishing a National Judicial Council consisting only of Judges consistent with the concept of judicial accountability?

It is necessary to point out that there is adequate support for the method of 'peer review' by Judges as provided in the Draft Bill, 2005. In fact, there is no controversy on this issue because the 1968 Act contemplates investigation by a Committee consisting of two Judges and a Jurist and the Draft Bill of 2005 contemplates investigation by a National Judicial Council of five Judges. In a large number of countries including U.K, U.S. Federal Judiciary, Pakistan, Bangladesh, Germany, Sweden etc., the disciplinary inquiry against the judges of superior courts is conducted only by a committee of Judges. This aspect will be dealt with in detail.

- (V) Should the Chief Justice of India be excluded from the inquiry on a 'complaint' under the proposed 'complaint procedure' ?
- (VI) What should happen when a Supreme Court Judge against whom a complaint has been filed and is pending, becomes the Chief Justice of India during the pendency of the investigation. A related question arises with regard to High Court judges also.
- (VII) Whether the remedy of 'removal' of a judge by address is sufficient and whether other 'minor measures' such as: advisories, warnings, corrective steps, request for retirement, withdrawal of cases from the Judge's List, censure or admonition (public or private), should be included in the Bill of 2005 – in cases coming before the Judicial Council under the 'complaint' procedure?

If the misbehaviour that is proved before the Judicial Council is serious enough to warrant removal then the Council will make a recommendation to the House in that behalf. But it is common experience that there are other types of 'deviant behaviour' known otherwise also as 'bad behaviour' as distinct from 'good behaviour'. This has been noticed in the Report of the National Commission for the review of the Constitution. In several countries law has been made empowering Judicial Councils or other bodies to impose such minor measures such as in U.K, U.S.A, Germany and the various States in the U.S. It is in this background that the Law

Commission is proposing the inclusion of such measures even though there is no such provision in the Bill of 2005.

- (VIII) Constitutional validity of a law by Parliament providing for imposition of 'minor measures' by the Judicial Council
- (IX) Whether in the case of a 'reference' by Speaker/Chairman pursuant to a Motion for removal by address under Art. 124, the Judicial Council is bound to report that the charges warranting removal are proved or are not proved or whether if such charges do not warrant removal it could either impose minor measures itself or whether or it could recommend to Parliament that it is a fit case warranting minor measures?
- (X) Tenability of an argument based on California and other State Constitutional Amendments to contend that imposition of 'minor measure' requires amendment of the Constitution.
- (XI) Tenability of an argument that the 'complaint' procedure before the Judicial Council is ultra-vires the Constitution because the allegations are not by way of a Motion in the House.
- (XII) Can a Chief Justice of a High Court be part of the Judicial Council in the case of an inquiry against a Judge of the Supreme Court?

- (XIII) Is there a need for a recusal provision to be incorporated in the Bill of 2005?
- (XIV) Should the process of investigation precede framing of charges and the inquiry commence only after the framing of charges? Should the investigating judges be different from the Judges in the Judicial Council who conduct the inquiry? Should the investigating judge invariably report his findings to the Judicial Council without finally disposing of the complaint at his level?
- (XV) Whether the National Judicial Council can itself conduct the preliminary investigation, frame charges and then conduct the inquiry?

The wording of Art. 124 (4) of the Constitution which talks of 'investigation and proof' has not been properly enacted into the 1968 Act and the Rules of 1969 leading to ambiguity and confusion as to where the preliminary investigation ends and the final inquiry begins. In fact argument was addressed by Sri Kapil Sibal, Counsel for Justice V.Ramaswami in his submissions before the Joint session of Parliament on 10<sup>th</sup> May, 1993 that there should be 'investigation' before the charges are framed. After charges are framed, there could be a regular inquiry into the charges. The Law Commission has found that in several countries, the investigation is done by a smaller group of

judges which is a different from the Commission which later conducts the regular inquiry.

(XVI) Should the Judge be given an opportunity at the stage of 'preliminary investigation' before the Judicial Council on a complaint to clarify the facts, even if, in the event of the charges being framed, he will have a full-fledged opportunity before the Judicial Council (or in case of a recommendation for removal, he may have yet another opportunity before the Houses)?

Sec. 7 of the Bill of 2005 uses the words 'scrutiny' and 'verification' and is silent on the question whether, in the case of a complaint, at the stage of preliminary investigation before charges are framed, the Judge concerned should be given an opportunity. While it is accepted generally that at the stage of such preliminary inquiries, normally, it is not necessary to give an opportunity to the affected person, the Privy Council, in a recent case speaking through Lord Slynn in Rees v Crane 1994(1) All ER 833, has held that in the case of Judges, it is desirable, if not necessary, to afford such an opportunity at the stage of preliminary investigation in the interest of the reputation of the Judge and so that the fair name of the Judiciary on the whole may not be tarnished as will be the case if every complaint is mechanically allowed to result in charges and inquiry. In the States in the U.S. the statutes mandate an opportunity to be given to the judge to submit his

response even before charges are framed. This aspect will require a detailed examination.

(XVII) Whether the provisions of sec 21 permitting stoppage of assignment of Judicial work to the Judge pending a motion or investigation into a complaint or reference is constitutionally valid? What is the proper interpretation of Art 124(5) read with Art 225 of the Constitution?

S.21 provides for stoppage of assigning judicial work to the judge against whom the investigation has commenced, where the Judicial Council considers it necessary in the interests of fair and impartial investigation. The Supreme Court of India has said in Sub-Committee on Judicial Accountability v. Union of India: 1991 (4) SCC 699, that this is not permissible in the absence of a provision either in the Constitution or in the 1968 Act. A related question is whether the Chief Justice could withdraw listing of cases from the Judge's list or direct no cases be listed before him during the pendency of investigation or inquiry . This necessitates examining the distinction between stoppage of judicial work and temporary suspension of the judge.

(XVIII)(A) Whether there should be some provision to prevent frivolous and vexatious 'complaints' being filed and provide for some sanctions as in the various Lok Pal Bills or as in the State laws on Lok Ayuktas.

(B) Whether the complaint must be in the form of a petition with a verification of contents giving the source of information and whether it should or should not be supported by an affidavit?

(XIX) Should the words 'misbehaviour' or 'incapacity' be defined in the Act? If so, in what manner?

It may be mentioned here that there can be various kinds of 'deviant' behaviour some serious and some not so serious. It is necessary to differentiate between these various kinds of behaviour and consider whether the definition of the words 'misbehaviour' or 'incapacity' be inserted in the proposed Act.

(XX) Whether a complaint which relates solely to the merits of a judgment or order ought to be entertained?

In several countries, complainants against Judges on the basis of the decision on merits of the Judgments are excluded from the scope of disciplinary inquiries. In fact it has been found that a majority of complaints against judges relate to the merits of a decision to which the complainant has been a party. The weeding out of such complaints is necessary since the proposed Judicial Council is to comprise of the senior-most judges who even otherwise would be tied down with pending judicial work. It, however, requires to be provided that in relation to a pending or decided case there are other connected

allegations of misbehaviour like bribery etc., the complaint will be maintainable.

(XXI) Whether a provision protecting complainant's identity – as in the case of Whistleblowers' laws – is necessary?

In various Whistleblowers laws and as per the procedure indicated in the 179<sup>th</sup> Report of the Law Commission on “Public Interest (Disclosure) Protection Act” the name and identity of the complainant has been recommended to be kept confidential. This is because individual complainants such as lawyers or litigants may not come forward boldly to expose wrong doings of Judges if there is likelihood of their professional work being imperilled before the High Court/Supreme Court, as the case may be, in other matters in which they are engaged before the same Judge or other Judges of the same court. Simultaneously, it is necessary to consider whether the Judicial Council may take action *suo-motu*, if it comes to its knowledge that there is ‘misbehavior’ which has not come before it by way of a complaint or from any other source.

(XXII) Is there a need for preserving the confidentiality of the Complaint, the investigation and the inquiry process? Should the Bill of 2005 contain a provision that such confidentiality will be maintained notwithstanding the provisions of the Right to Information Act 2005?

An important aspect that requires to be dealt with is the need to require the complainant and others including witnesses participating in the investigation and inquiry to maintain strict confidentiality regarding the documents and proceedings in relation to the complaint, the investigation and the consequential inquiry, if any. This is because the matters are of a sensitive nature involving a high constitutional functionary and any disclosure of such information at any stage may not only endanger a fair conduct of investigation and inquiry but also irredeemably tarnish the image of a judge even before the conclusion of the statutory and constitutional processes.

(XXIII) Should an appeal to Supreme Court for judicial review against orders awarding minor measures or removal be provided?

It requires to be considered whether a specific provision should be made permitting Judicial review before the Supreme Court against award of ‘minor measures’ by the Judicial Council or in case an order of ‘removal’ is passed by the President after the address procedure is completed. Incidentally, a question would arise whether judicial review under Art. 226 has to be expressly barred at all stages before the final order is passed by the Judicial Council in the case of ‘minor measures’ or before the final order of removal is passed by the President. Should an appeal be provided to the Supreme Court after

the final order of the Judicial Council (in case of minor measures or of removal passed by the President)? Yet another question is whether resort to courts even after the final orders of the Judicial Council or the President should be barred by statute?

(XXIV) What is the ‘standard of proof’ before the Judicial Council as well before the Houses of Parliament? Is it ‘preponderance of probabilities’ or is it ‘proof beyond reasonable doubt’? What are the standards in a ‘quasi-criminal’ inquiry?

Another aspect is as to the “standard of proof” that has to be followed by the Judicial Council. Question is whether it should decide upon the charges on the basis of ‘preponderance of probabilities’ or whether it should hold that the charges are proved ‘beyond reasonable doubt’? Are the proceedings quasi-criminal in nature, if so what protections are available to the Judge?

(XXV) What should be the procedure in case one of the members of the Judicial Council is elevated as the Chief Justice of India or is elevated to the Supreme Court, or where there is a vacancy on account of natural causes or the Judge’s services are not available due to other causes, so as to make it clear that de-novo proceedings are not contemplated?

- (XXVI) What should happen if the Judge against whom investigation or inquiry is initiated reaches the age of superannuation during the pendency of the proceedings before the Judicial Council?
- (XXVII) Where removal is recommended by the Judicial Council, should it also recommend that in case the recommendation is accepted by the Houses and the removal order is passed by the President, the judge should be barred from holding any public or judicial, quasi-judicial office nor can he have chamber practice or be an arbitrator in arbitration proceedings?
- (XXVIII) Should the Judicial Council frame a statutory Code of Conduct (subject to modification by Council by notification)? Should the breach of such Code should be treated as misbehaviour? Should the extant Code of Conduct approved by the Supreme Court in 1997 be adopted as the statutory Code till such time the Judicial Council frames a Code of Conduct?
- (XXIX) Whether the proposed Bill should apply to complaints relating to misbehaviour which occurred before the commencement of the proposed Act or in some cases to such conduct which occurred while a person was functioning as a High Court Judge before being elevated as a Chief Justice of the High Court or a Judge of the Supreme Court?
- (XXX) What other amendments are required to be carried out to the Bill of

2005?

There are certain other amendments which are required to be carried out in the Bill of 2005. These are dealt with towards the end of Chapter XX.

In Chapter XX, these and other issues are proposed to be studied in detail because this is the first time that the Law Commission of India is dealing with such important issues which are of great concern/ relevance to the Judicial Branch. In this context, we have also to bear in mind the principles of Judicial Independence and Judicial Accountability. We, therefore, propose to make a detailed survey of all aspects relating to Judicial Discipline and Removal in other countries.

### CHAPTER-III

#### JUDICIAL ACCOUNTABILITY AND LIMITATIONS ON JUDICIAL INDEPENDENCE

Judiciary is one of the three important pillars of any democracy governed by the rule of law. The Legislature, Executive and the Judiciary are all creatures of our Constitution. The view that the Legislature is supreme is no longer recognized even in England where the theory of parliamentary supremacy as propounded by Professor Dicey, was in vogue for a long time. Recent Judgments of Courts in England have declared that it is the Constitution that is supreme and that each of the three wings have their respective jurisdictions and powers to the extent allocated to them in the Constitution. If there is no written Constitution, the constitutional conventions govern. In our country, the Supreme Court of India laid down more than forty years ago in Special Reference No.1 of 1964 case (Keshav Singh's case) (1965 (1) SCR 413) as follows:

“.....though our legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution.....”

and

“In a democratic country governed by a written constitution, it is the Constitution which is supreme and sovereign”.

This has been reiterated in Peoples’ Union for Civil Liberties v. Union of India AIR 2003 SC 2363, para 53.

In UK, in International Transport Roth GmbH vs. Home Secretary 2002(3) WLR 344, Laws J stated that after the coming into force of the (UK) Human Rights Act, 1998, the British system which was once based on parliamentary supremacy has now moved from that principle to the system of Constitutional supremacy.

In Canada, in Vriend vs. Alberta 1998(1) SCR 493, Iacobucci J stated that after the Canadian Charter of Rights & Freedoms, Canada has moved from Parliamentary supremacy to constitutional supremacy. He said:

“When the Charter was introduced, Canada went, in the words of Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy.”

Our Constitution contains checks and balances which require all the three wings to work harmoniously. It has created a separation of powers between all the three branches or wings though the separation, it is now well accepted, is not as rigid as it is under the American Constitution. The legislature and the executive must act within their powers as declared by the Constitution and whenever they exceed their powers or jurisdiction, they can

be corrected by the Judiciary. The Indian Judiciary's powers of judicial review to declare Parliamentary and executive action ultra vires of the Constitution has been recognized ever since 1950, when the Constitution came into force. Art. 50 of the Directive Principles of the Constitution states that the State shall take steps to separate the judiciary from the executive in the public services of the State.

The fact that the Judiciary safeguards fundamental rights and the Constitution and can strike down any law or executive action that is contrary to the fundamental rights or other provisions of the Constitution does not, however, make the judiciary supreme. It too has to act within its powers and jurisdiction as envisaged by the Constitution.

Judicial Independence refers to the independence of the Judge as well as the independence of the Judiciary as an institution. Individual independence means that the Judge is free to decide a case according to law and he cannot be interfered with by anybody without process. The Indian Judiciary is independent and the Constitution has insulated it from interference both by legislature or executive.

There are several provisions in the Constitution which safeguard the independence of the Judiciary and the Judges. Judges of the High Courts and Supreme Court have their tenure guaranteed by the Constitution till they

attain the age of superannuation. Their salaries and allowances are charged on the Consolidated Fund of the State or Union, as the case may be, and are not subject to a vote by the State Legislatures or Parliament. Their pensions are also charged on the Consolidated Fund. The Constitution also states that the salaries and allowances of any Judge of the High Court and Supreme Court cannot be varied to their disadvantage after appointment. Article 121 and 211 prohibit any discussion in the Parliament or State Legislatures on the conduct of a Judge of the Supreme Court or High Court in the discharge of their respective duties. The High Courts and Supreme Court are Courts of record and have powers to punish for contempt. Under Art. 144, all authorities, civil and Judicial, in the territory of India shall act in aid of the Supreme Court. Judges are also immune under various laws like Judges (Protection) Act, 1985 from civil or criminal action for their acts, speech etc., in the course of or while acting or purporting to act in the discharge of their official or judicial duties or functions. However, Judges have to abide by the oath they have taken, namely, that “they will bear true faith and allegiance to the Constitution of India as by law established”, that they will uphold the sovereignty and integrity of India, that they will “duly and faithfully” and to the best of their” ability, knowledge and judgment, perform the duties of the office without fear or favour, affection or illwill and that they will uphold the Constitution and the laws’.

It is accepted that the independence of the Judges in their individual capacity or of the Judiciary as an institution is, however, not absolute. The fact that the powers of Judges are very wide is in itself an indication that the powers cannot be allowed to be absolute. Among the constitutional limitations on the Judges, the most important one is the provision for 'removal' of Judges of the High Courts/Supreme Court by address of the Houses of Parliament to the President on the ground of 'proved misbehaviour or incapacity'. This is provided in Art. 124 (2) and (4) in respect of Judges of the Supreme Court and in view of Art. 217, that procedure is attracted to the 'removal' of Judges of the High Court also.

Dato 'Param Cumarasamy as Vice-President of the International Commission of Jurists and as Former UN Special Rapporteur on Independence of the Judiciary, in his speech in Nov. 2004 at Chennai on 'Judicial Accountability' sated that:

"Accountability and transparency are the very essence of democracy. No one single public institution or for that matter, even a private institution dealing with the public, is exempt from accountability. Hence, the Judicial arm of the government too is accountable".

As Stephen B. Burbank, in his recent book on 'Judicial Independence' says, a 'completely independent court in this sense would also be intolerable because they would render impossible the orderly conduct of the social and economic

affairs of a society’, ‘Courts are institutions run by human beings. Human beings are subject to selfish or venal motives and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom’. ‘Wholly unaccountable Judges are likely to deviate from what the law might demand’. But, limitations must be realistic. He is also of the view that, in practice, impeachment is a difficult procedure and has become almost a dead letter. Polity should not treat Judicial independence and Judicial accountability as dichotomous but rather as different sides of the same coin. That is not just because a denial of independence necessarily entails accountability but also because a modern polity’s goals for its judiciary will almost surely include functions that require a measure of accountability, just as they do a measure of independence.

H. Franklin, in the same book, says: ‘to say that court in general should not be held accountable by the public and by the other branches is to ask for a protection no democratic country should grant’. Lee Epstein says in the same book that ‘Too little independence can undermine the separation of powers, too much independence can undermine the democratic basis of a political order’.

In the book ‘Judges and Judicial Accountability’ edited by Cyrus Das (2004), Rt. Hon Justice Tun Mohd Dzaidin Abdullah, Chief Justice of Malaysia said:

“To be faithful to his oath is the test of his integrity as a Judge. Implicit in this is that he must resist any influence or temptation. Indeed, independence is a vital component of a judge’s accountability, since a judiciary which is not truly independent, competent or possessed of integrity would not be able to give any account of itself.”

“Thus judicial accountability is an indispensable counterbalance to the judicial independence, for an unaccountable judge would be free to disregard the ends that independence is supposed to serve.”

“In that connection, accountability is fostered through the processes for selection, discipline and removal found in the Constitution and statutes in various judicial systems. As the justice system involves complete inter-relationships among the three branches of the Government, the demand for openness and transparency cannot shield the judiciary from scrutiny. Thus Judges, as trustees, must be imbued with the sense they act in the environment and must be able to give an account for their conduct in that trust.”

Archbald Cox, the Special Prosecutor who began legal proceedings against the then President Nixon in the Watergate crisis in the early 1970’s recounted an experience he had which is relevant to the issue of

accountability of Judges. This is how he described a conversation he had one day with Judge Learned Hand:

“Learned Hand, one of the great federal Judges who never reached the Supreme Court, once put the point for me, a young law clerk, from a Judge’s perspective. ‘Sonny’, he asked, ‘to whom am I responsible ? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they wish. Then the Judge turned and pointed out to the shelves of his law library.‘To those books about us. That’s to whom I am responsible’”. (Archbald Cox, *the Court and the Constitution*, 1987, P.20)

What he meant was that Judges’ accountability is to the Constitution and the laws, to the precedents and to the Code of Ethics that govern all judicial powers and conduct.

In March 2001, an article, ‘Strengthening Judicial Integrity against Corruption’ was released under the auspices of the UN Global Programme against Corruption by the Centre for International Crime Prevention, venner for CIJL Yearbook. It gives details of surveys in various countries.

Various types of misbehaviour or deviant behaviour of Judges in Italy have been listed out exhaustively by Judge Giaacomo Oberto, Judge of Turin

& Dy. Secretary of the International Association of Judges, and the list is so extensive that the real instances referred to there that happened in Italy appear to be common in most countries.

The literature on the subject of Judicial Independence and Accountability is voluminous. A large number of books and articles have been written by Judges, lawyers, jurists, social activists and public figures on the subject. Professor Shimon Shetreet's classical work on the subject 'Judges on Trial' and 'Judicial Independence' are considered among the best. It may, however, be said without any fear of any contradiction that none has supported the theory of absolute independence of the Judges and the Judiciary or that they are not accountable. Judges and the Judiciary are accountable to the people. Lack of accountability is bound to shake the confidence of the public in the Judiciary as an institution and that, in its turn, can lead to disastrous consequences to the rule of law and democracy.

The Judges (Inquiry) Act, 1968 was enacted to achieve laudable objectives one of which was to make the Judges accountable for their behaviour as envisaged in the Constitution. That Act has been in the statute book for more than three decades.

The present draft Bill of 2005 proposes to provide additional means of inquiry into the behaviour and conduct of Judges. While the 1968 Act provided for an inquiry by an *ad hoc* committee of two Judges and a Jurist to

be appointed every time when a motion for an address is admitted by the Speaker or Chairman, as the case may be, the present Bill proposes a permanent mechanism by way of a statutory Judicial Council of five Judges. The present draft Bill of 2005 also provides that the said Judicial Council shall also investigate and inquire into allegations of misbehaviour or incapacity of a Judge made in a complaint sent by any person. Consistent with Judgments of the Supreme Court in Justice V. Ramaswami's cases, the proposed Bill of 2005 provides for a non-Parliamentary procedure to be followed upto the stage when Motion for an address for removal is finally taken up by the House for discussion. In the above cases, it was held by the Supreme Court that the reference to the Committee of Judges under the 1968 Act and the inquiry by the Committee are not part of the Parliamentary process but are part of the judicial process to ascertain facts. The actual Parliamentary process starts only after the 'misbehaviour is proved' in an outside body constituted for investigation and inquiry. If the Judicial Council finds substance in the allegations after a regular inquiry in which the judge is heard and is of the view that the misbehaviour warrants 'removal', then it has to send its report with findings of guilt to the Speaker/Chairman, as the case may be. Till such time the Motion that has been initially moved is kept pending and is taken up for consideration and discussion, after receipt of the Report finding the Judge guilty. If the Report says that the misbehaviour is not proved, the matter ends there. The Parliament cannot take up the Motion again because, its jurisdiction to consider the Motion arises only if the misbehaviour or incapacity is 'proved' outside Parliament.

The Law Commission is aware that the present draft Bill proposes only 'removal' and no other minor measures. In the years after 1968, it has been the experience that there are various types of 'misbehavior' of Judges not all of which might warrant 'removal'. Other countries have also faced such situations. In the federal system in USA, the legislature enacted an Act in 1980 which is now replaced by the Judicial Improvement Act 2002, which enables the Judicial Council, as part of an 'inhouse' mechanism, to pass final orders short of removal, such as , request for retirement, withdrawal of cases, public or private censure or admonition and where the Judge is removed, for disqualifying from holding any other public office etc. the UK Act of 2005, the Canadian Bye laws, Federal Germany's Disciplinary Rules and all the States in US provide for 'minor measures'. We will be referring to the laws in Idaho, Connecticut, Texas, etc. in this connection.

The Law Commission will also examine whether a law permitting the Judicial Council to impose 'minor measures' other than 'removal' will be within the Legislature power of Parliament and whether, it will be necessary.

The Law Commission will examine, in the chapters to follow, the comparative law in other countries, and all aspect of the problem and provide a very comprehensive study.



**CHAPTER IV**

**INTERNATIONAL TRADITIONS WITH REGARD TO JUDICIAL  
INDEPENDENCE  
AND JUDICIAL ACCOUNTABILITY**

There are several instruments approved by the UN General Assembly which deal with independence of the judiciary as well as its accountability. There are also some other non-UN resolutions dealing with the same subject.

U.N. Basic Principles On Judicial Independence: 1985

We shall initially refer to the relevant instruments approved by the UN General Assembly. The first such instrument which deals with “UN Basic Principles on the Independence of the Judiciary” is contained in the resolution of the UN General Assembly dated 29<sup>th</sup> November, 1985 which endorsed the proceedings of the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders passed at Milan, Italy during the period 26<sup>th</sup> August to 6<sup>th</sup> September, 1985. The UN adopted the Basic principles on the independence of the judiciary by consensus. The UN General Assembly subsequently welcomed the principles and invited Governments “to respect them and take them into account within the framework of their national legislation and practice”, by its proceedings dated 13<sup>th</sup> December, 1985. As

regards independence of the judiciary, the following seven principles were laid down:

- “1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”

Paras 8 and 9 of the said resolution deal with the freedom of expression and association of judges, paras 10 to 14 deal with qualifications, selection and training, para 11 states that the term of judges, their independence, security, adequate remuneration, conditions of service, pension and the age of retirement shall be adequately secured by law. Para 12 states that judges whether appointed or elected shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. Paras 15 and 16 deal with professional secrecy and immunity, para 16 states that judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Under the heading of ‘Discipline, suspension and removal’, the following principles were stated in paras 17 to 20:

“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair

hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

U.N. Resolution on Procedures (1989):

The second instrument approved by the UN General Assembly relates to “Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary”, adopted by the Economic and Social Council in Resolution 1989/60 and endorsed by the General Assembly in Resolution 44/162 of 15<sup>th</sup> December, 1989. Procedure 7 requires all Member States to inform the Secretary General every five years beginning from 1988, of the progress achieved in the implementation of the basic principles, their incorporation into national legislation, the problems faced and difficulties or obstacles encountered in their implementation at the national level.

The third instrument approved by the UN General Assembly refers to the UN Basic Principles on the Role of Lawyers. We are not presently concerned with this question.

Dr. Singhvi Declaration on Independence of Judiciary (1985):

Among the other UN instruments, we shall first refer to the Singhvi Declaration contained in the UN Draft Declaration on the Independence of Justice. By a decision of the UN Economic and Social Council, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, entrusted Dr. L.M. Singhvi of India with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers. The Special Rapporteur accordingly submitted preliminary and progress reports in 1980, 1981 and 1982 and an additional report. At the 38<sup>th</sup> session of the Sub-Commission, Dr. Singhvi introduced his final report on the subject and drew attention in particular to his draft declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers. The study was circulated for comments which was submitted in the 39<sup>th</sup> session, thereafter Dr. Singhvi submitted his comments and suggestions and gave a revised version of the draft declaration in the 40<sup>th</sup> session of the Sub-Commission.

Dr. L.M. Singhvi's Final Report 1985:

We shall then refer to Dr. L.M. Singhvi's final report to the Sub-Commission on Prevention of Discrimination and Participation of Minorities of 1985. This report in paras 17 to 20 deals with discipline, suspension and removal and read as follows:

“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

UN Requests Governments To Take Into Account Dr.Singhvi's Draft (1988):

In the 40<sup>th</sup> session, the UN Sub-Commission in its Resolution 1988/25 appreciated the draft and thereafter, in the 45<sup>th</sup> session of the Sub-Commission invited Governments to take into account the principles set forth in Dr. Singhvi's draft in implementing the UN Basic Principles on the Independence of the Judiciary, approved in 1985.

Paras 2 to 8 of the draft declaration deal with the independence of the judiciary and read as follows:

“2. Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, for any quarter or for any reason.

3. In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment freely. Judges, on their part, individually and collectively, shall exercise their functions with full responsibility of the discipline of law in their legal system.

4. The Judiciary shall be independent of the Executive and Legislature.
5. (a) The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence.
- (b) No ad hoc tribunals shall be established to displace jurisdiction properly vested in the courts.
- (c) Everyone shall have the right to be tried with all due expedition and without undue delay by the ordinary courts or judicial tribunals under law subject to review by the courts.
- (d) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts.
- (e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, and, detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures so as to ensure that the detention is lawful and to inquire into any allegations of ill-treatment.
- (f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from

such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment.

- (g) No power shall be so exercised as to interfere with the judicial process.
- (h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.
- (i) The Executive shall not have the power to close down or suspend the operation of the courts.
- (j) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

6. No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

7. Judges shall be entitled to take collective action to protect their judicial independence.

8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.”

Paras 9 to 12 deal with qualifications, selection and training, paras 13 to 15 deal with posting, promotion and transfer, paras 16 to 19 which deal with tenure of Judges, read as follows:

“16.(a)The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

(b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.

17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.

18.(a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.

(c) Retirement age shall not be altered for judges in office without their consent.

19. The executive authorities shall at all times ensure the security and physical protection of judges and their families.”

Paras 20 and 21 deal with immunity and privileges, paras 22 to 25 deal with disqualifications, while paras 26 to 31 deal with discipline and removal. They read as follows:

“26.(a)A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board.

27. All disciplinary action shall be based upon established standards of judicial conduct.

28. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

29. Judgment in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

30. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

31. In the event a court is abolished, judges serving on that court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another court of the same status.”

International Commission of Jurists: 1981 (Siracusa Principles):

We shall next refer to the instruments promoted by the International Commission of Jurists. These are contained in the draft principles on the Independence of the Judiciary (Siracusa Principles), which were formulated during 25-29 May, 1981. These principles also refer to the judicial independence, qualification, Selection, postings, transfer, promotion etc., but we shall refer only to those relating to discipline and removal, namely, Art. 13 to 16. They are as follows:

“Discipline:

Art. 13. Any disciplinary proceedings concerning judges should be before a court or a board composed of and selected by members of the judiciary.

Art. 14. All disciplinary action should be based upon standards of judicial conduct promulgated by law or in established rules of court.

Art. 15. The decision of a disciplinary board should be subject to appeal to a court.

[Note: Opinion was divided as to whether the disciplinary board should also include a minority of non-judges.

Disciplinary sanctions may include a variety of options ranging from censure or reprimand to the most drastic action of removal.

A common law judge who was unable to attend the meeting has suggested that articles 13 and 15 should be amended to read as follows:

“13. Disciplinary proceedings against a judge shall be taken formally where it is desired that the judge be, for serious reason, removed from his office. Such disciplinary proceedings shall be taken in the first instance before a board composed of members of the judiciary selected by their peers and there shall be a right of appeal from the decision of such a board to a court.

15. Where the conduct of a judge does not warrant removal from his office, disciplinary or other procedures in relation to that conduct should be taken privately in accordance with the powers vested in the Chief Judge of his court.”]

### Removal

Art. 16. A judge should not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or

physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.”

International Bar Association Minimum standards of judicial independence, New Delhi (1982)

We shall next refer to the Minimum Standards of Judicial Independence laid down by the International Bar Association. These were adopted by the 19<sup>th</sup> Biennial Conference held in New Delhi in October 1982. They deal with judicial independence, the terms and nature of judicial appointments. So far as the subject of discipline and removal of judges is concerned, these are contained in paras 27 to 32 and read as follows:

- “27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.
28. The procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgments in disciplinary proceedings, whether held *in camera* or in public, may be published.
29. The grounds for removal of judges shall be fixed by law and shall be clearly defined.

30. All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.
31. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.
32. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.
33. The head of the court may legitimately have supervisory powers to control judges on administrative matters.”

#### World Conference of Independence of Judiciary, Montreal : 1983

We shall next refer to the World Conference on the Independence of Judiciary held at Montreal in 1983. The resolution related to the Universal Declaration on the Independence of Judges. After dealing with the independence and accountability of international judges, it dealt with national judges separately. Para 2 of Part II after referring to independence of the judiciary; para 3 refers to the qualifications, selection and training; para 4 relates to posting, promotion and transfer and para 5 to the tenure. Para 6 deals with immunities and privileges and para 7 with disqualifications. Para 8 deals with discipline and removal and they read as follows:

“VIII Discipline and removal

2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33(a) The proceedings for judicial removal or discipline when such are initiated, shall be held before a Court or a Board predominantly composed of members of the judiciary and selected by the judiciary;

(b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a Court or Board referred to in 2.33(a).

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36 With the exception of proceedings before the Legislature, the proceedings of discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary

proceedings, whether held in camera or in public, may be published.

- 2.37 With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.
- 2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.
- 2.39 In the event a court is abolished, judges serving on the court shall not be affected, except for their transfer to another court of the same status.”

### Lusaka Seminar: 1986

We shall next refer to the Lusaka Seminar on the Independence of Judges and Lawyers which was held from 10 to 14 November, 1986. This was sponsored by the Centre for Independence of Judges and Lawyers and the International Commission of Jurists. Paras 33 to 42 referred to the conditions of service and tenure, while para 45 dealt with discipline, suspension and removal. That para reads as follows:

“45. Principles 17 to 20 of the UN Basic Principles, guaranteeing a judge a fair confidential disciplinary hearing in accordance with

established standards of judicial conduct, providing that suspension or removal shall only be imposed for incapacity or misbehaviour, and providing for independent review of disciplinary decisions, should be implemented at the national level.”

#### Caracas Conference: 1999

Another Conference on Independence of Judges and Lawyers was organized at Caracas, Venezuela during 16-18 January, 1999 by the International Commission of Jurists. The Conference passed a plan of action upholding the principles of rule of law, independence of the judiciary and human rights.

#### Bangalore Principles of Judicial Conduct: 2002

We shall next refer to the Bangalore Principles of Judicial Conduct, 2002, which after referring to the UN Basic Principles on the Independence of the Judiciary, set out earlier formulated various principles relating to the independence of the judiciary. On the question of independence, paras 1.1 to 1.6 read as follows:

##### “Value 1: Independence Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold

and exemplify judicial independence in both its individual and institutional aspects.

- 1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
- 1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.
- 1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and Parliamentary branches of government, but must also appear to a reasonable observer to be free therefrom.
- 1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.
- 1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.
- 1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary

which is fundamental to the maintenance of judicial independence.”

The Bangalore Principles mainly deal with the principles of judicial conduct, impartiality etc. in paras 2.1 to 2.5, with integrity in paras 3.1 and 3.2, with propriety in paras 4.1 to 4.16, with equality in paras 5.1 to 5.5, with competence and diligence in paras 6.1 to 6.7. The declaration does not deal with the procedure for discipline.

Latimer House Principles and Guidelines for the Commonwealth, 1998:

The Latimer guidelines were formulated in a colloquium on “Parliamentary Supremacy, Judicial Independence...towards a Commonwealth Model”, jointly sponsored by the Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Magistrates and Judges Association and Commonwealth Parliamentary Association. The Conference was held at Latimer House, UK between 15-19 June, 1998. So far as judicial accountability is concerned, it is stated in para VI(1) under the heading of Judicial Accountability, (a) Discipline, as follows:

“(i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent

and impartial tribunal. Grounds for removal of a judge should be limited to:

(A) inability to perform judicial duties; and

(B) serious misconduct.

(ii) In all other matters, the process should be conducted by the chief judge of the courts;

(iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.”

Beijing Statement of Principles of Independence of the Judiciary (1995):

Beijing Statement of Principles of Independence of the Judiciary was prepared on 19<sup>th</sup> August, 1995. The preamble refers to the charter of the UN, the Universal Declaration, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It then refers to the 6<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders which dealt with the question of independence of the judges. It then refers to the 7<sup>th</sup> UN Congress on the Prevention of Crime and Treatment of Offenders held at Milan, Italy from 26<sup>th</sup> August to 6<sup>th</sup> September, 1985 adopting the basic principles on the independence of the judiciary and then to the 7<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders which recommended the basic principles above-stated at national, regional and interregional

implementation. It also refers to the “Tokyo Principles” passed by the Law Asia Human Rights Standing Committee on 17-18 July, 1982, and to the 5<sup>th</sup> Conference of Chief Justices of Asia and the Pacific at Colombo, Sri Lanka on 13-15 September, 1993. It was found that the Tokyo principles should be revised. On that basis the fresh principles of independence of the judiciary were formulated at Beijing on 19<sup>th</sup> August, 1995. Principles 3 to 9 deal with independence of the judiciary and principles 18 to 30 refer to the principles applicable to the tenure and disciplinary action. They read as follows:

- “3. Independence of the Judiciary requires that;
  - (a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
  - (b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.
4. The maintenance of the independence of the Judiciary is essential to the attainment of its objects and the proper performance of its functions in a free society observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.
5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is

the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.

6. In the decision-making process, any hierarchical organization of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with article 3(a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.

7. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

8. To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

9. Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.”

Principles Applicable to the tenure and disciplinary action:

“18. Judges must have security of tenure.

19. It is recognized that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people of other formal procedure.

20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.

23. It is recognized that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if every used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first

instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.

26. In any event, the judge who is sought to be removed must have the right to a fair hearing.

27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28. Judgments in disciplinary proceedings, whether held in camera or in public, should be published.

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30. Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the Judiciary, such consent shall not be unreasonably withheld by an individual judge.”

It appears that 20 Chief Justices first adopted the Beijing Statement in August, 1997 and this statement was further refined during seven conferences of Chief Justices held at Manila in August 1997 and signed by 32 Chief Justices throughout the Asia Pacific region. So far as principles relating to judicial independence and tenure and disciplinary action, they are substantially the same as those passed at Beijing referred to above. Among those who signed at Beijing on 19<sup>th</sup> August, 1995, was Justice S.C. Agarwal, Judge, Supreme Court of India representing the then Chief Justice of India, Justice A.M. Ahmadi.

## CHAPTER V

### **Section 220(2)(b) of the Government of India Act, 1935 & Joint Committee of Parliament on Judges (Inquiry) Bill, 1964**

#### Government of India Act, 1935 & Justice S.P. Sinha's case (1948)

The case of Justice S.P. Sinha, Judge of the Allahabad High Court was the only case prior to the commencement of the Constitution where a Judge was removed pursuant to a reference under sec 220(2)(b) of the Government of India Act, 1935.

On 20<sup>th</sup> July, 1948, pursuant to a petition by the Govt. of United Provinces, a reference was made by the Governor General of India, under sec 220(2)(b) of the Government of India Act, 1935. the complaint was forwarded to the Federal Court of India. earlier, the procedure was to refer such cases to the Privy Council. But, the present reference came before the Federal Court because of the India (Provisional Constitution) Order, 1947 and the India (Provisional Constitutional) Amendment Order, 1948.

The Federal Court, on receipt of the reference, directed a copy of the charges to the Judge seeking his reply. Thereafter, the Governor-General filed affidavits in support of the facts and allegations in the petition of the Governor and served on the Judge. He filed affidavits in reply. The

Governor-General filed affidavits in rejoinder. The Judge requested that the deponent who filed affidavits be summoned. This was allowed. Thereafter evidence, which included cross-examination on behalf of the Judge, came on record in an inquiry which lasted three full weeks. Evidence was concluded by 22<sup>nd</sup> March, 1949.

The proceedings took place in camera before the Federal Court which, however, stated that this should not be regarded as a precedent. After considering the material on five charges, the Federal Court held that one charge relating to his conduct concerning two cases was proved. As two instances of misbehaviour were proved the Federal Court opined that his continuance in office will be prejudicial to the administration of justice and to public interest. The Court recommended removal.

By order dated 22<sup>nd</sup> April, 1949, the Governor-General Sri C. Rajagopalachari passed an order of removal under sec 220(2) of the Govt. of India Act 1935, citing that it was the only case in the history of Indian High Courts.

The Judges (Inquiry) Bill, 1964 & the Report of the Joint Committee of Parliament (1966)

The Judges (Inquiry) Act, 1968 became law after the report of the Joint Committee of Parliament which discussed the report on Judges (Inquiry) Bill, 1964 during January 1966. The main reason for bringing about the Bill 1964 was that a Judge of the Supreme Court of India who was unwell was, according to some persons, not in a position to perform his judicial duties in the Supreme Court. Question arose as to whether and in what manner he could be asked not to function. The Bill of 1964 was referred to the Joint Committee of Parliament.

The report of the Committee was finally presented on 17<sup>th</sup> May, 1966 and thereafter the Bill which was originally introduced in Lok Sabha in 1964 was modified in the light of the report of the Committee and was passed by the Parliament in 1968.

Though the defects in the Bill were proposed in 1966 by the joint committee, the Bill, as corrected was ultimately passed in 1968 by Parliament.

On January 15<sup>th</sup>, 17<sup>th</sup>, February 14<sup>th</sup>, 1966, evidence was given before the Committee was given before the Joint Committee by leading personalities like Shri C.K. Daphtary, the then Attorney General of India, Shri M.C.

Setalvad, Dr. L.M. Singhvi, Shri N.C. Chatterjee, Shri G.S. Pathak, Shri K. K.Shah, Shri R.C.S. Sarkar, Shri P.N. Sapru, Shri M.P. Kamath and Shri M.N. Kaul. That evidence throws a flood of light on the interpretation of Arts 124 and 125 of the Constitution of India. The discussion was mainly based upon certain provisions of the 1965 Bill which, according to the Committee, violated the provisions of the Constitution.

Some of the issues discussed before the Joint Committee in 1966 concerned the interpretations of Articles 121,124,125 and 217 of the Constitution and are relevant in the present context. In fact, some of these points have since been thrashed out before the Supreme Court in Justice V. Ramaswamy's cases. That is why we feel that a brief reference is necessary to the discussion before the said Joint Committee.

#### The Judges (Inquiry) Bill, 1964

(For convenience, instead of the word 'clause' of the Bill, we are using the word 'section').

Section 2 of the Bill contained definitions and sec 2(c) stated that the word Judge meant Judge of the Supreme Court or of a High Court, including the Chief Justice of India and the Chief Justice of High Courts.

Section 3 of the Bill deals with “investigation into misbehaviour or incapacity of a Judge by the Committee” to be constituted by the Speaker and Chairman.

Sub section (1) of sec 3 refers to the manner in which a motion has to be brought in the House of the People. The Motion should be brought by not less than 100 Members of that House of People or by not less than 50 Members of the Council of States. In that event, the Speaker or the Chairman, as the case may be, may after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

Sub section (2) of sec 3 states that if the motion is admitted, the Speaker or as the case may be, the Parliament shall keep the motion pending and constitute, as much as may be, for purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a committee consisting of 3 members. The manner in which the members have to be chosen was mentioned as follows:

“(a) One member shall be chosen from among he Chief Justice and the other Judges of the Supreme Court; (b) one shall be chosen from among the Chief Justices of the High Courts and (c) one shall be chosen from among the persons who are, in the opinion of the Speaker, or as the case may be, the Chairman, distinguished jurists.”

Sub section (3) of sec 3 provides that the Committee shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held. Subsection (4) of sec 3 provides that the charges together with a statement of grounds, shall be communicated to the Judge and he shall be given a reasonable opportunity of filing his written statement. Subsection (5) of sec 3 provides for medical examination of a Judge, if the allegation is that he was unable to discharge his duties effectively due to physical or mental incapacity. The Medical board shall have to submit its report to the Committee.

Under subsection (7), the Judge has to be given a further opportunity to state his case in regard to the Medical report and the charges can be amended, if necessary, if they are amended, the Judge is given a further opportunity.

Subsection (8) of sec 3 permits the Central Government to appoint an advocate to conduct the case against the Judge if so required by the Speaker or the Chairman.

Section 4 states that the Committee may regulate its own procedure in making the investigation and shall give reasonable opportunity to the Judge for cross examining witnesses or adducing evidence. After the investigation, the Committee has to submit its report to the Speaker or, as the case may be, to the Chairman or to both, if it was jointly constituted by both. The report will then be laid in both the Houses.

Section 5 of the Bill dealt with the power of the Committee to issue summons, require delivery and production of a document, receive evidence on oath, issue summons for examination of witnesses or documents etc.

Section 6 provided that if the report finds the Judge not guilty or not suffering from any incapacity, the motion has to be rejected. On the other hand, if the report is against the Judge the motion and the report will be taken up by the House in which it is pending. If the motion is adopted by the each House according to Art 124(4), or Art 218 than the misbehaviour or incapacity shall be deemed to be proved and an address for removal of the Judge shall be presented by each House in the same way in which the motion has been adopted.

Subsection 7 enables a Joint Committee of both Houses to make rules. The joint committee will consist of 15 members nominated by the Speaker.

These were the salient provisions of the Bill of 1964 which came up for discussion before the Joint Committee.

#### Discussion before the Joint Committee

The evidence given by Shri C.K. Daphtary, Attorney General for India related to Art 124(4). He said that a motion is presented in one of the

Houses of Parliament, question was whether there can be any discussion about the conduct of a Judge under art. 121. That article prohibits discussion except upon a motion “for presenting an address to the President”. Shri G.S. Pathak pointed that at the initial stage of initiating the motion, the motion is in the nature of a complaint or petition. It is only after the misbehaviour or incapacity is proved, that an address is actually made to the President under art 124(4). Therefore, at the stage of initiating the motion there can be no discussion. He emphasized that if there is discussion at the initial stage there can be character assassination. Shri P.N. Saprú suggested that stage when the motion is initiated, discussion should be avoided. Shri G.S. Pathak pointed out Art 121 uses the words “except upon a motion for presenting an address to the President praying for the removal of the Judge as thereafter provided” and that meant that the motion is to be supported only after the proof of misbehaviour or incapacity. He pointed out that under art 124(4), first the misbehaviour or incapacity has to be proved and only thereafter the motion has to be supported by a majority of the total members of the House. Art 124(4) does not require a majority of the House at the stage of initiation of the motion which leads to the appointment of a committee before the allegations have to be proved. Shri P.N. Saprú pointed out that at the stage when the motion is initiated, Parliaments in UK and the Commonwealth countries like Canada and Australia do not permit any discussion. He suggested that Parliament could sit in camera at the stage of initiation, but Shri G.S. Pathak suggested that instead the law that is to be made could state that there should be no discussion. The discussion in Parliament could take

place only after a judicial tribunal decides that the misbehaviour and incapacity have been proved.

However, initially Shri C.K. Daphtary did not accept this view. According to him once a motion was initiated under art 124(4), the prohibition for discussion under art 121 was lifted. He said that we need not consider that there are two stages and that the discussion about the conduct of Judge is permitted only later on. Later, C.K. Daphtary changed his opinion and stated that there could be discussion only after proof of misbehaviour or incapacity. Shri P.N. Sapru also suggested that there are two stages. According to Mr. P. Barman, at the stage of initiation of Motion, the Speaker/Chairman would decide whether to refer to a Committee. There could be discussion at that stage also because Art. 121 lifts the bar against discussion at that stage also. According to Shri G.S. Pathak, the motion is kept pending and after proof before a Judicial Tribunal, there could be discussion. According to Mr. P. Barman, there are two stages of the same motion. He was supported by Sri D.L. Sen Gupta. He also said Parliament may acquit the Judge even if the Committee held him guilty. But, if Committee held the Judge not guilty, the matter ends since there is no 'proved misbehaviour'. Several members opined that there must be 'proof of misbehaviour' before the Address. Art. 121 speaks of Motion but Art. 124 (4) does not speak of Motion, according to Sri K.K. Shah. Address can be only after a Motion. But, there should be no character assassination before 'proof'. Dr. Singhvi quoted from Robert McGregor Davison that there is a

joint address in Canada. Mr. P. Barman said: 'It is very dangerous to define 'misbehaviour'. Mr. Debabrata Mookerjee agreed. Then members said that the Committee may even say that the complaint is 'frivolous'.

Another point discussed was whether any motion could be initiated under Art. 124(4) before a law was made under art 124(5). Dr. Singhvi quoted the view of Todd of Australia. He also quoted Jefferson's Manual as regards the procedure in the Senate in US.

Yet another question was whether the President could act on his own, after the address, made and whether he would have discretion in the matter of accepting the motion or whether he should abide by the view of the Executive. Shri C.K. Daphtary observed that the advice of the Cabinet would be binding on the President. So far as the Parliament was concerned, it was not bound by the report of the Committee.

Shri M.N. Kaul, formerly Secretary General of the House of Lok Sabha and later Director of the Institute of Constitutional and Parliamentary Studies, New Delhi, gave elaborate evidence. He suggested that the trial of the Judge should be judicial in character. He also stated that whenever a member raised a complaint against a sitting Judge, it was necessary for the Speaker/Chairman to consider whether any prima facie case was made out. After the Constitution came into force, the first case that arose was in relation to a complaint made by an eminent scientist Dr. Meghnath Saha against a

Judge. The notice came before the Speaker Shri Mavlankar who scrutinized the same and he felt that it was necessary to first find out if there was a prima facie case to admit the notice. He said “this power I can use to settle matters without the thing every coming on the order paper”. The notings on the important matters remained in the personal custody of the Secretary General himself. Mr. Mavlankar also said “my first duty is to send for the member”. Such complaints against high constitutional functionaries should, therefore, be first examined by the Speaker to find out if there was a prima facie case. It seems he told Dr. Meghnath Saha “look here, you have given notice; you are an eminent member and I know that you may have some prima facie evidence but it is my duty as a Speaker, to satisfy myself ..... initially it is my power and responsibility to admit it or not to admit it. I think that I should view it with an extremely critical eye; that is to say if I have no recourse left, then in those circumstances alone I will place this on the order paper”. If a member makes a complaint without justification, he may incur the displeasure of the Speaker. The Speaker will have to check and verify the allegations initially. He must ask the member if the member had made some verification and satisfied himself. The complaint in that case appears to be that three Judges of a High Court were delaying pronouncements of the judgments for a long time and one was about to retire. But Mr. Mavlankar said that before admitting the motion, he would write to the Chief Justice of the High Court concerned. He also brought it to the notice of the Home Minister and the Chief Justice of India. The Chief Justice replied that he was taking appropriate action in the matter. But the Home Minister and the

Chief Justice appreciated the manner in which the Speaker dealt with the matter without straightaway admitting the motion. The then Prime Minister, Jawaharlal Nehru also supported what the Speaker did. The threat of a motion ultimately worked and the problem was solved. The cases were disposed of and the judgments were delivered. Dr. Saha who made the complaint was also satisfied. Mr. M.N. Kaul referred to two other complaints from another High Court and that was also resolved in the above manner when the Judges came to know that the Speaker was holding up a complaint so that the matter could be sorted out with the help of the Chief Justice of the High Court. The third case related to Justice Imam of the Supreme Court who was not keeping good health and who ultimately resigned in similar circumstances. It was thereafter that the Government realised that law should be made under Art. 124 clause (5) of the Constitution. According to him, the motion referred to in Art. 121 and 124(4) meant a proposal for the consideration of the House which is in the mind of the sponsors. The Speaker could dismiss the motion if it was frivolous. If he finds a prima facie, case he would admit the motion. Merely because the motion is admitted under Art. 124(4) did not mean that the allegation against the Judge was proved. It still remains the view of the sponsors. He stated that it should not be for the executive to move the Speaker but it should only be for the Members of Parliament to move the Speaker by way of a motion. It is not permissible to bring the executive into the picture at that stage. Notice on the motion by the Speaker does not amount to investigation and proof. Admission of the motion by the Speaker does not also amount to

investigation and proof. Putting the motion on paper is not part of the investigation and proof. Parliament does not come into the picture till the report of the Committee is laid on the Table. It is, therefore, competent in Parliament to make a law in relation to the antecedent stages. No Member of Parliament should think that when he moves a motion, the charges are proved. He has only started the machinery to go into action. At that stage if the member does not satisfy the Speaker about a prima facie case, the Speaker may say that he is not satisfied or that there is no basis. According to Mr. K.K. Shah the words “as hereinafter provided in Art. 121 in the sentence “except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided”, referred only to the later stage of address and not to the stage of the motion. But, according to Mr. Kaul it referred to both the stages. Under both stages, there could be discussion. But Mr. Shah pointed out that 124(4) deals with the removal “after an address supported by a majority” and voting has been presented to the President. Otherwise at the initial stages when the motion is initiated there could be a character assassination. But according to Mr. Kaul there should be not be much discussion at the initial stage and a convention should be established that there should be no discussion. If the House of representatives makes an address to the President, it will request the Rajya Sabha to present a similar address to the President for the removal of a Judge. The Houses can move independently or they can have a joint session. If anybody sends a petition to the President, he could forward it to the concerned Minister who could make some preliminary inquiry before

referring it to the Speaker or before a motion is made in the House. It is also open to the President to have the complaint sent to the Chief Justice of India through the Minister. The President should not have the power to appoint a tribunal because the President acts on the advice of the executive. The tribunal must be appointed by the House.

It was pointed out that the accused Judge has to be given the right to engage a counsel, right of hearing, right of cross-examination and right of using evidence etc. before the body which investigates the allegations. Mr. Debabrata Mukerjee repeatedly asked Mr. Kaul whether at the stage of initiation of the motion there could be a speech by the sponsor or by other members in support of it or whether Art. 121 would be a bar but Mr. Kaul was of the view that Art. 121 lifted the bar even at the stage of initiation of the motion but Mr. Mukerjee did not agree. However, Mr. Kaul pointed out that a member could waive his right of speech at that stage but Mr. Mukerjee pointed out that if the Speaker should be first satisfied about the prima facie case before referring the matter to a Committee, then the problem can be easily solved and at the initial stage it becomes a statutory procedure rather than a preliminary procedure.

Mr. M.C. Setalvad, representing the Indian Jurists Commission and the Institute of Constitutional and Parliamentary Studies, agreed that the Government should have no place in initiating a motion and it should be only for the Members of Parliament. He agreed that legislation may provide that

Parliament could appoint a body to conduct an inquiry. Mr. Setalvad suggested that the Rule Committee of Parliament could provide that there could be no speech and discussion at the stage when the motion was initially moved in the House. At any rate, he was of the opinion that at the initial stage discussion about the conduct of the Judge should be avoided. He was also of the view that clause (5) of Art.124 was only an enabling provision. He was also of the opinion that a retired Judge should not be a member of the tribunal. Thereafter, the Joint Committee submitted its report dated 13<sup>th</sup> May, 1966 (some members dissented).

The Joint Committee recommended that in order to ensure and maintain the independence of the judiciary, the executive should be excluded from every stage of the procedure for investigation and that initiative should only be with Parliament. Before admission of the motion, the Speaker or the Chairman may consult such persons as he may deem fit or gather other material and either admit or reject the motion. If he admits the motion, he should keep the motion pending and constitute a committee consisting of three members, one each to be chosen from amongst the Chief Justice and other Judges of the Supreme Court, Chief Justices of the High Courts and the distinguished jurists. The report of the committee must be submitted to the Speaker or the Chairman or to both so as to be laid before both Houses.

The Joint Committee also felt that if the investigating body exonerates the Judge no further action should be taken on the motion. If, however, the

report is against the Judge then the motion should be taken up for consideration in the House or Houses in which it is pending. If the motion is adopted by each House in accordance with Art. 124(4) read with Art. 218, then the misbehaviour or incapacity should be “deemed” to have been proved and then an address should be presented to the President by each House. The rule making should be given to a Joint Committee of the Parliament and not to the Government.

As a result of the said suggestions, the Bill of 1964, was amended and ultimately the Judges (Inquiry) Act, 1968 was passed.

## CHAPTER VI

### CONSTITUTIONAL PRINCIPLES LAID DOWN BY SUPREME COURT OF INDIA IN JUSTICE V.RAMASWAMI'S CASES

(In regard to Articles, 121,124,125 of the Constitution and Judges (Inquiry) Act, 1968)

In this Chapter we shall deal with the interpretation of various provisions of the Judges (Inquiry) Act, 1968 and the constitutional principles dealing with the 'removal' of Judges of the High Courts and the Supreme Court.

Several principles have been laid down by the Supreme Court in a series of judgments in connection with the inquiry for removal, initiated against Justice V. Ramaswami, formerly Judge of the Supreme Court. These judgments are four and are contained in (i) Sub-Committee on Judicial Accountability vs. Union of India, 1991(4) SCC 699; (ii) Sarojini Ramaswami (Mrs.) vs. Union of India, 1992(4) 506; (iii) Krishnaswami vs. Union of India, 1992(4) SCC 605 and (iv) Lily Thomas vs Speaker Lok Sabha, 1995(4) SCC 234 .

Brief Chronology of facts and Judgments in Justice V.Ramaswami's cases:

Before we proceed to refer to the principles laid down in the above judgments, we propose to set out the background of facts which led to the above judgments.

Justice V. Ramaswami was appointed Chief Justice of the High Court of Punjab and Haryana and there were certain allegations of financial impropriety and other irregularities against him while he was working as Chief Justice of that High Court at Chandigarh. By the time of the inquiry, he had been elevated to the Supreme Court. The then Chief Justice of India, Justice Sabyasachi Mukharji, took note of the allegations and advised Justice Ramaswami, to abstain from judicial functions until the allegations were cleared. On 18<sup>th</sup> July, 1990, upon receipt of the letter, Justice V. Ramaswami applied for leave for six weeks in the first instance w.e.f. 23<sup>rd</sup> July, 1990. The Chief Justice directed the office to process his application for leave. These facts are contained in statement of the Chief Justice of India to the Bar dated 20<sup>th</sup> July, 1990.

The Chief Justice of India then appointed a Committee consisting of three Judges of the Supreme Court (B.C. Ray, K.J. Shetty and M.N.Venkatachaliah JJ), presided over by Justice B.C. Ray, to go into the facts to find out whether there was any prima facie truth in the allegations requiring the judge not to exercise judicial functions. The said Committee

was not a Committee of Inquiry into the charges, but was constituted only to ascertain the facts in a prima facie manner. After some inquiries, it expressed the view that charges of improper conduct involving moral turpitude were not established. It then considered whether, before a regular inquiry is instituted, Justice V. Ramaswami could be asked to desist functioning as a judge. It was of the view that as long as the constitutional warrant appointing him as Judge of the Supreme Court was in force, he could not be asked not to exercise his judicial functions. It stated :

“In the result, till the matters are finally examined at the appropriate levels, it is difficult to hold that the Judge should consider himself disentitled to discharge the judicial functions of his office. However, (only if ) upon a careful analysis of all the material, the appropriate authorities find facts from which an inference of moral turpitude becomes inescapable and if the Chief Justice of India agrees that those assessments are bona fide and the facts proved reasonably justify or admit of such inferences, then and then alone, could it be said that it will be an embarrassment for the Judge to discharge judicial functions. Till then, it is perhaps inappropriate to say anything – apart from what we have indicated by way of financial reimbursements – which may have the effect of interdicting the legal incidence of constitutional warrant of the appointment of the Judge.”

Thus, the B.C. Ray Committee thought that, at the stage when the allegations were not yet inquired into, there was no justification to interdict the Judge's right to function as per the warrant of appointment.

Thereafter, on 28<sup>th</sup> February, 1991, 108 Members of the Lok Sabha presented a Motion to the Speaker of the 9<sup>th</sup> Lok Sabha for Address to the President for the removal of the learned Judge under Art. 124(4) of the Constitution read with the provisions of Judges (Inquiry) Act, 1968. On March 12, 1991, the Speaker of the Lok Sabha in purported exercise of his general powers as well as of his powers under sec. 3 of the said Act, admitted the Motion and constituted a three member committee consisting of Justice P.B. Sawant, Judge of the Supreme Court, Justice P.D. Desai, Chief Justice of Bombay High Court and Justice O. Chinnappa Reddi, a Jurist who was also former Judge of the Supreme Court, to investigate into the grounds on which the removal was prayed for. This Committee was thus one under section 3 of the 1968 Act.

Soon after the decision of the Speaker to admit the Motion and constitute the Committee as aforesaid, the term of the 9<sup>th</sup> Lok Sabha came to a premature end upon its dissolution. The Supreme Court by its judgment dated October 29, 1991 declared that the Motion as well as the decision of the Speaker have not lapsed and that the Committee can conduct the inquiry. (Sub Committee of Judicial Accountability vs. Union of India 1991(4) SCC

699). We shall refer to the various constitutional issues decided in the judgment separately.

After the said judgment, the Committee started the inquiry and framed 14 charges on the basis of the allegations. Justice V. Ramaswami did not participate in the inquiry in spite of notice. The Committee took evidence and prepared an elaborate report in regard to 14 charges, on July 20, 1992. They held Charge numbers 1, 2, 3, 4, 7, 8, 9, 11, 13 and 14 have been proved, that Charge No. 5 was not proved (subject to the finding on Charge No. 7), Charge Nos. 6 and 10 were also not proved. It held that Charge No. 12 was partly proved.

At that stage, Justice Ramaswami's wife Mrs. Sarojini Ramaswami filed writ petition 514 of 1992 requesting for a direction that the Committee hand over a copy of the Report to Justice Ramaswami before it was submitted to the Speaker of the Lok Sabha in order to enable Justice V. Ramaswami to question the findings of the Committee in judicial review proceedings in a court of law. By another elaborate judgment the Supreme Court dismissed the writ petition on 27<sup>th</sup> October, 1992 (vide Sarojini Ramaswami vs. Union of India 1992(4) SCC 506. Several important constitutional principles were again laid down by the Supreme Court in this judgment to which we shall be referring in detail.

Thereafter, one Mr. Krishnaswamy who was a Member of Parliament filed a writ petition ( WP. 149 of 1992) seeking a review of the earlier judgment of the Supreme Court in Sub Committee on Judicial Accountability vs. Union of India 1991(4) SCC 699. Another person Mr. Raj Kanwar filed a writ petition 140 of 1992 contending that the notice of Motion and its admission by the Speaker were unconstitutional. Both these writ petitions were dismissed by the Supreme Court by its third judgment in Krishnaswamy vs. Union of India 1992(4) SCC 605 on 27<sup>th</sup> October, 1992.

After the Report of the Committee was tabled in Parliament, Justice V. Ramaswami was given a copy of the Report and he, in fact, filed a written memorandum before the Parliament. In Parliament, he was represented by Mr. Kapil Sibal, Senior Advocate. Several Members having abstained, the Motion for removal did not ultimately succeed.

Thereafter one Ms. Lily Thomas filed a Writ Petition stating that those Members of Parliament who abstained from voting, must be deemed to have accepted the findings of the Committee. This Writ Petition was dismissed.

These four judgments laid down several important principles regarding interpretation of Art. 121,124,125 of the Constitution and of the Judges (Inquiry) Act, 1968 which are quite relevant for an analysis of the provisions of the present Judges (Inquiry) Bill, 2005. These principles will be referred to in detail in this Chapter.

Before we deal with the above judgments, we shall refer to the points arising out of the Report of Justice P.B. Sawant Committee, which was appointed by the Speaker.

The Sawant Committee Report (20<sup>th</sup> July, 1992):

We have already stated that after admitting a Motion, the Hon'ble Speaker of the Lok Sabha appointed Justice Sawant Committee under Section 3 of the Act.

The above Committee stated that under section 4 of the High Court's Act, 1861 and under section 102 of the Government of India Act, 1915, Judges of the High Courts in India held office during the "pleasure" of Her or His Majesty. However, under proviso (b) to sec 220(2) of the Government of India Act, 1935 it was provided that a Judge cannot be removed from his office unless the Judicial Committee of the Privy Council on a reference being made by his or her Majesty, recommended that the Judge be removed, on the ground of misbehaviour or of infirmity of mind or body.

Under the provisions of the Constitution of India while providing for a tenure of 60 years (later amended as 62 years) for High Court Judges and 65 years for Supreme Court Judges, it was stated in clause (b) of the 2<sup>nd</sup> Proviso to Art 124(2) that a Supreme Court Judge may be removed from his office in

the manner provided in clause (4) of Art 124. Clause (4) of Art 124 stated that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an Address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than the 2/3<sup>rd</sup> of the Members of that House present and voting, has been presented to the President in the same session for such removal on the ground of “proved misbehaviour or incapacity”. Sub clause (5) of Art 124 provided that Parliament may, by law, regulate the procedure for the presentation of an Address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4). Art 217 provided that in the case of the Judges of the High Courts, they may be removed from their office by the President in the manner provided in clause (4) of Art. 124.

The Committee then referred to the provisions of the Judges (Inquiry) Act, 1968 and the Judges (Inquiry) Rules, 1969 and pointed out that the Judges of the Supreme Court and the High Court exercise vast powers under the Constitution and the laws and that the very vastness of the powers and the immunity granted to them required, that Judges should be fearless and independent, but they should adopt a high standard of rectitude so as to inspire confidence in the public who may seek and who may want to seek redress in the Court. While it was necessary to protect the Judges from false and malicious attacks, it was also necessary to protect the fair image of the institution of judiciary from those Judges who conducted themselves in a manner as to blur that image.

The Committee then referred to the word “misbehaviour” used in Art. 124(4) and incidentally referred to the meaning of the word “misconduct” which, according to the Committee, appeared to be a stronger word but narrower than the word “misbehaviour”. It then considered the meaning of the word “proved misbehaviour” used in the Constitution and stated that these words were perhaps borrowed from sec. 72(ii) of the Australian Constitution. They referred to the opinions of Dr. Griffith, Solicitor General and of Mr. C.W. Pupincus QC, which were placed before the Senate in Australia in the case of alleged misbehaviour of Justice Murphy. The Committee then referred to an article by Wisley Brown (vol. 26 Harvard Law Review, p.684) as to what conduct would warrant impeachment of a Judge of the Federal Judiciary in USA. The Committee also referred to the cases in USA of Judge Steward F. La Motte Jr (FLA) 341 Southern Reporter (2d series 513), to the case of Judge Harry E. Claiborne (Report 99 – 688, 99<sup>th</sup> Congress 2<sup>nd</sup> Session) and to the cases of Judge Walter L Nicson Jr (101 – 36 or 101<sup>st</sup> Congress First Session), Judge Alcee L. Hastings (Report 100 – 810, 110<sup>th</sup> Congress 2<sup>nd</sup> Session) and of Judge Richard A Napolitano (317 F. Supp. 79 (1970)) and finally to the case of Stephen Chandler v. Judicial Council of 10<sup>th</sup> Circuit of the US (398 US 74).

One of the important propositions laid down by the Committee is related to the “standard of proof” required in impeachment proceedings. The Committee referred to an article by Chief Justice Ben F. Overton of the

Supreme Court of Florida, in the Chicago-Kent Law Review. In the US, the standard of proof was higher than preponderance of probabilities, namely, the standard required was “clear and convincing evidence” and that was the standard required in the case of ‘misbehaviour’ which was treated as an impeachable offence. The Committee felt that the standard in our country should be “proof beyond reasonable doubt”. It said:

“We think that the concept of clear and convincing evidence, delectable though it may be, introduces needless sophistication and refinement. The impeachment proceeding is, in the strict sense, sui generis, neither civil nor criminal, in nature. The gravity of the charge against a judge of the Supreme Court or a High Court, the uniqueness of impeachment proceedings, and the forbidding consequence if the charges are held proved, make it practical, safe and necessary to insist upon a high degree of proof. That degree of proof is, in our view, proof beyond reasonable doubt without any further refinement”.

They further added as follows:

“The Constitution, the Judges (Inquiry) Act and the Judges (Inquiry) Rules, give us an indication, however slight it may be, that an inquiry into the Act is thought to share the nature of quasi criminal proceedings. The word “investigation” usually associated with criminal cases is used both in Art. 124(4) of the Constitution and the

Judges (Inquiry) Act. The Committee is required by section 3(3) of the Act to frame definite ‘charges’ against the judge on the basis of which the investigation is proposed to be held. Section 6 uses the words ‘guilty’ and ‘not guilty’. Rule 7 of the Judges (Inquiry) Rules talks of ‘plea of judge’ and again uses the words ‘guilty’ and ‘not guilty’. In our view, the use of the words ‘investigation’, ‘charge’, ‘plea’, ‘guilty’ and ‘not guilty’, all of which are ordinarily associated with criminal proceedings, do inform us of the quasi criminal nature of the proceedings”.

“In fact, as far back as 1870, the Privy Council issued a Memorandum of the removal of Colonial judges where it described the proceeding for removal as quasi criminal”.

Finally, the Committee laid down the following propositions as applicable for inquiry under Art. 124(4):

“(1) The word “misbehaviour” as applicable to judges of the Supreme Court and the High Courts, in the context of Articles 124(4) and (5) and other relevant provisions of the Constitution, means conduct or a course of conduct on the part of a judge which brings dishonour or disrepute to the judiciary as to shake the faith and confidence which the public reposes in the judiciary. It is not confined to criminal acts or to acts prohibited by law. It is not confined to acts

which are contrary to law. It is not confined to acts connected with the judicial office. It extends to all activities of a judge, public or private.

(2) The act or omission must be wilful. The wilful element may be supplied by culpable recklessness, negligence, disregard for rules or an established code of conduct. Even though a single act may not be wilful, series of acts may lead to the inference of wilfulness.

(3) Monetary recompense would not render an act or omission anytheless ‘misbehaviour’ if the person intentionally committed serious and grave wrongs of a clearly unredeeming nature and offered recompense when discovered.

(4) ‘Misbehaviour’ is not confined to conduct since the judge assumes charge of the present judicial office. It may extend to acts or omissions while holding prior judicial office, if such act or omissions makes him unworthy of holding the present judicial office.

(5) The standard of proof is proof beyond reasonable doubt and not a balance of probabilities.

(6) The ‘misbehaviour’ must be held proved accordingly by the Inquiry Committee constituted under the Judges (Inquiry) Act.

(7) The judge against whom an inquiry is being held is under a constitutional obligation to cooperate with the inquiring authority and not to raise petty-fogging objections to obstruct the inquiry in which case an adverse inference may be legitimately drawn against him.”

Thus, the above discussion from the Report of the Sawant Committee sufficient light on the importance of judicial independence, its vastness and hence the need for accountability and as regards to what amounts to 'misbehaviour' and as to the 'standard of proof' required in proceedings which are quasi-criminal in nature and the proof must be the 'proof beyond reasonable doubt'.

(A) The first judgment: Sub-Committee on Judicial Accountability v. Union of India, 1991 (4) SCC 699: effect of dissolution of Lok Sabha:

The first judgment was rendered on October 29, 1991 by a Constitution Bench consisting of B.C. Ray, L.M. Sharma, M.N. Venkatachaliah, J.S. Verma and S.C. Agrawal, JJ. We have already mentioned that the main issue in this case filed by the Sub-Committee on Judicial Accountability was whether on the dissolution of the 9<sup>th</sup> Lok Sabha, the motion introduced in that Lok Sabha by 108 Members of Parliament and the admission of the Motion, lapsed.

B.C.Ray J, speaking for the Supreme Court laid down the following broad principles. He stated that the parliamentary proceeding starts only after the report is submitted by the Committee appointed by the Speaker pursuant to the Motion, that the earlier Acts of admitting the Motion, the reference to the Committee and the proceedings before the Committee were not part of the parliamentary proceeding and hence they would not lapse. The Supreme

Court also pointed out that use of the word ‘Motion’ at the stage of admission of Motion used in sec. 3 of the 1968 Act was not to be confused with a regular Motion within parliamentary procedure and, at the initial stage before the report was submitted, a Motion only meant a “complaint or an allegation”. The Court stated that the 1968 Act and the Rules framed thereunder supersede any rules made under Art. 118 of the Constitution and that the latter Article deals with the rules of procedure framed by each House of Parliament.

The above are the broad conclusions arrived by the Supreme Court. We shall now refer to the relevant discussion in this case.

In the above Judgment, the Supreme Court referred (see para 16) to the fact that the rule of law was a basic feature of the Constitution, and that the independence of judiciary was an essential attribute to the rule of law. Art. 124(2) and 217(1), required, in the matter of appointment of judges of the High Court and Supreme Court consultation with the Chief Justice of India and Chief Justice of the High Court. These provisions also ensured fixity of tenure of office of the judge. The Constitution protects the salaries of the judges. Art. 121 provides that no discussion shall take place in Parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties except on a motion for presenting the address to the President praying for the removal of a judge. Art. 124(4) and 124(5) afford protection against premature determination of the tenure. Art.

124(4) says that a judge of the Supreme Court shall not be removed from his office except on the ground of “proved misbehaviour or incapacity”. All these provisions should be harmoniously construed. While so construing, the law and procedure for removal of judges in other countries could provide the background and the position in comparative view, but the solution must be found within our constitutional scheme. No doubt, a comparative idea was good for providing a proper perspective for the understanding and interpretation of the constitutional scheme. The Supreme Court then referred to the procedure in UK and in Canada and Australia. It referred to the case of inquiry against Justice Leo Landreville of the Supreme Court of Ontario, Justice Murphy in Australia and Justice Vasta of the Supreme Court of Queensland. The Court referred to the views of Justice L.J. King, Chief Justice of the Supreme Court of South Australia (in “Minimum Standards of Judicial Independence”, 1984 (58) ALJ 340) to the effect that removal by address by Parliament was extremely rare because in most cases the concerned judge would resign. Further, as the standards of judicial conduct that have been set out generally are very high, the removal by the Legislature was a rarity. The Supreme court also referred to an article by Justice M.H. McLelland of the Supreme Court of New South Wales (‘Disciplining Australian Judges’, 1990 (64) ALJ 388) wherein it was suggested that there should be legislation laying down the procedure before a tribunal, that a tribunal constituted should be under the supervisory jurisdiction of the High Court and that there should be an appeal from the tribunal to the High Court. The Supreme Court also pointed out that in Australia, a Constitution

Commission was set up for suggesting reforms and that that Commission suggested the establishing of a National Judicial Tribunal to determine what type of acts found by the Tribunal, would be amounting to ‘misbehaviour or incapacity’ warranting removal (see “From the Other Side of the Bar Table: An Advocate’s View of the Judiciary”, 1987 10 University of New South Wales Law Journal 179).

B.C.Ray J, then referred to the removal procedure in the United States for impeachment on the ground of “conviction for treason, bribery or other high crimes or misdemeanors” in the federal system. The majority of the States also have similar provisions for removal of judges of States. In some States, provision was made for removal by an address of the Governor to both Houses of Legislatures or by a Joint Resolution of the Legislatures. In some States the removal power was vested in the State Supreme Court while in some States special courts were provided to hear removal charges. In the State of New York, the Court was known as the “Court on the Judiciary” (see Henry J Abraham, *the Judicial Process*, 3<sup>rd</sup> Ed, p. 45). A federal law was passed in 1932 (incorporated in Title 28 of the US Code) and that law was replaced by another Act in 1939 which made provision for Judicial Councils. That law was replaced by the Judicial Councils Reform and Judicial Conduct and Disability Act, 1980. In this Act, Judicial Councils were empowered to receive complaints against judicial conduct which was “prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of

office by reason of mental or physical disability”. That Act prescribed an elaborate judicialised procedure for processing such complaints within the administration system of the Judicial Councils concerned and the Judicial Conference of US. So far as States were concerned, 50 States had laws for disciplining their judges and in each, a variously constituted commission was organized in either a single tier or in many tiers depending upon the perceived desirability of separating fact finding from judgment and recommendation tasks. The Commission’s recommendations would be transmitted to the State Supreme Court for its authoritative imprimatur, except in States where they were to be received by the legislatures that retained judicial removal power (see Robert J. Janosik, Encyclopedia of the American Judicial System, Vol. II., p. 575-78).

B.C. Ray J then referred (paras 27 to 32) to the directive regarding “judicial removal and discipline” contained in the Minimum Standards of Judicial Independence, passed in the Conference of the International Bar Association at its 19<sup>th</sup> Biennial Conference at New Delhi in October 1982 to the following effect:

“27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.

28. The proceedings for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the Disciplinary

Tribunal. Judgments in disciplinary proceedings whether held in camera or in public, may be published.

29.(a) The grounds for removal of judges should be fixed by law and shall be clearly defined.

(b) All disciplinary action shall be based upon standards of judicial conduct promulgated by law or in established rules of court.

30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

31. In systems where the power to discipline and removal of judges is vested in an institution other than the legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.”

(emphasis supplied)

B.C. Ray J then referred to the First World Conference on the Independence of Judges held at Montreal on 10<sup>th</sup> June, 1983 and to the following clauses in the Universal Declaration on the Independence of Justice which concerned “discipline and removal of national judges”:

“2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33(a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and Selected by the judiciary.

(b) However, the power of removal may be vested in the legislature by impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33(a).....

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36 With the exception of proceedings before the legislature, the proceedings for discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37 With the exception of proceedings before the legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.

2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status.” (emphasis supplied)

B.C. Ray J then referred to para 17 to 20 of the Basic Principles on the Independence of the Judiciary, insofar as they related to discipline, suspension and removal, passed by the 37<sup>th</sup> UN Congress on the Prevention of Crime and Treatment of Offenders held at Milan during August 26 to September 6, 1985:

“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

The above resolution was endorsed by the UN General Assembly on November 9, 1985 and 13<sup>th</sup> December, 1985.

The Supreme Court pointed out that prior to the commencement of the Constitution of India, sec. 200(2) of the Government of India Act, 1935 required a decision of the disciplinary Committee of the Privy Council on the question of removal of a judge. That would mean that the decision was to be by a judicial body.

The Supreme Court then went into a further important aspect as to whether in India the process of removal was purely a political process or whether it was a judicious blend of the political and judicial process of the removal of judges. B.C. Ray J pointed out, after referring to views of Wisley Brown (the Impeachment of the Federal Judiciary, (1912-1913), (Harvard Law Review 684) and of Prof. Mauro Cappelletti in his book “The Judicial Process in Comparative Perspective”, (1989) that the procedure in US was political but that in India, it was a blend of political and judicial processes. It observed “but the constitutional scheme in India seeks to achieve a judicious blend of the political and judicial processes for the

removal of judges. Though it appears at the first sight that the proceedings of the Constituent Assembly relating to the adoption of clauses (4) and (5) of Art. 124 seem to point to the contrary and evince an intention to exclude determination by a judicial process of the correctness of the allegations of misbehaviour or incapacity on a more careful examination this is not the correct conclusion.....”

In this context, B.C. Ray J referred to the speeches of Sir Alladi Krishnaswamy Ayyar in the Constituent Assembly of 29<sup>th</sup> July, 1947, of Mr. K. Santhanam and of the proposal of Mr. M. Ananthasayanam Ayyangar only for a judicial tribunal (which was rejected because Sir Alladi proposed a combination of judicial and political process). The proceeding was not, therefore, exclusively judicial. In other words, the inquiry part of it could be judicial while the removal part would be Parliamentary.

The Supreme Court referred to the procedure for issue of notice of motion and as to whom the Speaker or the Chairman, as the case may be, may consult before admitting the Motion. Sec. 3 permits consultation with ‘persons’. If the motion is admitted, the Speaker/Chairman shall have to keep the motion pending and then constitute the Committee. Under sec. 6 (2), if the Report of the Committee contains a finding that the judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in subsection (1) of section 3, shall, together with the Report of the Committee, be taken up for consideration by the House or the Houses of

Parliament in which it is pending. The Supreme Court pointed out that the effect of sec. 3 and sec. 6(2) is as follows:

“The effect of these provisions is that the motion shall be kept pending till the Committee submits its report and if the Committee finds the judge guilty, the motion shall be taken up for consideration. Only one motion is envisaged which will remain pending. No words of limitation that the motion shall be kept pending subject to the usual effect of dissolution of the House can or should be imported”.

The Supreme Court further pointed out that the procedure indicated in the 1968 Act overrides any rules made by the House under Art. 118. While the latter article may enable the motion to lapse on dissolution, no such thing was contemplated by the Act of 1968 which law was passed under Art. 124 (5). In India, the notion of parliamentary sovereignty was no longer applicable. This it said was clear from the observations of the Supreme Court in Special Reference No.1 of 1964 case (Keshav Singh’s case, 1965 (1) SCR 413) where Gajendragadkar CJ observed:

“... though our legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution”.

and

“In a democratic country governed by a written Constitution, it is the Constitution which is supreme and sovereign”. (emphasis supplied)

The Supreme Court then considered the meaning of the word “proved” in the clause “proved misbehaviour and incapacity” which occur in Art. 124 (4). The Court explained that no motion for presenting the address referred to the Art. 121 or 124(4) can be made “until the allegations relating to misbehaviour or incapacity have first been found to be proved in some forum outside either Houses of Parliament”. No motion for removal of a judge would be permissible under Art. 124(4) and the Houses of Parliament would not be brought into the picture “till some authority outside the two Houses of Parliament has recorded a finding of misbehaviour or incapacity”. This it said would mean that both judicial and parliamentary procedures are harmonized and blended. Art. 121 suggests that the bar on discussion in Parliament with respect to the conduct of any Supreme Court judge is lifted “upon a motion for presenting an address to the President praying for the removal of a judge as hereinafter provided”. The word motion and the clause as hereinafter provided are obvious reference to the motion referred to in clause (4) of Art. 124 which in turn, imports the concept of Motion in regard to “proved” misbehaviour or incapacity, i.e. after it was ‘proved’ outside the Legislature.

The provision in Art. 124(5) for the making of a law was not an enabling provision but incorporated a condition precedent on the power of removal by Parliament. The Supreme Court then held

“.....in this connection, the parliamentary procedure commences only after proof of misbehaviour or incapacity in accordance with the law enacted under clause (5), the machinery for investigation and finding of proof of the misbehaviour or incapacity being statutory, is governed entirely by provisions of the law enacted under clause (5). This also harmonises Art. 121. The position would be that an allegation of misbehaviour or incapacity by a judge has to be made, investigated and found proved in accordance with the law enacted by Parliament under Art. 124(5) without the Parliament being involved up to that stage; on the misbehaviour or incapacity of a judge being found proved in the manner provided by that law, a motion for presenting an address to the President for removal of the judge on that ground would be moved in each House under Art. 124(4); on the motion being so moved after the proof of misbehaviour or incapacity and it being for presenting an address to the President praying for removal of the judge, the bar on discussion contained in Art. 121 is lifted and discussion can take place in the Parliament with respect to the conduct of the judge; and the further consequence would ensue depending on the outcome of the motion in a House of Parliament. If, however, the finding reached by the machinery provided in the enacted law is that the allegation is not

proved, the matter ends and there is no occasion to move the motion in accordance with Art. 124(4)”. (emphasis supplied)

The Supreme Court further pointed out that the word “proved” also denotes proof in the manner understood in our legal system, i.e. as a result of a judicial process. The policy appears to be that the entire stage upto the proof of “misbehaviour or incapacity”, beginning with the initiation of investigation on the allegation being made, is governed by the law enacted under Art. 124(5) and in view of the restrictions provided in Art. 121, that machinery has to be outside the Parliament and not within it. If this be so, it is a clear pointer that the Parliament neither has any role to play till misconduct or incapacity is found proved nor has it any control over the machinery provided in the law is enacted under Art. 124(5). The Parliament comes in the picture only when a finding is reached by that machinery that the alleged misbehaviour or incapacity has been proved. The initial allegation has been described as a motion because it is a complaint made to the Speaker or Chairman and is made by specified number of Members of Parliament. On receiving a complaint under sec. 3, if the Speaker/Chairman forms an opinion that there is a prima facie case for investigation, he will constitute the judicial Committee as prescribed; if parliamentary process and the judicial process are separate, the Parliament process starts only after the judicial body records a finding of proved misbehaviour or incapacity and reports it to the Speaker/Chairman. This is clear when clause (4) of Art. 124 is construed with Art. 317 in relation to the removal of members of the Public

Service Commission where the word 'proved' is not used. The use of the word motion in sec. 3 to indicate the process of investigation and proof does not make it a motion in the House notwithstanding with the use of that expression in sec. 3 and 6. If the allegation is not proved, the Speaker need not commence the process under clause (4) of Art. 124. The Speaker is, therefore, a statutory authority under the Act, chosen because the further process is parliamentary and the authority to make the initial complaint being given to the Members of Parliament, the complaint is described as motion. The Court then observed as follows:

“Indeed, the Act reflects the constitutional philosophy of both the judicial and political elements of the process of removal. The ultimate authority remains with the Parliament in the sense that even if the Committee for investigation records a finding that the judge is guilty of the charges it is yet open to the Parliament to decide not to present an address to the President for removal. But if the Committee records a finding that the judge is not guilty, then the political element in the process of removal has no further option. The law is, indeed, a civilized piece of legislation reconciling the concept of accountability of judges and the values of judicial independence.

The Speaker, while was admitting the motion on constituting a Committee to investigate on alleged grounds of misbehaviour or

incapacity does not act as part of the House. The House does not come into the picture at that stage.” (emphasis supplied)

The Supreme Court then referred to the principles of natural justice at the stage of admitting motion as follows: It stated that at the stage under sec. 3 when the Speaker admits a motion, a judge is not, as a matter of right entitled to such notice. But this does not prevent the Speaker if the facts and circumstances place before him indicate that hearing is appropriate and he may give a hearing.

The Court then referred to an argument that by resort to a judicial remedy (under Art. 226 or Art. 32) such as the one filed in this case by the Sub-Committee on Judicial Accountability, the judge who is being investigated can be restrained from exercising judicial functions. The Supreme Court pointed out that the ‘judiciary by itself’ could not do so. It may be that as a matter of propriety the judge may voluntarily not function. While, under Art. 317(2), there was specific provision in the Constitution for ‘suspension’ which precluded a Member of the Public Service Commission from functioning while inquiry was going on, there was no such power of suspension in Art. 124(4). The Court observed:

“the absence of a legal provision as under Art. 317(2)..... to interdict the judge ..... till the process of removal under Art. 124(4) is completed does not necessarily indicate that the judge shall continue to

function during that period. That area is to be covered by the sense of propriety of the learned judge himself and the judicial tradition symbolized by the views of the Chief Justice of India. It should be expected that the learned judge would be guided in such a situation by the advice of the Chief Justice of India, as a matter of convention unless he himself decides as an act of propriety to abstain from discharging judicial functions during the interregnum.... The Constitution while providing for the suspension of a Member of the Public Service Commission in Art. 317(2) in a similar situation has deliberately abstained from making such a provision in case of higher constitutional functionaries, namely, the Superior Judges and the President and the Vice-President of India, facing impeachment. It is reasonable to assume that the framers of the Constitution had assumed that a desirable convention would be followed by a Judge in that situation which would not require the exercise of a power of suspension.” (emphasis supplied)

(The Court did not have to deal with a law, if any made under Art 124(5) which may permit non-listing of cases).

The above discussion shows that several important principles of constitutional law were laid down by the Supreme Court in the first case in the context of Art. 124, 121, 217 of the Constitution and the Judges (Inquiry) Act, 1968. These principles are extremely relevant in the matter of discussion of the provisions of the Judges (Inquiry) Bill, 2005.

(B) The Second Judgment: Mrs. Sarojini Ramaswami vs. Union of India (1992)4 SCC 506.

We have already set out the circumstances under which and the relief for which this petition was filed by Mrs. Sarojini Ramaswami. She mainly sought a direction that a copy of the Report of the Sawant Committee may be furnished to Justice V. Ramaswami, even before it is discussed in Parliament.

The Supreme Court, after referring to the constitutional scheme and the provisions of the 1968 Act observed that the copy of the report could not be furnished till the report was placed for consideration by Parliament and an order of removal was passed by the President. In the course of the discussion, the Supreme Court laid down various legal principles. We shall refer to them presently.

At the stage of admitting the motion under sec 3(1) of the Act, the section contemplated that the Speaker/Chairman may either admit or refuse to admit the motion “after consulting such persons, if any, as may be available to him”. Interpreting these words, the Supreme Court observed that in this process of consultation it was reasonable to assume that one such person to be consulted would be the Chief Justice of India, who apart from being the head of the Indian judiciary, would also be the authority involved in the choice and availability of a sitting Judge of the Supreme Court and a sitting

Chief Justice of a High Court as members of the Committee constituted under sec 3(2) of the Act, in case the motion is admitted by the Speaker/Chairman.

The Supreme Court referred to Judges (Inquiry) Rules, 1969 and in particular to Rule 9 and stated that where a finding was given by the Committee that the Judge was “not guilty”, in case one member gave dissenting note that the Judge was “guilty”, then that finding need not be placed before the House whereas in a situation where a finding of “guilt” was given by two members and one member gave a finding of “not guilty”, then both the findings must be placed before the House. This was the effect of the Rules.

Where a finding of “not guilty” is given by the Committee, the entire process of removal comes to an end and it will not be permissible to start the Parliamentary procedure for removal against the Judge. It is only where a finding of “guilt” is given by the Committee and the report is placed before the House that the Parliamentary process starts. This indicates that the finding of “guilt”, if any, made by the Committee is “inchoate” until the motion, if it is based on the findings of guilt, is allowed as contemplated by Art 124. Even thereafter till the President issues an order of removal, no proceeding for judicial review can be initiated in a court of law before the order of removal, if any, passed. The reason is that even though there is a finding of “guilt” in the Report, Parliament may still not pass the motion for removal. The proceedings are statutory and judicial in nature before the

Committee till the report is placed in Parliament and only then the parliamentary or political procedure starts.

The procedure, as pointed out in the earlier judgment in Sub Committee on Judicial Accountability vs. Union of India (1991)4 SCC 699 is “a judicious blend of the political and judicial processes for the removal of Judges”. The different schemes for removal of Judges in other countries do not provide the answer to the problem in India though they may be of precedential value. They may be of some guidance.

Parliament does not substitute its finding for that of the Inquiry Committee. In case it decides not to adopt the motion by the requisite majority the motion for removal fails and the proceedings terminate. But in doing so, Parliament does not take the decision not to adopt the motion because it declines to accept and act on the finding of “guilt” recorded by the Committee. This Parliament does after debating the issues on the basis of the material before it (i.e. Report and matter referred to therein). It is at that stage, i.e. the stage of consideration of the Report and materials, that the Judge concerned will be given a copy of the report and an opportunity to submit his case as to why the finding should not be accepted.

In this context, the Supreme Court referred to the procedure followed by the Parliament in Australia in the case of Mr. Justice Vasta of the Supreme Court of Queensland. In that case, the Australian Prime Minister made it

clear that the Judge had to be given an opportunity during the proceedings in Parliament and that the Judge could appear personally or by his legal representative before Parliament, if he so wished. The relevant passage from the statement of the Prime Minister of Australia reads as follows:

“I believe that Mr. Justice Vasta has the right – and we have the duty to allow him – to address us, either personally or by his legal representatives, should he so wish”.

The Supreme Court further pointed out that it was only after the motion was passed that the misbehaviour is “deemed to be proved” as stated in sec 6(3) of the Act and till such time the findings of the Committee are inchoate.

While reiterating that the finding of “guilt” made by the Committee is not binding on Parliament, the Supreme Court also stated that while voting on the motion Parliament is not required to give any reasons if it chooses not to adopt the motion. Following are the relevant observations: (at page 553)

“Even though judicial review of the finding of “guilty” made by the Inquiry Committee may be permissible on limited grounds pertaining only to legality, yet the power of Parliament would not be so limited while considering the motion for removal in as much as the Parliament is concerned to not adopt the motion in spite of the finding of “guilty”

made by the Committee on a consideration of the entire material before it which enables it to go even into probative value of the material on which the finding is based and to decide the desirability of adopting the motion in a given case the Parliament decides by voting on the motion and is not required to give any reason for its decision if it chooses not to adopt the motion.” (emphasis supplied)

From the above passage, it is clear that according to the Supreme Court, while the scope of judicial review is limited to legality of reasons in the Report, the scope of jurisdiction of Parliament, while considering the report is wider and is not confined to the legality of the reasons but can extend even to examine the probative value of the evidence, with the additional advantage that Parliament need not give any reason for not accepting the motion. This is in contrast to any challenge to the report in a court of law where the Court has to give reasons. This was one more reason why it should be in the interest of the Judge not to challenge the Report in a Court soon after it was made and it would be more advantageous to him to account the outcome of the parliamentary process and, in case it goes against him, he can challenge the removal after the President passes the order of removal. This is so even though the Committee may have the trappings of a Court but still its decision was an inchoate one. If the Committee decided that a Judge is “not guilty” that decision would be final and where it is so decided, it would be conclusive and then the entire process of inquiry terminates and the parliamentary process does not start and has to be closed.

The Report of a Committee being inchoate, the Inquiry Committee cannot be treated as a “Tribunal” for the purpose of Art 136 of the Constitution. The Report of the Committee holding the Judge guilty cannot be challenged at that stage before it is submitted to the Speaker/Chairman and the Act and the rules deliberately do not provide for a copy of the Report to be given to the Judge as soon as the report was filed by the Committee.

The Supreme Court explained that the submission of the Judge that judicial review should be given at the stage of the report before it is submitted to the Speaker/Chairman and not after the removal order was passed because once it was accepted by Parliament, it becomes a political question, cannot be accepted. The submission is not correct in as much as under Art 124 read with the 1968 Act the procedure is partly judicial under the statute and partly political in Parliament, after the report. In the United States, judicial review after impeachment was barred because the procedure in the Senate is treated as political, Senate being the sole authority and the inquiry being made under the rules made by the Senate. There the inquiry by the committee is treated as part of the a political process. Such a situation was not contemplated by Art 124 read with the provisions of the 1968 Act.

The Supreme Court observed that currently the trend was that even political questions can be debated in courts in some circumstances. But

where it is partly judicial by force of statute and therefore political, there was no difficulty in accepting judicial review after the removal. It stated (p. 569):

“The above discussion indicates the modern trend to accept judicial review in certain situations with the circumscribed limits even where the entire process is political since the “political question doctrine” as discussed in Powell (395 US 486 (1969) permits this course. In such cases where the entire process is political, judicial review to the extent permissible on conclusion of the political process is not in doubt. There appears to be no reason in principle why judicial review at the end of the entire process of removal of a Judge in India, where it is a composite process of which the political process is only a part, cannot be exercised after conclusion of the entire process including the political process.”

The Supreme Court then referred to Art. 122 of the Constitution which prohibits the courts from inquiring into proceedings of Parliament but pointed out that in view of the provisions of Art. 124(4) and (5) read with the provisions of the Judges (Inquiry) Act, 1968, and the Judges (Inquiry) Rules, 1969, the prohibition is lifted and the Judge has to be given an opportunity before the Houses of Parliament. A violation of the above principle (of natural justice) would constitute illegality and would not be immune from judicial scrutiny. This is in accord with the principles laid down in Keshav Singh’s case, 1965 (1) SCR 413. In Sub-Committee on Judicial

Accountability v. Union of India, 1991 (4) SCC 699 the observations are to the following effect: “A law made under Art. 124(5) will override the rules made under Art. 118 and shall be binding on both the Houses of Parliament. A violation of such a law would constitute illegality and could not be immune from judicial scrutiny under Art. 122(1)”.

But the proceedings can be questioned only if and after the President passes an order for removal. Verma J (as he then was) summarized the law as follows (p.572-3):

“95. In sum, the position is this: Every Judge of the Supreme Court and the High Courts on his appointment is irremovable from office during his tenure except in the manner provided in clauses (4) and (5) of Art. 124 of the Constitution of India. The law made by the Parliament under Art. 124(5), namely, the Judges (Inquiry) Act, 1968 and the Judges (Inquiry) Rules, 1969 framed thereunder, is to be read along with Art. 124(4) to find out the constitutional scheme adopted in India for the removal of a Judge of the Supreme Court or a High Court. The law so enacted under Art. 124(5) provides that any accusation made against a sitting judge to enable initiation of the process of his removal from office has to be only by not less than the minimum number of Members of Parliament specified in the Act, all other methods being excluded. On initiation of the process in the prescribed manner, the Speaker/Chairman is to decide whether the accusation

requires investigation. If he chooses not to act on the accusation made in the form of motion by the specified minimum number of Members of Parliament, the matter ends there. On the other hand, if the Speaker/Chairman, on a consideration of the materials available and after consulting such persons as he thinks fit, forms the opinion that a prima facie case for investigation into the accusation against the Judge is made out, he constitutes a Committee of judicial functionaries in accordance with section 3(2) of the Act. If the Inquiry Committee at the conclusion of the investigation made by it records a finding that the Judge is 'not guilty', the process ends with no one, not even the Parliament, being empowered to consider much less question the finding of 'not guilty' recorded by the Inquiry Committee. If the finding made by the Inquiry Committee is that the Judge is 'guilty', then the Parliament considers the motion for removal of the Judge along with the Committee's report and other available materials including the cause, if any, shown by the Judge concerned against his removal for which he has to be given an opportunity after submission of the report to the Speaker/Chairman under section 4(2) of the Act. To be effective, this opportunity must include supply of a copy of the report to the Judge concerned by the Speaker/Chairman while causing it to be laid before the Parliament under section 4(3). If the Parliament does not adopt the motion for removal of the Judge, the process ends there with no challenge available to any one. If the motion for removal of the Judge is adopted by the requisite majority by the Parliament

culminating in the order of removal by the President of India under Art. 124(4) of the Constitution, then only the Judge concerned would have the remedy of judicial review available on the permissible grounds against the order of removal. The statutory part of the process, by which a finding of guilty is made by the Inquiry Committee, is subject to judicial review as held in Sub-Committee on Judicial Accountability but in the manner indicated herein, that is, only in the event of an order of removal being made and then at the instance of the aggrieved Judge alone. The Inquiry Committee is statutory in character but is not a Tribunal for the purpose of Art. 136 of the Constitution.”

(emphasis supplied)

After stating so, the learned judge observed that the above view is in complete accord with the opinion of the majority in Sub-Committee on Judicial Accountability v. Union of India that the statutory part of the process of removal of a judge is subject to judicial review.

The third Judgment : Krishnaswamy v. UOI: 1992 (4) SCC 605

We have already pointed out that one Krishnaswamy who was a Member of Parliament filed Writ Petition 149 of 1992 in the Supreme Court praying for quashing the proceedings of the Justice Sawant Committee.

Simultaneously, one Raj Kanwar also filed WP 140 of 1992 stating that the Justice Sawant Committee violated Art. 145(3) of the Constitution.

Both the writ petitions challenged the earlier judgments on Sub-Committee on Judicial Accountability and sought a fresh consideration of the points decided in that case.

The Supreme Court rejected these contentions on preliminary grounds that the petitioners have no locus standi. This was the view of the majority. There was also a minority judgment but it is not necessary to deal with it in view of the opinion of the majority.

The Fourth judgment: Lily Thomas vs Speaker Lok Sabha, (1993) 4 SCC 234:

The petitioner Ms. Lily Thomas moved the Supreme Court under Art. 32 seeking a declaration that the Motion of Impeachment against Justice V. Ramaswami of the Court moved in the Lok Sabha for his removal from the office of Judge, should be deemed to have been carried by construing the expression, 'supported by a majority' in Art.124(4) in such a manner that any member who abstained from voting should be deemed to have supported the Motion. It was also claimed that the Supreme Court may recommended for repeal of Art. 124(4) as it had been rendered unworkable and non-functional and that it should be substituted by an appropriate provision.

The petition was dismissed and, in that context, the Supreme Court held that the proceedings for address are partly judicial and partly political in character. The statutory process appears to start when the Speaker acts under the 1968 Act and comes to an end when the Judges Committee appointed by the Speaker submits its report to the Speaker. The debate on the Motion thereafter in Parliament and discussion and the voting is political in nature. The right to vote implies a right also to remain neutral. Hence those Members who abstained cannot be considered to have voted in favour of the motion for removal.

These are the Constitutional principles laid down by the Supreme Court in the four cases relating to Justice V. Ramaswami and have to be borne in mind while dealing with the provisions of the Bill of 2005.

## CHAPTER VII

### REMOVAL PROCEDURE IN THE UNITED KINGDOM

The provisions concerning removal of Judges in relation to England and Wales are somewhat different from those applicable for Scotland. So far as the Judges of superior courts in England and Wales are concerned, the relevant provisions are contained in sec 11(3) of the Supreme Court Act, 1981. Section 11(3) provides that a person appointed as Judge of the Supreme Court “shall hold that office during ‘good behaviour’, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament”. A similar provision applicable to Judges in the House of Lords (Lords of Appeal in Ordinary) is contained in sec 6 of the Administrative Jurisdiction Act, 1876. (There is an extensive discussion by Prof. Shimon Shetreet in ‘Judges on Trial’, (1976) Ch. IV, Part III p. 87).

Presently the Constitutional Reform Act, 2005 makes provisions relating to discipline of Judges of the superior Courts upto the Judges of the Court of Appeal. This Act will be referred to in detail in the latter part of this chapter.

At Common Law: impeachment, writ of scire facias, and address by Parliament

At Common Law, the grant of an office during ‘good behaviour’ created an office for life which could be terminated only by the death of the grantee or upon breach of ‘good behaviour’ (see Coke on Littleton, para 42a). The grantee held the office under the condition that he behaved well. Upon breach of this condition, the grantor was entitled to terminate the office. The removal of persons holding office during ‘good behaviour’ could be effected by judicial proceedings commenced by a writ of *scire facias* or upon criminal conviction. Further under sec 12 of the Administration of Justice Act, 1973 the office of a Judge who was incapacitated from resigning, may be vacated by the Lord Chancellor upon medical certificate.

Prior to the Act of Settlement, 1700, under the Common Law a judicial office held during ‘good behaviour’ could be terminated by impeachment by judicial proceedings commenced by a writ to repeal the Letters Patent or upon criminal conviction (see vol. 8 Halsbury, Laws of England, page 680, 4<sup>th</sup> Ed. 1974). However, the Act of Settlement made a change and established the security of judicial tenure and provided that Judges held office during good behaviour, “but upon the Address of both Houses of Parliament there may be leave to remove them”, that is, upon an Address for the removal of a Judge, passed by each House of Parliament and presented to the Crown whereupon the Crown may lawfully remove the Judge.

The effect of this provision of the Act of Settlement, 1700, according to Prof. Shelrat, remained controversial for three centuries. One view was that

the Act of 1700, by establishing security of judicial tenure and a new mechanism of removal by address, excluded all other methods of removal existing prior to the Act such as impeachment and that only the Chancellor can take initiative. The other view was that the Act established an additional remedy by Address which could be invoked when the misbehaviour complained of did not constitute a legal breach of the conditions on which the office was held, (requiring a writ of *scire facias*).

The Preamble to the Act of Settlement, 1700 stated that the Act was “an Act for the further limitation of the Crown”. This gave the meaning that the Act of Settlement did not exclude the power of impeachment which was in existence earlier. Prior to the Act, the Crown could have proceeded against Judges by filing a writ of *scire facias* to repeal the Letters Patent or by criminal information. However, according to Prof. Shimon Shetreet (pages 90-115) the generally accepted interpretation of the Act was that while Judges should hold office during ‘good behaviour’ and cannot be removed by the Crown except for breach of good behaviour, established in *scire facias* proceedings, the Parliament enjoyed an unqualified power of removal. The wording of the Act shows that the first part of the section provides for tenure during ‘good behaviour’ while the second part begins with the word “but” and establishes the power of removal by Address. This word ‘but’ disconnects ‘good behaviour’ and ‘Address’. This wording points strongly against regarding the ‘power of removal by Address’ as an incident to the tenure during “good behaviour”. The interpretation is that there is a

permanent independent and unqualified power of removal. Thus Parliament is not limited to considerations of “good behaviour” in its technical sense.

This view, according to Prof. Shetreet, is supported by the debates in Parliament. Thus, after the Act of Settlement, 1700, judges would hold office during good behaviour but can be removed by Address in Parliament, impeachment, *scire facias* or criminal conviction.

Even so, it is not clear whether today judicial removal by *scire facias* or by other judicial proceedings is still possible, the generally accepted view today is and probably has been for over centuries, that Judges cannot be removed except upon an Address. Prof. Shetreet states that in the 140 years preceding the publication of his book in 1976, it has been generally accepted that the Address is the exclusive mechanism of removal. This is based on constitutional practice. Prof. Hood Phillips was of the view that now it was mandatory for the Crown to be go by the convention of an Address. While Judges hold office during good behaviour, Parliament enjoys the unqualified power of removal not only for misconduct but for any other reason. Thus Parliament’s power is not subject to any statutory limitations.

It is also the view in United Kingdom that an action of Parliament upon a motion for an Address ousted the jurisdiction of the Courts. (Merricks vs. Heathcoat – Amory (1955(1) Chancery p. 567).

Parliament has not intervened when complaints against a Judge concerning matters of court practice and procedure or when the decision was reversed in the Appellate Court. Situations might arise in which judicial behaviour was short of a criminal offence and outside the judges' judicial duties and in such situations, the conduct of a Judge has been discussed by Parliament and is then the subject matter of an action in the Court. Thus when a Judge in his private capacity attacks any other person which induced an MP to move for an Address, and later on if an action in tort is brought against the Judge, the Court would have full jurisdiction.

Under the Common Law prior to the Act of Settlement, 1700, the Crown could suspend Judges even if they hold office during good behaviour. There are two recorded cases where the Crown exercised this power, in the case of Judge John Walter and Judge John Archer. In both cases, the Judges continued to receive their emoluments and retained their entitlement. Suspension meant that they could not exercise their official functions. Prof. Shetreet states (ibid page 111) that the Act of Settlement, 1700 abolished this prerogative power in respect of Judges. He says that although in law it is quite clear that a Supreme Court Judge cannot be suspended, in practice, he would certainly be expected to take leave of absence pending a criminal trial or proceedings before Parliament for misbehaviour involving moral blame. This is necessary because permitting him "to dispense justice as a Judge of the land as usual with grave accusation over his head" is likely to destroy public confidence in the impartiality of judicial proceedings before him in

particular and of the judicial process in general. (Judge Kernich K.S.1825, Vol.13, Parliamentary Debates, 2000 series, 1138 Art. 1149)

Prof. Shetreet states (ibid page 112) that if criminal proceedings are instituted against a Judge for an offence involving moral blame, violence or dishonesty and the Judge refuses to take the leave of absence pending the trial (or resign his office), it is generally believed that administrative arrangements would be made to ensure that no cases are assigned to his list. This would probably be done by the Head of the Division instructing the Clerk incharge of the cause list not to prepare any list for the particular Judge. Similar arrangements will apparently be made if a Judge loses his faculties because of old age or illness but still refuses to retire. In the 1950s, a Judge upon his failing to respond to the pressure put upon him was not assigned any work and finally he retired. Prof. Shetreet states that this unrecorded case reminds one of the case in US in Chandler's case (1969) 398 US 74 (see also (1965) 382 US 1003), where the Federal Judge unsuccessfully challenged the order of the Judicial Council which directed that no cases be shown as assigned to him, including those previously listed.

Prof. Shetreet however states (ibid p 113) that the Judge, no doubt, retains his judicial power even if cases are not assigned to him and if an aggrieved individual comes to him in chambers, or at home, or in the street and asks for injunction, he has full jurisdiction to grant him the proper judicial remedy. The Judge retains his title and still receives his salary. The

only thing he cannot do because of the administrative arrangements, is to sit regularly on the Bench to hear cases in his list. Neither the clerk nor the Head of the Division has any statutory duty to assign him judicial work if the Judge has no right to demand allocation of cases and the Head of the Division and the clerk have no duty to assign cases to him, the Judge is not entitled to a judicial remedy. This is because an individual who has not suffered an injustice is not entitled to a judicial remedy. Similarly, the Judge can obtain no judicial remedy if he were only assigned very minor cases to be heard in chamber. There is an analogy in the case of a member of the Brighton Council whose name was struck off from all the committees (Manton vs. Brighton 1951 (2) QB 393).

This is the position under common law and after the Act of Settlement, 1700 and after the Supreme Court Act, 1981.

### Recent developments in UK

In July, 1994, the Lord Chancellor stated that “misbehaviour could include: conviction for drunk driving, any offence involving violence, dishonesty or moral turpitude and a substantiated complaint of behaviour likely to cause offence on religious or racial grounds or which amounts to sexual harassment”. (see Eddey and Darbyshire on the English Legal System, 7<sup>th</sup> Ed. 2001 p. 289).

Till recently, there has been no formal machinery for making complaints against Judges in the United Kingdom other than the procedure of impeachment or Address for removal. Sometimes Appellate Courts have criticized Judges for improper behaviour such as falling asleep, making impatient gestures and for interrupting excessively or for incompetence and for commenting in the press about a case a Judge is trying (see Rodney Brazier *Constitutional Practice : The Foundations of British Government*, 3<sup>rd</sup> Edition 1999 p. 289).

#### JUDICIAL CORRESPONDANCE UNIT & PROTOCOL: 1998

In 1998 the Lord Chancellor set up the Judicial Correspondence Unit with specific responsibilities for handling complaints against Judges. The Unit is under the ambit of the Judicial Group in the Lord Chancellor's Department. Complaints about the handling of cases by the Court are generally are dealt with by the Customs Service Unit of the Court's Service. The Court's Service is an executive agency of the Lord Chancellor's Department.

(see *Mechanism for Handling Complaints against Judges* by Mr. Chau Pak – Kwan, Research & Library Division, Parliamentary Council Secretariat, Hong Kong, 2002).

In recent years the Unit has been expanded to meet the growing demand for an increasing rigorous style of investigation. The staff of 13

members cost around 600 thousand pounds. The budget allocation for overheads in 2002-2003 was 53 thousand pounds.

There is a Protocol used by the Unit when dealing with the complaints against Judges. The Lord Chancellor only considers complaints about personal conduct but not about judicial decisions. The term “personal conduct” means a Judge whose behaviour towards litigants, defendants or others in Court and a Judge’s behaviour or manner when dealing with a case. Personal conduct may include matters such as the making of inappropriate personal or offensive remarks by a Judge during the course of a trial, which do not form part of his or her decisions in the case and behaviour by a Judge outside Court which is inappropriate and would tend to bring the judiciary into disrepute.

Complaints about alleged discourtesy, discrimination or bias in the dealing of a case may be amenable to judicial appeal processes, but may also be treated as complaints about judicial conduct, particularly where the allegation is that the act of discrimination on racial or sexual grounds has caused offence to the complainant.

Complaints are sent directly to the Unit or through a Member of Parliament depending on the choice of the complainant and the nature of the complaint. There is an initial screening process. Complaints relating to merits of judicial decisions will be dismissed. Complaints will also be

refused if the hearing complained of took place long ago and the judge concerned cannot reasonably be expected to remember the case such as it was heard more than two years ago.

The first stage of investigation is to seek the complainant's willingness to place the complaint before the Judge concerned for comments. Unless this willingness of the complainant is received, the investigation will not continue and the complaint will be dismissed. If the consent is ready, a letter is addressed to the Judge concerned asking for his remarks within ten days. If the complaint is of a serious nature involving corruption, sexual or racial bias or criminal activity the Lord Chancellor is notified of the complaint. Once the investigation is completed, the complaint is evaluated unless the complaint is trivial or clearly unjustified. Other serious cases are sent to the Lord Chancellor. The complainant is kept informed of the stage of the investigation.

So far as the disciplinary action is concerned, the Lord Chancellor sets the standards of conduct. The Lord Chancellor's dismissal powers are restricted to Judges below the level of the High Court, on grounds of misbehaviour or incapacity. A formal public rebuke is the Lord Chancellor's heaviest punishment short of dismissal.

By the 1980s there were calls for the establishment of a formal complaints and disciplinary system. An influential group called "Justice"

submitted a report in 1992 that something more than the current informal arrangements were needed.

### The Recent Constitutional Reform Act, 2005

Recently, the Constitutional Reforms Act, 2005 was passed. Chapter 4 contains 4 parts. Part 1 deals with the rule of law; Part 2 contains arrangements to modify the office of Lord Chancellor, Part 3 deals with the Supreme Court, Part 4 deals with appointments and discipline. Chapter 1 of Part 4 deals with the Commission and Ombudsman. Chapter 2 deals with appointments and Chapter 3 with discipline.

Before the Act of 2005, the Lord Chancellor could remove judges below the High Court but judges of superior Courts could be removed only by the address procedure.

But, under Chapter 3 of Part 4 of the Act of 2005, Lord Chancellor in consultation with the Lord Chief Justice could remove the judges listed in Schedule 14. The Lord Chief Justice could issue advice, a formal warning or reprimand for disciplinary purposes. He may also suspend a judge. The Lord Chief Justice could nominate any 'judicial office holder' to conduct an inquiry. But, so far as removal is concerned, the procedure by way of address remains.

Chapter 3 deals with disciplinary powers, contains sections 108 to 121. Section 108 reads as follows:

“108 Disciplinary powers:

- (1) Any power of the Lord Chancellor to remove a person from an office listed in Schedule 14 is exercisable only after the Lord Chancellor has complied with prescribed procedures (as well as any other requirements to which the power is subject).
- (2) The Lord Chief Justice may exercise any of the following powers but only with the agreement of the Lord Chancellor and only after complying with prescribed procedures.
- (3) The Lord Chief Justice may give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes (but this section does not restrict what he may do informally or for other purposes or where any advice or warning is not addressed to a particular office holder).
- (4) He may suspend a person from a judicial office for any period during which any of the following applies:-
  - (a) the person is subject to criminal proceedings;
  - (b) the person is serving a sentence imposed in criminal proceedings;

- (c) the person has been convicted of an offence and is subject to prescribed procedures in relation to the conduct constituting the offence.
- (5) He may suspend a person from a judicial office for any period if –
  - (a) the person has been convicted of a criminal offence,
  - (b) it has been determined under prescribed procedures that the person should not be removed from office, and
  - (c) it appears to the Lord Chief Justice with the agreement of the Lord Chancellor that the suspension is necessary for maintaining confidence in the judiciary.
- (6) He may suspend a person from office as a senior judge for any period during which the person is subject to proceedings for an Address.
- (7) He may suspend the holder of an office listed in Schedule 14 for any period during which the person-
  - (a) is under investigation for an offence, or
  - (b) is subject to prescribed procedures.
- (8) While a person is suspended under this section from any office he may not perform any of the functions of the office (but his other rights as holder of the office are not affected).

Therefore, under sec. 108(3) to (7), the Lord Chief Justice can pass various types of orders, enumerated in subsection (3) against ‘judicial office holders’ viz. Senior Judge and those listed in Schedule 14. ‘Senior Judges’

mean Master of Rules, President Queen's Bench, President Family Division, Chancellor of High Court, Lord Justice of Appeal and Puisne Judge of the High Court (Judges of the House of Lords are obviously not covered by the measures the Lord Chief Justice can take).

The power of suspension can be invoked even when criminal proceedings or address proceedings are pending.

Section 119 provides for delegation of functions of the Lord Chief Justice under Sec.100(3) to (7) to a 'Judicial office holder' and states as follows:

“ Section 119 Delegation of functions:

- (1) The Lord Chief Justice may nominate Judicial Office holder (as defined in Sec. 109(4) to exercise any of his functions under the relevant section:
- (2) The relevant sections are:
  - (a) Section 108(3) to (7);
  - (b) Section 111(2);
  - (c) Section 112;
  - (d) Section 116(3)(b)”

'Judicial office holder' is defined in sec. 109(4) (see below).

It is therefore, seen that the Lord Chief Justice may delegate the functions of investigation under Sec.108 (3) to (7) to another ‘Judicial Office holder’.

Therefore, the inquiry is only by peers and the final decisions are taken by the Lord Chief Justice.

Section 109 deals with “Disciplinary powers: interpretation” and reads as follows:

109. “Disciplinary powers”: interpretation:

- (1) This section has effect for the purposes of section 108.
- (2) A person is subject to criminal proceedings if in any part of the United Kingdom if proceedings against him for an offence have been begun and have not come to an end, and the times when proceedings are begun and come to an end for the purposes of this subsection are such as may be prescribed.
- (3) A person is subject to proceedings for an Address from the time when notice of a motion is given in each House of Parliament for an Address for the removal of the person from office, until the earliest of the following events-
  - a. either notice is withdrawn;

- b. either motion is amended so that it is no longer a motion for an address for removal of the person from office;
  - c. either motion is withdrawn, lapses or is disagreed to;
  - d. where an address is presented by each House, a message is brought to each House from Her Majesty in answer to the Address.
- (4) “Judicial office” means-
- a. office as a senior judge, or
  - b. an office listed in Schedule 14;
- and “judicial office holder” means the holder of a judicial office.
- (5) “Senior judge” means any of these-
- a. Master of the Rolls;
  - b. President of the Queen’s Bench Division;
  - c. President of the Family Division;
  - d. Chancellor of the High Court;
  - e. Lord Justice of Appeal;
  - f. Puisne judge of the High Court.
- (6) “Sentence” includes any sentence other than a fine (and “serving” is to be read accordingly).
- (7) The times when a person becomes and ceases to be subject to prescribed procedures for the purposes of section 108(4) or (7) are such as may be prescribed.

- (8) “Under investigation for an offence” has such meaning as may be prescribed.

Schedule 14: Schedule 14 refers to various other offices with which we are not concerned. Section 115 deals with regulations about procedure and state that the Lord Chief Justice may, with the agreement of the Lord Chancellor, make regulations providing for the procedures to be followed in the investigation and determination of allegations made by any person of misconduct by judicial office holders. Section 116 deals with contents of Regulations. Sections 115 and 116 read as follows:

“115. Regulations about procedures

The Lord Chief Justice may, with the agreement of the Lord Chancellor, make regulations providing for the procedures that are to be followed in-

- a. the investigation and determination of allegations by any person of misconduct by judicial office holders;
- b. reviews and investigations (including the making of applications or references) under sections 110 to 112.

116. Contents of regulations

- (1) Regulations under section 115(a) may include provision as to any of the following-

- (a) circumstances in which an investigation must or may be undertaken (on the making of a complaint or otherwise);
- (b) steps to be taken by a complainant before a complaint is to be investigated;
- (c) the conduct of an investigation, including steps to be taken by the office holder under investigation or by a complainant or other person;
- (d) time limits for taking any step and procedures for extending time limits;
- (e) persons by whom an investigation or part of an investigation is to be conducted;
- (f) matters to be determined by the Lord Chief Justice, the Lord Chancellor, the office holder under investigation or any other person;
- (g) requirements as to records of investigations;
- (h) requirements as to confidentiality of communications or proceedings;
- (i) requirements as to the publication of information or its provision to any person.

(2) The regulations-

- (a) may require a decision as to the exercise of functions under section 108, or functions mentioned in subsection (1) of that section, to be taken in accordance with findings made pursuant to prescribed procedures;

- (b) may require that prescribed steps be taken by the Lord Chief Justice or the Lord Chancellor in exercising those functions or before exercising them.
- (3) Where regulations under section 115(a) impose any requirement on the office holder under investigation or on a complainant, a person contravening the requirement does not incur liability other than liability to such procedural penalty if any (which may include the suspension or dismissal of a complaint)-
  - (a) as may be prescribed by the regulations, or
  - (b) as may be determined by the Lord Chief Justice and the Lord Chancellor or either of them in accordance with provisions so prescribed.
- (4) Regulations under section 115 may-
  - (a) provide for any prescribed requirement not to apply if the Lord Chief Justice and the Lord Chancellor so agree;
  - (b) make different provision for different purposes.
- (5) Nothing in this section limits the generality of section 115.

These are the relevant provisions of the UK Constitutional Reform Act, 2005.

## CHAPTER VIII

### IMPEACHMENT AND ADDRESS PROCEDURES ARE DIFFERENT

#### IMPEACHMENT:

There is a significant difference between an impeachment proceeding on the one hand which is a trial by legislature and an address of both Houses to His or Her Majesty leading to removal, on the other. This is discussed in chapters V and VI of Part III of the Book 'Judges on Trial' (1976) by Prof. Shimon Shetreet. This aspect is important because the Constitution of India uses the word 'impeachment' only in the case of the President (Art. 56, 61). In the case of the Vice President, removal is by resolution on the Council of States (Art 67(b)); in the case of the Deputy Chairman, it is by resolution of the Council of States (Art 90(c)); in the case of the Speaker and Deputy Speaker of the House of People, it is by resolution of the House of People (Art 94(c)); and in the case of Judges of the Supreme Court and the High Court, it is by address of each of the Houses to the Parliament to the President (Arts 124, 125, 217). Thus, there is difference between removal of impeachment or by way of resolution or by way of address.

Impeachment is reserved for trying 'high crimes and misdemeanours'. Impeachment is in fact a trial by the legislature, wherein the House of

Commons is a prosecutor and the House of Lords exercises ‘the functions of a High Court of Justice and of a Jury’ and returns the verdict and imposes a sentence (May’s Parliamentary Practice, 39, 17<sup>th</sup> Ed, 1964). Impeachments are reserved for extraordinary crimes and extraordinary offenders but all persons, whether peers or commoners may be impeached for any crime whatever. Impeachment was a political weapon of Parliament in England in its struggle against the Crown. Misdemeanours included official misconduct such as neglect of duty, abuse of power, oppression of rights or misapplication of funds. They also included acts which Parliament deemed an encroachment upon its prerogatives, bribery, corruption, subversive activities and treason. The Crown could not interfere with impeachment proceedings by exercise of its powers of prorogation which terminates sessions of Parliament or by way of dissolution. Nor could the Crown grant pardon to the accused. Impeachment has not been resorted to in UK since 1805. The proceedings are always initiated in the House of Commons. They might have originated by a petition by an aggrieved person or by a report of a Committee or upon relevant information brought to its attention. A motion is required for commencement of the impeachment proceedings. The House may refer the matter to a Committee for further inquiry or may stay away to impeach the accused. But before final resolution, the House may hear the accused at the Bar either in person or by counsel. Once a motion is passed, the Member who has made the motion will go to the Bar and impeach the accused. Thereafter, the Committee which is appointed to draw the articles of impeachment will deliver the same to the House of Lords

and a copy will be sent to the accused after his answers are received by the House of Commons. The trial begins in the House of Lords. The House of Commons appoints Managers to represent it. The accused is summoned and if he does not come to participate, he may be arrested and brought before the House of Lords. The accused or his counsel is heard, thereafter the House of Lords passes a verdict of 'guilty' or 'not guilty'. Each peer is asked for his opinion on each charge separately. If not found guilty by a simple majority, the Lords will dismiss the impeachment. If found guilty, Lords may not pass judgment unless the Commons demanded it. After obtaining the view of the Speaker of the House of Commons, the Lords will impose sentence upon the convicted person. In impeachment proceedings, the person may be imprisoned, fined, removed, disqualified from office or otherwise punished, or if the offence is capital, he may be sentenced to death. The Commons may, however, give up the proceedings in the middle and not proceed forward. Even after conviction, the Commons can pardon the accused.

In the House of Lords, in impeachment proceedings, procedural safeguards are followed. The accused is heard, given the copies of all depositions and the accused can be assisted by a lawyer. Every Lord must be present at the trial. In impeachment proceedings, the hearing of the evidence and arguments cannot be delegated to a Committee because in impeachment proceedings "all the law Lords must judge". When in doubt about the question of law, the Lords could consult the judges before making a final decision on the matter. That opinion of the judges must be given in the

presence of the accused. Impeachment proceedings are criminal in nature and were considered as such (see Berger, Impeachment for High Crimes and Misdemeanours, 1971, 44 South California Law Review 395 at 400-415; see Berger on Impeachment and Good Behaviour, 1970, 79 Lord Law Journal, 1475 at 1518, 1519).

In several cases, judges of the courts were impeached for supporting the Crown against Parliament. But the last one was in 1805.

### **Address of both Houses for removal is different from impeachment proceedings**

The procedure by way of Address for removal (discussed by Prof. Shtreet in Ch. VI of his work 'Judges on Trial' (1976) is different from impeachment. There have been doubts whether the Address for removal may originate in either House or whether it must originate in the House of Commons. The better view is that although proceedings may originate in either House, "preferably they should be commenced in the House of Commons" (see vol. 8, Halsbury Laws in England 681 (4 Ed) 1974). Except in a few cases, proceedings have always originated in the House of Commons. Proceedings may be initiated by a motion for inquiry into the conduct of a judge. The motion may be based on a petition of an aggrieved individual or a report of a commission or an investigation conducted by an MP. Parliament may pass a resolution for an address to the Crown praying

that a commission of inquiry shall investigate into the conduct of a judge or the way he administered the court. A motion for an inquiry into the conduct of a judge should be made upon previous notice, allowing the accused to meet the charges by communicating his defence to other MPs. In the period between the notice and the debate on the motion, the government and other members will conduct some inquiries and will form their view upon the matter. After due notice had been given, the Member at a later date will state the alleged misconduct. Sometimes the complaint will be incorporated into articles of charge. On presenting the charges, the Member will move for referring the matter to a Select Committee or to a Committee of the whole House for inquiry. Charges must be specific and distinct and reliable evidence must be introduced before the start of the inquiry. It is an established constitutional practice that “such a procedure for an address should not be instituted unless the prima facie case against a judge was so strong as to justify an address”. If these requirements are not satisfied, the matter will not be referred for further inquiry.

If the requirements are satisfied, the members may decide the case on merits, but in practice judicial misconduct has been referred to a Select Committee for further inquiry and in some cases the matter is dropped on the ground that the alleged misconduct did not justify an address for removal (p.132 of Prof. Shetreet’s book). In fact, in several cases further inquiry before the Select Committee revealed facts in favour of the judge which led to abandonment of the proceedings. Apart from the principle that only such

misconduct as would warrant an address for removal should be referred for further inquiry, other considerations are also taken into account. The harm that such an inquiry might bring to the accused judge particularly where subsequent non-parliamentary procedures in court are possible. While a judge has absolute immunity in the exercise of his judicial functions, subsequent proceedings outside Parliament are feasible in the case of misconduct outside his judicial functions giving rise to civil or criminal action against the judge. The fact that an inquiry into the conduct of a judge, no matter how it terminates, is of itself a form of punishment, will be carefully considered by Parliament in deciding whether or not to refer the matter for inquiry. (Smith's case (1834), 21 Parliamentary debates, 3<sup>rd</sup> series, 272 at 333). If the House decides to make an inquiry, it makes a further inquiry, or it may refer to a Select Committee or a Committee of the whole House. The Committee gathers evidence and hears witnesses including the judge, thereafter it reports its recommendations which is discussed in the House. The judge is given due notice, copies of documents, he may appear by counsel or in person and introduce evidence in his defence. Upon the approval of the report by the House of Commons, the whole process is repeated again in the House of Lords including the setting up of a Committee, hearing evidence at the Bar, debates and deliberation (p.133-34 of Prof. Shetreet's book). If the Lords come to the same decision to present an Address to the Crown, they insert their title in the blank left for them by the Commons in the Address. After this is done, the House of Commons is intimated and the Address is presented to Her Majesty. Only in one case of

Sir Jonah Barrington, the entire process was gone through in one exercise 1830. During the process, procedural safeguards are followed, the charges must be in writing, the judge intimated, copies be given, the judge be heard and allowed to cross-examine witnesses or call witnesses in support of his defence. This is at the stage of the inquiry by the Committee. The charges are not altered by the House of Commons at a later stage. Delay is avoided on the principle “when a judge was charged with criminality, he ought to be acquitted or condemned with as little loss of time as possible” (O’Grady’s case, (1823)). Proceedings are initiated at the commencement of a session of Parliament so that they are not carried to another session. Sometimes, judges are not made to suffer public indignity. Prof. Shimon Shetreet states: “The concern of the House to protect judges from public indignity resulting from false charges is illustrated in the order issued by the Commons that the charges against Lord Ellenborough, CJ be erased from the Journals of the House” (1816, 34 Parliament Debates, 1<sup>st</sup> Ser. at 131).

As to whether the procedure in Parliament is deemed “judicial” or not, Prof. Shimon Shetreet states as follows:

“Without clear statutory provisions regulating the procedure for an address for removal, doubts might be entertained as to the nature of the proceedings in Parliament upon a motion for an inquiry into conduct of a judge with a view to passing an address for removal. In fact MP’s have been divided on questions of procedure. However, on the whole,

it is clear that the proceedings have been deemed judicial in nature and procedural safeguards protecting the accused judge, as well as public confidence in the courts, have been followed. That the proceedings for an address have been deemed judicial also appears from the frequent reference by Members to proceedings for impeachment in support of their views of the proper procedural course which should be followed by the House upon a motion for an Address for removal.”

As to the role of Government, Prof. Shetreet states that no inquiry should be started without preliminary investigations. This principle has been accepted in several cases. This principle was derived from the Government’s responsibility for the “due administration of justice throughout the Kingdom” and from the “obligation which they owe to the dispensers of justice to preserve them from injurious attack or calumnious accusations” (see A. Todd, *Parliamentary Government in England*, 730 at 741 (1867)). Inter alia, judges have been approached, normally by the Lord Chancellor and given an opportunity to refute the charges such as in Baron Gurney’s case (1843) and Kelly’s case (1867). Yet another principle is that Government, namely, the Executive should not start proceedings in Parliament but proceedings should be initiated only by Members, unless the misconduct is very grave. Unlike proceedings for impeachment, dissolution or prorogation of Parliament in UK, terminates the proceedings on a motion for an address for removal. (Of course, our Supreme Court has taken a contrary view in the judgment in Sub-Committee on Judicial Accountability v. Union of India:

1991 (4) SCC 699. It has also held that dissolution of the House does not terminate the motion) Sometimes where the motion for removal fails, there may be a general censure of the judge in the debates (p.139 of Prof. Shetreet's book).

## CHAPTER IX

### REMOVAL PROCEDURE IN CANADA (Federal) & IN ITS STATES

#### (A) Federal Courts

Canadian Constitution Act of 1867 states in sec 99(1) that judges of Superior courts shall hold office during “good behaviour” and be removed only by the Governor General on address of the Senate and House of Commons. Sec. 9(1) of the Supreme Court Act also contains like terms. Canada’s Parliament has also set in place a process to assess alleged breaches of good behaviour by federally appointed judges. Under the Judges Act, 1985 the role is played by the Canadian Judicial Council. The Act repeals an earlier statute of 1971. It is learnt that Canadian Parliament has never had to face a situation of removal of a judge although sometimes judges retire or resign before the matter gets that far. Where appropriate, the Council may express disapproval of a judge’s conduct if the matter is not serious enough to recommend that the judge be removed.

Some of the principles accepted before the Canadian Judicial Council are that no investigation is permitted about unnamed judges or general complaints about the judiciary as a whole or on the merits of the case.

The Judges Act, 1985:

In Canada, the Judges Act [R.S. 1985, C. J-1] deals with the question of disciplinary action against judges. Part 2 of the Act (sections 58 to 71) deals with the Canadian Judicial Council and its powers.

Under sec. 59(1), it is stated that the Judicial Council shall consist of (a) the Chief Justice of Canada who shall be the Chairman of the Council, (b) the Chief Justice and any senior associate Chief Justice and associate Chief Justice of each superior court or branch or division thereof, (c) the senior judges, as defined in section 22(3) of the Supreme Court of Yukon, the Supreme Court of North West territories and the Nunavut Court of Justice, and (d) the Chief Justice of the Court Martial Appeal Court of Canada. All are judges.

(Subclause (e) of sec. 59(1) and subsections (2) and (3) of sec. 59 have been repealed.) Subsection (4) of sec. 59 states that each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme

Court of Canada, appoint any former member of that court to be a substitute member of the Council.

Sec. 60 of the Act refers to the objects and powers of the Council. Subsection (1) of sec. 60 states that the objects of the Council are to promote efficiency and uniformity and to improve the quality of judicial service, in superior courts. Subsection 2(c) states that in furtherance of the above objects, the Council may make inquiries and investigation of complaints or allegations described in sec. 63 and sub-sec. 2(d) states that the Council may make inquiries described in sec. 69.

Sec. 63 deals with inquiries by the Council and reads as follows:

“63.(1)The Council shall, at the request of the Minister or the Attorney General of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.

(3) The Council may for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province,

having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

- (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have
- (a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and
  - (b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.
- (5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.
- (6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.”

Section 64 of the Act deals with notice of hearing and reads as follows:

“64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.”

Section 65 of the Act deals with Report and Recommendations.

It will be seen that the Council is permitted to recommend removal from office either on the ground of age or infirmary or misconduct of the Judge or on his or her having failed in due execution of that office or having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office. The Act does not contemplate any measures to be imposed other than removal. Sec. 66 refers to grounds of leave for absence to a judge found to be incapacitated or disabled. It reads as follows:

“The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if

leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.”

Subsection (3) of sec. 66 deals with annuity to a judge who resigns and reads as follows:

“The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the time when the finding was made by the Governor in Council.”

Section 69(3) states that the Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person (who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons) by order remove the person from office. Sec. 70 deals with report to Parliament and any orders of the Governor in Council made pursuant to sec. 69(3) and states that all reports and evidence relevant thereto, shall be laid before Parliament within 15 days after that order is made or if Parliament is not then sitting, on any of the first 15 days next thereafter that either House of Parliament is sitting.

Section 71 deals with removal by Parliament or Governor in Council and states that nothing is done or omitted to be done under the authority of any of the sections 63 to 70 affects any power, right or duty of the House of Commons, Senate or Governor in Council in relation to the removal from office of the judge or any other person in relation to whom an inquiry may be conducted under any of those sections.

Canadian By-laws:

Canadian Judicial Council has made By-laws which are called Canadian Judicial Council Inquiries and Investigations By-laws [SOR/2002-371]. By-law No.2 refers to the constitution of an Inquiry Committee under sec. 63(3). By-law No.3 deals with appointment of independent counsel. By-law No.4 deals with an Inquiry Committee engaging a legal counsel. By-laws Nos.5 to 7 deal with Inquiry Committee proceedings and read as follows:

- “5.(1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.
- (2) The independent counsel shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.

6.(1) Any hearing of the Inquiry Committee shall be conducted in public unless, subject to subsection 63(6) of the Act, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.

(2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest.

7. The Inquiry Committee shall conduct its inquiry or investigation in accordance with the principles of fairness.”

By-law No.8 refers to the Inquiry Committee Report and reads as follows:

“8.(1) The Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office.

(2) After the report has been submitted to the Council, the Executive Director of the Council shall provide a copy to the judge, to the independent counsel and to any other persons or bodies who had standing in the hearing.

(3) If the hearing was conducted in public, the report shall be made available to the public.”

By-laws Nos.9 and 10 refer to the judge’s response to the Inquiry Committee report and read as follows:

“9.(1) Within 30 days after receipt of the report of the Inquiry Committee, the judge may

- (a) make a written submission to the Council regarding the report; and
- (b) notify the Council that he or she wishes to appear in person before the Council, with or without counsel, for the purpose of making a brief oral statement regarding the report.

(2) If the judge is unable, for any reason beyond the judge’s control, to meet the time limit set out in subsection (1), the judge may request an extension of time from the Council.

(3) The Council shall grant an extension if it considers that the request is justified.

10.(1) If the judge makes a written submission regarding the inquiry report, the Executive Director of the Council shall provide a copy to the independent counsel. The independent counsel may, within 15 days after receipt of the copy, submit to the Council a written response to the judge’s submission.

(2) If the judge makes an oral statement to the Council, the independent counsel shall also be present and may be invited by the Council to make an oral statement in response.

(3) The judge's oral statement shall be given in public unless the Council determines that it is not in the public interest to do so."

It will be seen that the Inquiry Committee may act in accordance with fairness and this implies grant of opportunity to the judge. Further, under the Canadian By-laws, hearing is given to the judge before the Inquiry Committee and again before the Judicial Council after the report is submitted by the Inquiry Committee. The Judicial Council consists only of judges.

By-laws Nos.11 and 12 deal with the consideration of the Inquiry Committee report by the Council and reads as follows:

"11.(1)The Council shall consider the report of the Inquiry Committee and any written submission or oral statement made by the judge or independent counsel.

(2) Persons referred to in paragraph 2(3)(b) and members of the Inquiry Committee shall not participate in the Council's consideration of the report or in any subsequent related deliberations of the Council.

12. If the Council is of the opinion that the report of the Inquiry Committee is unclear or incomplete and that clarification or

supplementary inquiry or investigation is necessary, it may refer all or part of the matter in question back to the Inquiry Committee with specific directions.”

By-law No.13 states that the Executive Director of the Council shall provide the judge with a copy of the report of its conclusions presented by the Council to the Minister. By-law No.14 states that these by-laws come into force on January 1, 2003.

It may be noted that the Council submits its report to the Minister, the subsequent procedure is given in the Act itself as mentioned above in sec. 69 (3) where the Governor in Council may on the recommendation of the Minister, remove the person from office (if he is competent to do so, otherwise than on an address of the Senate or the House of Commons or on a joint address of the Senate or House of Commons). Sec. 70 provides that the order of the Governor in Council shall be placed before the Parliament at its next sitting.

#### Complaint procedure:

As per to the “complaints procedure” approved by the Canadian Judicial Council w.e.f. 1.1.2003, the procedure for dealing with a complaint has been laid down in great detail. Under sec. 2.2 of the procedure, the Executive Director of the Council shall not open a file in respect of

complaints which are evasional or an obvious abuse of the complaint process. A complaint which is from an anonymous source shall be treated in the same manner as in other complaints, to the extent possible. Under sec. 3.4 where a file has been opened and thereafter a complainant seeks to withdraw the same, the Chairperson of the Council may close the file as withdrawn or proceed with consideration of the complaint on the basis that the public interest and the due administration of justice require it. The Chairperson under sec. 3.5 shall review the file and may close the file if he or she is of the view that the complaint is trivial, vexatious, made for an improper purpose, manifestly without substance and does not warrant consideration or is outside the jurisdiction of the Council because it does not involve conduct. The Chairperson shall review the file and may seek additional information from the complainant or seek the judges' comments and of his or her Chief Justice. When the Chairperson under sec. 3.6 has closed a file, the Executive Director shall provide to the judge and to his or her Chief Justice a copy of the complaint and of the letter closing the complaint. Under sec. 4.1 where the Chairperson has decided to seek comments from a judge, the Executive Director shall write to the judge and his or her Chief Justice requesting comments. Under sec. 5(1)(a)(i) the Chairperson shall review the response of the judge and the judges to the Chief Justice, as well as any other relevant material received in response to the complaint and may close the file where the Chairperson concludes that the complaint is without merit or does not warrant further consideration or (ii) where the judge acknowledges that his or her conduct was inappropriate but the Chairperson is of the view that no

further matters are needed. Under sec. 5.1(b) the Chairperson may hold the file in abeyance pending pursuit of remedial measures under sec. 5.3. Under clause (c) of sec. 5.1 the Chairperson may ask the Council to make further inquiries and prepare a report or refer the file to a panel under sec. 5.2 before closing the file falling under sec. 5.1(a)(ii) where the judge acknowledges his mistake, in his behaviour, the Chairperson may in writing provide the judge with an assessment of his or her conduct and express any concerns which are necessary. Under sec. 5.3, the Chairperson may in consultation with the judges, Chief Justices and with the consent of the judge recommend that the problems may be addressed by way of counselling or other remedial measures and close the file if satisfied that the matter has been appropriately addressed. Under sec. 5.4, the judge will be given a copy of the letter.

Under sec. 6, procedure where the complaints involved Council members is laid down. Under sec. 9, the panel shall consist of 3 or 5 members including a Chairperson and may include 1 or 2 puisne judges chosen from among a roster of judges established for this purpose, provided that the Chairperson and a majority of a panel shall be members of the Council. The panel shall not include any judges who are members of the court to which the judge, who is the subject of the complaint is a member. Under sec. 9.3, the Executive Director shall inform the judge about the constitution of the panel. Sec. 9.4 states that the judge shall be provided with any information to be considered by the panel that he or she may not have previously received and shall be given a reasonable opportunity to

respond in writing. Under sec. 9.5, after referring the file to the panel the Chairperson shall not participate in any further consideration of the merits of the complaint by the Council. Sec. 9.6 provides that the panel shall review the file and may direct further inquiry or close the file if the matter is not serious enough to warrant removal or hold the file in abeyance pending remedial measures like counselling etc. or the panel may make a recommendation to the Council that an Inquiry Committee be constituted under sec. 63(3) because the matter may be serious enough to warrant removal and provide a report to the Council and to the judge. If the file is closed, the panel will inform the judge about its assessment of the conduct. Under sec. 10, the Chairperson shall name those Council members who will be members of the Inquiry Committee and will designate its Chairperson. The judge shall be entitled to make written submissions. Under sec. 10.4, the Council shall decide that no investigation is warranted because the matter is not serious enough to warrant removal or that an investigation shall be held under sec. 63.2 because the matter may be serious enough to warrant removal. Under sec. 12.7 where an Inquiry Committee is constituted, the complainant shall be advised accordingly.

(B) Judges of the Provinces in Canada

Unlike superior Court Judges in the Federal system, who can be removed only by Parliament as stipulated by sec 99 of the Constitution Act, 1867, in most provinces, the provincially appointed Judges can be removed

by the Cabinet, without prior address of the legislature but the Government is bound by the recommendations of the Provincial Judicial Council.

In Ontario, the North-West Territories and Nunaval, the removal is by the legislature while in British Columbia and Newfoundland, removal can be effective by the Provincial Judicial Council itself.

A Quebec Judge can be removed by the Minister of Justice, only if so recommended by the Quebec Court of Appeal, following as recommendation of the Quebec Judicial Council. But, the Minister can reject a recommendation for the Judge's removal. (Cristin Schmitz, 2001, Workopolis. Com)

#### Case law relating to Judicial Councils in Canada

There are some Judgments of the Canadian Supreme Court and State Federal Courts on some issues relating to the proceedings before the Judicial Councils and their constitutionality and they are dealt with in Chapter XX 'Discussion or Points referred to in Chapter II'.

## CHAPTER X

### **PROCEDURES IN AUSTRALIA (FEDERAL) & STATE COURTS, AND JUSTICE MURPHY'S CASE**

#### Australian Federal system:

Section 72(ii) of the Australian Constitution governs the Supreme Court, the County Court and the Ministers Court and states that the federal judicial officers shall not be removed except by the Governor in Council on address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity.

In Australia, it is not settled whether the removal of a judge upon an address would be subject to judicial review. The debates of the National Australasian Convention, 1897 show that the constitutional provision indicates that the two Houses are the only judges of the alleged misbehaviour of the judge and that their address and the action of the Governor General thereupon would not be reviewable by the High Court. In this connection, the correspondence between Mr. Isaacs and Mr. Barton at page 952 of the Debates in 1896-97 may be noticed. However, two Parliamentary Commissioners opined that the High Court could review a removal and quash it where the evidence did not disclose matters which could amount to misbehaviour.

It is also not settled in Australia whether the Governor General in Council will be bound to act in accordance with an address by both Houses. It is generally thought an address should be binding. However, one of the Parliamentary Commissioners took a view that sec. 72 preserves the Governor-General's discretion to act upon an address (see chapter 20, page 511).

The question may be academic because the Governor General would probably accept the proof of misbehaviour contained in the address, on ministerial advice.

It is for the two Houses to determine whether to decide the question in the House or ask some other body to advise them. Each of the two Senate Committees appointed in 1984 and the statutory Parliamentary Commission of Inquiry appointed in 1986 to inquire into the conduct of a High Court judge, Justice Murphy were asked to find the facts and advise whether the conduct constituted misbehaviour. This is permissible as long as the Houses do not delegate the actual determination of the question of misbehaviour.

Because of the use of the word "proved" it is inferred that the procedures are judicial requiring formulation of charges and a full inquiry with opportunity to the judge to be heard by the Houses. This situation arises where an Inquiry Committee is delegated with the function of finding

the facts of prima facie misbehaviour. The Houses may adopt the proceeding followed by the courts or adopt an inquisitorial mode. If the facts have already been gathered in some other inquiry or by conviction for an offence in a court, the Houses may decide that no further evidence is necessary. Generally, a Select Committee is appointed to conduct the investigation.

Odgers' Australian Senate Practice:

Odgers' Australian Senate Practice, (Eleventh Edition 2004), edited by Harry Evans, discusses in detail several constitutional questions in relation to investigation/inquiry into "misbehaviour" of Judges referred to in sec. 72 (ii) of the Australian Constitution and the various issues arising in regard to the procedure for removal on Address and other matters.

As to whether there could be judicial review of the order of removal passed by the Governor-General in Council after an Address, two of the Parliamentary Commissioners, as stated earlier, had expressed the view that the High Court could review a removal on the judicial side and quash it. The authors, however, refer to the US judgment in Nixon v. US (1993 (508) US 927) wherein the US Supreme Court had held that the removal of a judge by impeachment was not judicially reviewable.

On the question of discretion of the Governor General after the Address by both Houses, the authors say that it is not settled whether the Governor General in Council would be bound to act in accordance with an Address by both Houses. They state that it is generally thought that because the Houses act on “proved” grounds, the Address by the Houses should be binding. However, one of the Parliamentary Commissioners took the view that sec. 72 preserves the Crown’s discretion to act or not to act upon the Address. The question as already referred to, may look academic because the Governor General may ultimately go by the advice of the Ministry. On the question whether the Houses of Parliament should themselves decide the question of ‘misbehaviour’ or whether they could delegate this function to a Committee, there is no unanimity because there is no statute mandating any particular procedure. But, they could perhaps delegate as long as the final determination is for the purposes of the Houses.

So far as the hearing to be given to the judge is concerned, that hearing must be given finally in the Houses, even though the judge concerned might have been given an opportunity before any Committee which recorded the evidence. The final decision as to misbehaviour is, therefore, a matter for the Houses.

One other important view expressed by the authors is that the hearing in the Houses is to be given separately in each House. It is stated as follows:

“It may be thought that an inquiry on behalf of both Houses would have something to commend it, but a strong argument could be made out that any inquiry should always be initiated and followed up by one House, and that the other House should not become involved at all until it receives a message requesting its concurrence in an address. The two Houses proceeding separately in this way would give the judge who was the subject of the inquiry the safeguard of two hearings, which is probably what the framers of sec. 72 intended. Any joint action by the two Houses may remove this safeguard.”

Thus, it appears to be the view that the Committee to which the inquiry is delegated is initially the Committee of one of the Houses and not the Committee of both the Houses. Apart from that, after the Committee submits its report to one of the Houses and that House agrees with the prima facie findings of the Committee, that House would request the other House to concur with its resolution and when such concurrence is sought from the other House, the judge has to be given a separate opportunity in the other House.

Another question is whether the Committee or the Select Committee to which the inquiry is delegated, can be given the power as part of the delegation, to compel evidence, ie., to summon witnesses and to require the production of documents. It is doubtful whether one House acting alone

could lawfully confer such a power on persons or a body other than its own members.

A further question is whether the Committee so appointed is merely gathering evidence and, therefore, no special safeguards are necessary. A body which is merely gathering evidence probably does not require any elaborate proceedings or provide safeguards. However, a body which has the power to compel evidence, should have some restraints imposed upon it. If a Committee is also to formally hear evidence and come to a judgment on it, then procedures and safeguards are essential. The authors then make an important statement on ‘investigation’ as distinct from ‘inquiry’. It says:

“It is suggested that it may be best to separate the functions of locating and hearing evidence. Then for the initial inquiry some investigative body other than a select committee may be properly considered and the questions of the power to compel evidence and of safeguards may be more readily considered at the later stage.”

“It would appear that insufficient consideration was given to any of the foregoing questions when the Act of the Parliament was passed in 1986 to establish the Parliamentary Commission of Inquiry..... That body also combined the functions of locating evidence, conducting a formal hearing of evidence and advising the Houses on the judgment of the evidence. It was given power to compel evidence. In was, in

effect, a joint body reporting to both Houses. It was also virtually required to meet in closed session which may be appropriate for an initial inquiry but is inappropriate for the hearing of evidence..... It has generally been assumed that a formal hearing of evidence following the procedures of a trial, would take place before a House agreed to an address under sec. 72.”

According to these comments, a separate body which investigates into facts and then comes to a decision to frame the charges, and another body which subsequently inquires into the charges with restraints, appears to be proper rather than combining investigation and inquiry by one committee.

A connected point was argued by Mr. Kapil Sibal in his submissions before the Lok Sabha in the case of Justice V. Ramaswamy. He argued that no “investigation was done at any point of time before Justice Sawant Committee which straight away framed charges and inquired into them”. According to him, if the procedures were “quasi-criminal”, an investigation must have been done before framing charges. Inquiry comes only later. Mr. Sibal argued that under sec. 3 of the Judges Inquiry Act, 1968, what was contemplated was ‘investigation’ by a committee after admitting the motion. He submitted that after admitting the motion, the first thing that the Committee should have done was to make an investigation into the grounds on which the removal of a judge was prayed for and then frame charges. But the answer of the other Members (particularly, Mr. George Fernandes)

was that sec. 3(3) states that the Committee shall frame definite charges against the judge on the basis of which the investigation is proposed to be held. So, according to some Members, the subsection contemplated framing the charges first and thereafter investigation. Obviously, the word ‘investigation’ used in sec 3(3) of the 1968 was intended to describe an ‘inquiry’.)

States in Australia:

While removal on address from Parliament is the only method of removal of Federal Judges under sec 72(ii) of the Commonwealth Constitution, the State Judges in Queensland, Western Australia, South Australia and Victoria can be removed under the ‘*quamdiu se bene gesserint*’ method. Removal ground provisions in the Commonwealth Constitution are limited to certain prescribed grounds. But no removal provision in any State law is restricted to prescribed grounds, except in New South Wales. There is no address from Parliament although grounds are not prescribed (Queensland, Victoria, South Australia, Western Australia) or only on an address from Parliament (Tasmania), or on an address from Parliament but not on prescribed grounds only (New South Wales).

New South Wales: *Judicial Officers Act, 1986:*

Sec 53 of the Constitution Act 1902 (New South Wales) part 9, (inserted by Constitution (Amendment) Act 1992 (NSW) deals with ‘Removal from Judicial Office and states:

- “Section 53: (1) No holder of Judicial office can be removed from the office, except as provided by this Part (Part 9);
- (2) The holder of a Judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.
- (3) Legislation may lay down the procedures and requirements to be completed with before a judicial officer may be removed from office.”

Section 4 to 56 provide for suspension, retirement and abolition of office.

The New South Wales Act, 1986 refers to a Judicial Commission and the Conduct Division of the Commission. Sec. 3 defines the Commission as a Judicial Commission and it also defines the Conduct Division. Under sec. 5, the Commission will consist of ten members, six official and four are appointed members. But the Conduct Division under sec. 22, which deals with disciplinary action, consists of three persons who are all judicial officers.

Part 5 deals with the Conduct Divisions (sec. 13 and 14), Part 6 deals with complaints against judicial officers. There are four Divisions in Part 6. The first Division deals with the making of complaints (sec. 15 to 17), the second Division deals with preliminary examination of complaints (sec. 18 to 21), the third Division deals with Conduct Division and submission of reports (sec. 22 to 29), and the fourth Division deals with miscellaneous aspects (sec. 30 to 39).

Part 7 deals with suspension and removal of judicial officers (sec. 40 to 43A). Schedule 3 deals with procedure of the Conduct Commission.

Sec. 3(a) defines 'judicial officer' as a judge or associate judge of the Supreme Court, or a judge of the District Court or a magistrate etc.

The Conduct Division of the Commission which consists of three persons and is constituted under sec. 22. That section states that the three persons shall be judicial officers but one may be a retired judicial officer.

Under sec. 15, the complaints have to be made to the Commission but the Commission shall not deal with the complaint (except where it dismissed the complaints summarily under sec. 20) unless it appears that the complaint, if substantiated could justify parliamentary consideration for removal of the judicial officer from office or where even if it substantiates as aforesaid, it might not justify parliamentary consideration for removal and warrants

further examination affecting the judicial and official duties and performance of the officer. Subsection (3) of section 15 states that a complaint should not relate to a matter arising before the appointment of the judicial officer or a matter arising before the commencement of the Act, unless it appears that if it substantiated, it could justify parliamentary consideration for removal. Under subsection (4) of sec. 15, a complaint may be made in relation to a judicial officer's competence in performing judicial or official duties. A complaint under subsection (6), may be made even though the matter constitutes or may constitute a criminal offence. The Commission or Conduct Division may adjourn consideration if the allegations are being dealt with by a court or it may adjourn the matter for any other appropriate reason.

Sec. 16 states that the Minister may refer any matter relating to a judicial officer to the Commission. Sec. 17 deals with the manner of making complaints as provided in the regulations. The complainant must identify himself.

Before the Commission refers any matter to the Conduct Division, it has to conduct a preliminary examination under sec. 18 and thereafter, under sec. 19, it may either summarily dismiss the complaint or classify the complaint as a minor one or it may classify it as a serious one. Sec. 20 permits the Commission to dismiss the complaint summarily if it is frivolous, vexatious or trivial or is too remote in point of time or if there is other remedy or redress or where it relates to the exercise of a judicial or other

function that is or was subject to adequate appeal or review rights, or where the person against whom the complaint is made is no longer a judicial officer or where generally the complaint is not justified.

Under sec. 21 where the complaint is not summarily dismissed, it shall be referred to the Conduct Division. Under sec. 23, the Conduct Division shall examine the complaint and initiate such investigation as is appropriate. All this shall be done confidentially, as far as practicable.

Under sec. 24, the Conduct Division may hold hearings and where the complaint is of a serious nature, the hearings shall take place in public, unless the Division directs that it should be in private. Where the complaint is of a minor nature, the hearing shall be private. The Conduct Division may give directions as to who may be present at the hearing. At the hearing, the judicial officer may be represented by a legal practitioner.

In the matter of serious complaints, the Conduct Division has powers under sec. 25 as are conferred by statute, namely, the Royal Commissions Act, 1923 on Commissioners. In case of minor complaints, the Division may receive evidence on oath or affirmation.

The Conduct Division may itself dismiss a complaint on the same grounds upon which the Commission could summarily dismiss a complaint or where the complaint has not been substantiated.

Under sec. 29, in case of a serious complaint, the Conduct Division shall submit a report to the Governor. Where the Division is of the view that the matter could justify parliamentary consideration of removal, then the report shall set out the Division's findings of fact and the opinion. The Minister shall lay the report before the Houses after the report is presented to the Governor. A copy of the report shall also be given to the Commission. Where the complaint is a minor one, the Conduct Division shall submit the report to the Commission. In all cases, copies will be given to the judicial officers.

Sec. 34 deals with medical examination of the judicial officer where the complaint states that the officer is physically or mentally unfit to exercise his or her functions efficiently. Sec. 41 provides that a judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor setting out the opinion of the Division that the matter could justify parliamentary consideration for removal. Sec. 40 permits suspension of judicial officers after a complaint is made or a report is made by the Conduct Division that the judicial officer deserves to be removed or where he is charged for an offence punishable by imprisonment for 12 months or more or has been convicted by a Court within New South Wales or elsewhere.

We may also state that sec. 38 permits a complainant to be declared as a vexatious complainant by the Commission. Sec. 36 and 37 are important, and prohibit publication of the evidence given before the Division or of the matters contained in documents filed with the Division. It also states that any person who makes a publication in contravention of the direction of the Conduct Division will be guilty of an offence punishable by fine or imprisonment upto one year or both. Sec. 37 prohibits the members or officers of the Commission or the Conduct Division from disclosing information except where (a) consent is given by the person from whom the information is obtained or (b) in connection with the administration or execution of the Act (except sec. 8 and 9) or (c) for purposes of legal proceedings arising out of the Act or any report or (d) for any other lawful excuse.

### Victoria

“Courts Legislation (Judicial Conduct) Act, 2005” of Victoria amends the Constitution of Victoria, the Supreme Court Act and other Acts.

We shall first refer to sec. 77(1) and 77(4)(a) of the Constitution Act, 1975 as amended by the Courts Legislation (Judicial Conduct) Act, 2005.

(A) Constitution Act, 1975 of Victoria (as amended in 2005): sec. 77(1) and 77(4)(a) in Part III, read as follows:

“77. Commissions of Judges:

(1) The Commissions of the Judges of the Court shall, subject to subsection (4), continue and remain in full force during their good behaviour, notwithstanding the demise of Her Majesty, any law usage or practice to the contrary thereof in anywise notwithstanding but the Governor may remove any such Judge upon the address of the Council and the Assembly.

(2) .....

(3) .....

(3A) .....

(4) The Commission of a judge ceases to be in force and the office becomes vacant-

(a) in the case of a judge appointed before the commencement of section 4 of the Courts Amendment Act 1986 who has not made an election under section 80A – upon the judge attaining the age of 72 years; or

(b) .....

(c) .....

(d) ..... “

Part II of the Act contains sec. 18(2) which reads as follows:

Section 18 Power for Parliament to alter this Act:

(1) Subject to this section the Parliament may, by any Act, repeal, alter or vary all or any of the provisions of this Act and substitute others in lieu thereof.

(1A) .....

(1B) .....

(2) It shall not be lawful to present to the Governor for Her Majesty's assent any Bill by which –

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(fa) Part VII; or

(fb) Part III AA

(g) any provision substituted for any provision specified in paragraphs (a) to (fb)

may be repealed, altered or varied;

.....

Unless the third reading of the Bill is passed by a special majority”.

The object of the Act of 2005 was to amend the Constitution Act of 1975 to make fresh provisions with respect to the grounds for removal from

office of judicial office holders and to provide for an appointment of investigating agency etc. The Constitution Act of 1975 is amended by inserting the words “(fb) Part IIIAA; or” and substituting in sec. 18(2)(g) of the Constitution Act 1975, the words (fb) for the words (fa).

Sec. 4 inserts Part IIIAA after Part III. Part IIIAA introduced by sec. 4 consists of sec. 87AAA to 87AAJ relating to procedure for removal of Judges.

The effect of the amendment in 2005 of the Constitution is that the new Part IIIAA introducing ss 87AAA to 87AAJ cannot be amended except by a special majority.

Sec. 87AAA defines investigating committee as a committee appointed under sec. 87AAD. It also defines the word ‘judicial office’ as meaning the office of the Judge of the Supreme Court, Master of the Supreme Court, Judge of the County Court, Master of the County Court and the Magistrate. It also defines the word ‘panel’ as the panel established under sec. 87AAC.

Sec. 87AAB deals with removal from judicial office and reads as follows:

“87AAB. Removal from judicial office :

- (1) The Governor in Council may remove the holder of a judicial office from that office on the presentation to the Governor of an address from both Houses of the Parliament agreed to by a special majority in the same session praying for that removal on the ground of proved misbehaviour or incapacity.
- (2) A resolution of a House of the Parliament or of both Houses of the Parliament praying for the removal from office of the holder of a judicial office is void if an investigating committee appointed under section 87AAD has not concluded that facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office holder from office.
- (3) This section extends to term appointments or acting appointments to a judicial office but does not prevent the holder of the office ceasing to hold office on the expiry of the term or the period for which he or she is appointed to act.
- (4) Except as provided by this Part, no holder of a judicial office can be removed from that office.”

Sec. 87AAC(1) refers to the constitution of the ‘judicial panel’ which will consist of seven persons appointed by the Attorney General. Under 87AAC(3) a person is only eligible for appointment if he or she has held “a qualifying office” but no longer holds one. Subsection (3) reads as follows:

“87 AAC: Judicial Panel:

- (1) A panel of 7 persons is established for the purposes of this Part.
- (2) Members of the panel are appointed by the Attorney-General for the term specified in their instrument of appointment.
- (3) A person is eligible for appointment as a panel member if he or she has held a qualifying office but no longer holds one.

.....

A ‘qualifying office’ is defined in sec. 87AAA as office of a judge of the Federal Court of Australia, Family Court of Australia, Family Court of Western Australia, Supreme Court of a State other than Victoria, Supreme Court of Australian Capital Territory or the Northern Territory. Thus the panel consists only of retired Judges.

Sec. 87AAD deals with appointment of an “investigating committee”. It states that a committee may be appointed if the Attorney General is satisfied that there are reasonable grounds for the carrying out of the investigation into whether facts exists that could amount to proved misbehaviour or incapacity on the part of the holder of a judicial office such as to warrant the removal of that office holder. An investigating committee shall consist of three members out of the panel of seven persons referred to in sec. 87AAC, who are appointed by the Attorney General and for selecting the three members the Attorney General will seek the recommendation of the most senior member for the time being in the panel. The Attorney General

will also appoint the most senior member among the three as chairperson of the committee.

Sec. 87AAE refers to the role of the investigating committee as follows:

“87AAE Role of investigating committee

The role of an investigating committee is to investigate the matter relating to the holder of a judicial office referred to it and report to the Attorney General, within the period specified by him or her, its conclusion as to whether facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office holder from office.”

Sec. 87AAF refers to the powers of the investigating committee and reads as follows:

“87AAF Powers of investigating committee

(1) An investigating committee has, and may exercise, the powers conferred by sections 17, 18, 19, 19A, 19B, 19C, 19D, 19E, 20, 20A, 21 and 21A of the Evidence Act 1958 as if the committee were a body of persons to whom the Governor in Council has issued a commission and the chairperson of the committee were the president or chairperson of the commission.

- (2) A person is not excused from answering any question or producing any document or thing when required by an investigating committee on the ground that the answering of the question or the production of the document or thing is prohibited by or under any Act.
- (3) The answering of a question or the production of a document or thing, when required by an investigating committee, does not constitute a breach of a provision made by or under any Act prohibiting the disclosure of information of a kind contained in that answer, document or thing.”

Sec. 87AAG refers to the procedure and evidence at an investigation and reads as follows:

“87AAG Procedure and evidence at an investigation :

- (1) If the investigating committee agrees, a person or body may be legally represented at the investigation or represented by an agent of any other kind.
- (2) The investigating committee is not bound by the rules of evidence and may be informed on any matter in issue at the inquiry in any manner that it considers appropriate.
- (3) The investigating committee may give directions as to the procedure to be followed at or in connection with the investigation.”

The investigating committee prepares a report on the conduct and gives findings and conclusions in the said report which will be submitted to the Attorney General under sec. 87AAH. The report must state conclusions as to whether facts exist that could amount to proved misbehaviour or incapacity such as to warrant removal of the office holder. Subsection (3) thereof states that the Attorney General may, if he or she considers it appropriate to do so, cause a copy of the report of the investigating committee to be laid before each House of Parliament.

It is pertinent to note that sec. 5 of the Act amends sec. 77(1) of the Constitution Act of 1975 as a consequence of Part IIIAA and omits the words “during their good behaviour”. It also omits the words “but the Governor may remove any such Judge upon the address of the Council and the Assembly”. Sec. 5 also inserts before sec. 77(4)(a) of the Constitution Act of 1975 the following clauses “(aaa) on the judge being removed from office by the Governor in Council in accordance with Part IIIAA; or (aa) on the abolition of the office of the judge by under an Act; or”.

Part 3 deals with amendment of other Acts consequential to Part IIIAA inserted in the Constitution Act 1975. It amends the Supreme Court Act of 1986 in sec. 104(3A)(b) substituted the words “any Council in accordance with Part IIIAA of the Constitution Act 1975” for the words “on the address of both Houses of Parliament”.

The fact that the Act of 2005 of Victoria amends the Constitution would show that the procedure for removal on the address of both Houses of Parliament is substituted by the procedure now stated in Part IIIAA. As set out above, in case the ‘investigating committee’ recommends removal and gives its report to the Attorney General, he can cause a copy thereof to be laid before the House of Parliament as seen from sec. 87AAE. The report would contain the committee’s conclusion as to whether facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office holder from office.

Queensland: Western Australia and South Australia:

The Supreme Court Act (Qld) provides in sec 195(1) that the commission of any present present/future Judges of the said Supreme Court shall continue in force during his, her or their good behaviour. Sec 195(2) also says that, ‘However, it shall be lawful for her Majesty to remove any such Judge or Judges upon the address of the Parliamentary Assembly’. Queensland had only one House of Parliament since 1922. The Constitution Act 1867(Gild) sec 15 also deals with a Commission ‘quamdiu se bene gesserint’ while sec 16 provides for removal by address also. Both methods are available. The case of McLawley vs. Vasta Judge of Queensland Supreme Court, (referred to by the Supreme Court of India in Justice V. Ramaswamy’s cases) was based upon the second method of removal by address. Initially, there was a Parliamentary Commission of Inquiry,

composed of three retired Supreme Court Judges (Gibbs, Lush & Helsham). The Commission found no misconduct in the Judge's carrying out of his duties of office as a Judge; but they also made findings on other matters which related evidence in certain defamation proceedings and taxation transactions. The State Parliamentary Assembly adopted these later findings as the reason for its address to the Governor. The Governor removed him in June 1989 on account of the address.

In Western Australia, sec 9(1) of the Supreme Court Act 1935, and ss 54, 55 of the Constitution Act, 1889 (WA), provide that Judges or the Supreme Court hold office during good behaviour but can be removed by address both Houses to the Majesty.

In South Australia, the Constitution Act 1934(SA) sec 74 and ss 74, 77 provide likewise.

Tasmania: Under the Supreme Court Act 1887 (Tas) sec 5 and Supreme Court (Judges Independence Act) Act 1857 (Tas) only one method of removal or suspension by address is provided without specified grounds.

The Justice Murphy case of Australia – Important Procedural issues before the Committee

The case of Mr. Justice Murphy of the High Court of Australia is very important in the context of various procedural and evidentiary issues that arose before the Committee. Questions relating to standard of proof, compellability of witnesses, right of the judge to remain silent, his right to cross examination etc., all these questions were raised by Justice Murphy and the result was that the findings of the 1<sup>st</sup> Senate Committee were cancelled and the 2<sup>nd</sup> Senate Committee was appointed and thereafter there were criminal proceedings in which the Judge was convicted but released and there was a retrial and this was followed by a Parliamentary Commission of Inquiry and it gave its findings. But before action could be taken, the Judge died in October 1986. (The entire inquiry proceedings are discussed exhaustively in Odgers' Australian Senate Practice (2004), edited by Harry Evans, Clerk of the Senate).

1<sup>st</sup> Senate Committee

Justice Murphy, Judge of the High Court of Australia was also a former Senator, Leader of the Labour Party in the Senate and Attorney General in the Labour Government of Mr. Whitlam. In 1983-84, two newspapers published alleged transcripts of tape recordings of telephone conversation between certain persons which had been illegally intercepted

and recorded by Members of the New South Wales Police Force. The newspapers claimed that the transcripts revealed the activities of the persons associated with organized crime. Most of the parties to the conversation were not identified by name, but one of them was referred to as “a senior Judge”. The conversation recorded also included the one between that Judge and a Sydney Solicitor who was alleged to have been associated with leaders of organized crime. The judge was subsequently identified as Justice Murphy of the High Court of Australia, which is the highest Court in that country. The Labour Government took the view that no inquiry was necessary but the Opposition Liberal National Party and Australia’s Democrats which were in majority in the Senate insisted action against the judge, contrary to the wishes of the Government. The Senate appointed a Select Committee on 28<sup>th</sup> March, 1984 to report upon the genuineness of the alleged transcripts and as to whether the conduct of the Judge constituted misbehaviour warranting removal.

Various directions were given to the Committee by the Senate. But the Committee was directed to protect the privacy rights and reputation of individuals and not to disclose the operational methods and investigation of law enforcement agencies (including the police). Witnesses were to be given notice of the matters proposed to be dealt with during their appearances and also to make submission in writing before appearing, and witnesses could be assisted by counsel. The Committee determined guidelines for its proceedings which stated that it could meet in private and that the material

submitted to it would not be published unless it was necessary to make it public. Witnesses were to be notified of their rights and to be informed of the allegations against them. Witnesses could consult their lawyers during their appearance. The Committee could accept any request by witnesses to give evidence in private unless the Committee felt that it was necessary to hear the evidence in public. Witnesses were given the right to object to the questions on grounds of irrelevance or self-incrimination. Mr. Murphy was not finally summoned, but the Committee indicated to him that it desired to hear his evidence on a number of matters. It was so done because it was not clear whether the Senate or its Committees could summon a High Court Judge.

The Judge claimed all the rights of an accused person in a criminal trial, including the right to be notified of his specific charge, the right not to attend if he so chose and the right to have all the evidence heard in his presence and the right to cross examine witnesses. It was not within the power of the Committee to allow cross examination of witnesses by the Judge's lawyer without express permission of the Senate. The Committee took the view that it was only "an investigating agency", as in the case of a prosecution authority to determine whether a prosecution could be commenced. It considered that only if it determined that the evidence so warranted, it would recommend to the Senate that there should be a formal hearing of the evidence, with the rights of an accused person extended to the Judge.

The Judge refused to give oral evidence but gave a written statement to the Committee in regard to the evidence which it had received. His lawyer made submissions on that evidence and on law.

In its Report, the 1<sup>st</sup> Senate Committee held that it was not satisfied of the genuineness of the tapes and the transcriptions. It held that the conduct of the Judge did not amount to “proved misbehaviour”.

It, however, referred an incidental matter arising out of the evidence of one Mr. B which, if accepted, would show that the Judge was guilty of another offence, namely, the offence of trying to influence committal proceedings in the Magistrate’s Court. The Committee did not go into this question. But thus led to the appointment of the second Senate Committee.

### 2<sup>nd</sup> Senate Committee

In as much the report of the first Senate Committee was in favour of the Judge, the Opposition which was in the majority in the Senate got another Senate Committee appointed on 6<sup>th</sup> September, 1989 in relation to the matters disclosed in the evidence of Mr. B, namely, that the Judge attempted to influence the committal proceedings. One of the points was whether the Senate could delegate to the Committee the power to compel evidence from witnesses. In order to see that the Committee was non-partisan, two independent commissioners were also appointed.

The Committee was given various directions contained in 23 paragraphs. The Senate directed that the Committee could give its findings on the basis of two different standards of proof, namely preponderance of probability and also proof beyond reasonable doubt. (The Commissioners were to be two retired Supreme Court Judges of the State). Witnesses could be examined by the lawyer assisting the Committee as also the lawyer of Judge Murphy and the lawyer for other witnesses. Hearings were to be in public unless the Committee by majority held otherwise. Justice Murphy was given the rights of an accused in a criminal trial except that he was not to be called but would be invited to give evidence. All evidence was to be taken in his presence or in the presence of his counsel. If Justice Murphy chose to give evidence, then he may be subjected to cross examination.

The 2<sup>nd</sup> Committee formulated allegations against the Judge and stated that it would observe rules of evidence as in a Court and rely only on evidence admissible in court proceedings. Mr. Murphy's lawyer cross examined the witnesses. The Committee's proceedings were thus a departure from parliamentary norms. Mr. B was also examined and cross examined. Other witnesses were also examined. Mr. Murphy declined to give evidence. His counsel made a statement of his reasons for that decision and one of the reasons was that the Senate elections were close by.

The Members of the 2<sup>nd</sup> Senate Committee differed in their opinions. Two members held that the actions of Justice Murphy had a tendency to pervert the course of justice. One Commissioner was satisfied beyond reasonable doubt also. Two other Members were not satisfied beyond reasonable doubt, but found on balance of probabilities, that he was guilty. One other Member was not satisfied beyond reasonable doubt. Three senators found him guilty under both standards of proof. Yet another senator did not find him guilty by either standards.

When the Senate met, senators of all parties agreed that they would refrain from further action in as much as, in the meantime, the Director of Public Prosecution had decided to prosecute Justice Murphy on two charges of attempting to pervert the ordinary course of justice.

### Criminal Proceedings

In the criminal proceedings during 1985-86, the Supreme Court held that the evidence given before the two Senate committees was not admissible in the criminal court. Then Parliament passed the Parliamentary Privileges Act, 1987. Thereafter Justice Murphy was committed for trial in the Supreme Court and the committal was confirmed by the Federal Court (i.e. the High Court). (see Murphy vs. DPP (1985) 60 ALR 299). The Judge was also convicted by the Supreme Court in July 1985 and sentenced to 18 months imprisonment but was released pending the appeal.

Thereafter, the conviction was quashed because of legal and procedural irregularities in the original trial and a new trial in the Supreme Court was ordered.

In the 2<sup>nd</sup> trial the Judge chose not to give evidence but exercised his right to make an unsworn statement to the Jury as per New South Wales law, upon which he could not be cross examined. The trial Judge acquitted him but the Prosecutor recommended for prosecution under various charges of bribery and conspiracy relating to influencing the criminal inquiry which the Director of Prosecutions declined.

#### Inquiry by Parliamentary Commission

Thereafter, in May 1986, the Royal Commission into Alleged Telephone interceptions held that the tapes and transcripts were genuine. Meanwhile Justice Murphy attempted to resume his seat in the High Court. Thereafter, the Government appointed a new inquiry by a Parliamentary Commission.

The Parliamentary Commission was constituted by a special statute and had to report to the two Houses of Parliament. The bill to establish the Commission was brought in and passed speedily by both Houses. The

Commission could hear the evidence in closed sessions. Three distinguished former Supreme Court Judges were appointed on the Commission.

The Act precluded the Commission from examining issues dealt with in the trials earlier. Unlike the 2<sup>nd</sup> Senate Committee, it was empowered to compel the Judge to give evidence. It was to admit only evidence which was admissible in a court. It was given access to the documents of the 2<sup>nd</sup> Senate Committee and also allowed to hear evidence in private.

Justice Murphy questioned the constitutionality of the Commission but the High Court held against him. (Murphy vs. Lush (1986) 65 ALR 651).

In August 1986, the Commission concluded its preliminary inquiry and was about to take evidence when it was revealed that Justice Murphy was suffering from terminal cancer. As the inquiry into the charges would take considerable time, a bill was introduced to repeal the Act which established the Commission. However, before the repeal, the Commissioners held that misbehaviour under the constitution could only relate to performance in his judicial duties in a conviction is criminal offence. But it held that the word 'misbehaviour' consisted of conduct which indicated unfitness to continue in office. In the meanwhile, in October 1986 Justice Murphy died and the matter came to an end.

## CHAPTER XI

### PROCEDURES IN HONG KONG, GERMANY AND SWEDEN

#### HONG KONG:

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Under the Constitution of Hong Kong, 1990 ( as amended), Art. 88 states that the Judges of the courts of the Hong Kong special Administrative Region shall be appointed by the Chief Executive Officer, on the recommendation of an independent commission. \_

“Section 89”:

(1) A Judge of a court of the Hong Kong Special Administrative Region may only be removed for inability of his or her duties, or for misbehavior , by the Chief Executive on the recommendation of a Tribunal appointed by the Chief Justice of the court of Final Appeal and consisting of not fewer than three Lord Judges.

(2) The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehavior, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local Judges and may be removed by the Chief Executive on the

recommendation of the tribunal and in accordance with the procedures prescribes in this law.

Sub clause (2) of Sec.90 states that in the case of removal of Judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall in addition to following the procedures prescribed in Article 88 and 89 of this Law, obtain the endorsement of the Parliamentary Council and report such appointment or removal to the standing Committee of the National Peoples Congress for the record.

Thus the investigating Tribunal in Hong Kong consists only of Judges.

## GERMANY

German Constitution is known also as the Basic Law of the Federal Republic of Germany. It was promulgated by the Parliamentary Council on 23<sup>rd</sup> May, 1949. It was amended by the Unification Treaty on 31<sup>st</sup> August, 1990 and federal statute of 23<sup>rd</sup> September, 1990. On 3<sup>rd</sup> October, 1990, Germany established the unity of Germany. The Constitution protects the treaty and basic rights of man, respects public life and facilitates peaceful change.

Art. 97 of the Basic Law deals with independence of judges and reads as follows:

“Art. 97 (Independence of the judges):

- (1) The judges are independent and subject only to the law.
- (2) Judges appointed permanently on a full time basis to an established post, can against their will, be dismissed, or permanently or temporarily suspended from office or transferred to another post or retired before expiration of their term of office only under authority of a judicial decision and only on grounds and in the form provided by law. Legislation may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of the courts or their areas of jurisdiction, judges may be transferred to another court or removed from their office, provided they retain their full salary.”

Art 98 of the Constitution (as amended on 18<sup>th</sup> March, 1971) states that ‘if a Federal Judge, in his official capacity or un-officially, infringes upon the principles of the Basic Law or the Constitutional order of the Land, the federal constitutional courts may decide by a four-third majority, upon the request of the Bundestag, that the judge be transferred to another office or be placed on the retired list. In a case of intentional infringement, his dismissal may be ordered’.

The Germany Judiciary Act was passed on 19<sup>th</sup> April, 1972 and was last amended by Art. 1 of the law of 11<sup>th</sup> July, 2002. Chapter 1 is introductory, chapter 2 deals with qualification for judicial office, chapter 3 deals with judicial tenure and in that chapter, sec. 21 provides the procedure for dismissal from service. While sec. 24 deals with termination of service by judicial decision, sec. 25 in that chapter states that judges shall be independent and subject only to the law. Chapter 5 deals with special duties of a judge and sec. 39 thereof deals with maintenance of independence. It states that in and outside office, a judge shall conduct himself in relation also to political activity in such a manner that confidence in his independence will not be endangered. Chapter 6 deals with honorary judges. These are all in Part 1 of the Act.

Part 2 of the Act deals with judges in federal service. Chapter 1 is general, chapter 2 deals with the representation of judges and deals with constitution of Councils of Judges. Sec. 50 states that the Council of Judges shall be composed of five elected judges consisting of the Federal Courts of Justice and with the Federal Patents Court and three elected judges at the Federal Court of Administration, the Federal Finance Court, the Federal Labour Court and the Federal Social Court. The Council of Judges consisting of three elected judges shall also be established for the judges of the Military Service Courts. Judicial Councils deal with Judicial appointments.

Chapter 3 deals with “Federal Service Court” which deals with disciplinary proceedings.

Sec. 61 in chapter 3 deals with the constitution of the Service Court. Subsection (1) states that a special division of the Federal Court of Justice shall be established as a “Federal Service Court” with judges in federal service. Subsection (2) states that Federal Service Court shall conduct its proceedings and give its decisions and for that purpose it shall consist of a presiding judge, two permanent associate judges, and two non-permanent associate judges. The presiding judge and the two permanent associate judges shall be members of the Federal Court of Justice and the two non-permanent associate judges shall be judges for life. The President of the Court and his permanent deputy may not be members of the Federal Service Court. Subsection (4) states that the Federal Service Court shall be akin to a criminal division within the meaning of sec. 132 of the Courts Constitution Act. Sec. 62 deals with the jurisdiction of the Federal Service Court. Subsection (1) states that the Federal Service Court shall give a final decision in disciplinary matters as well as retirement of judges, their transfers, nullity of appointment, revocation of appointment, dismissal, retirement on account of unfitness for service or limited employment on account of limited unfitness for service.

Sec. 63 states that the provisions of the Federal Disciplinary Rules shall apply to proceedings in disciplinary matters. Sec. 64 speaks of

“disciplinary measures” such as a reprimand in a disciplinary ruling or a reprimand or a regulatory fine or removal from office imposed on a judge of one of the Supreme Courts of the Federation. Chapter 4 deals with judges of the Federal Constitution Court. Sec. 69 states that the Act shall apply to judges of the Federal Constitution Court only insofar as they are compatible with the special legal status of such judges pursuant to the Basic Law and to the Federal Constitution Court Act.

In other words, the disciplinary powers against judges are vested in the Federal Service Court which consist only of Judges.

In an article (1998 Vol.61, Law and Contemporary Problems), under the title ‘Separating Judicial Power’, David P. Currie, Prof. of Law, University of Chicago, states that in some respects the German Constitution is more protective of judicial independence than that of the US. It guarantees judicial review of administrative action, it ensures their right to attack the constitutionality of Government action before the constitutional court, it permit judges to be disciplined or removed only by other judges.

## SWEDEN

According to Article 8 of Chapter 12 which deals with ‘Parliamentary Control’ of the Swedish Constitution, the removal of Judges is done only by the Swedish Supreme Court. Article 8 reads as follows:

“Article 8:

‘(1) Proceedings under penal law on account of a criminal act committed by a member of the Supreme Court or the Supreme Administrative Court in the exercise of his official functions shall be brought before the Supreme Court by a Parliamentary Ombudsman or by the Justice Chancellor.

(3) The Supreme Court shall likewise examine and determine whether, in accordance with the provisions laid down in this connection, a member of the Supreme Court or the Supreme Administrative Court shall be removed from office or suspended from duty, or shall be obliged to undergo a medical examination. Proceedings to this effect shall be initiated by a Parliamentary Ombudsman or by the Justice Chancellor’.

Thus, in Sweden, the discipline of Judges is entrusted to the Supreme Court, including removal or suspension.

## CHAPTER XII

### PROCEDURES IN TRINIDAD AND TOBAGO AND PRIVY COUNCIL JUDGMENT (1994)

The case of Justice Crane and the judgment of the Privy Council, Rees vs Crane 1994 (1) All ER 833 are quite important and interesting. The case deals with the issue of non-listing of cases before the Judge, pending an inquiry. The Privy Council held that, unlike in other cases of ‘investigation’ (as distinct from an inquiry), it is proper to give opportunity to the Judge even during the stage of ‘investigation’ before charges are framed against the Judge.

Justice Crane was appointed as a judge in 1978 and was senior puisne judge of the High Court of Trinidad and Tobago since 1985. The three appellants before the Privy Council were members of the tribunal appointed by the President of Trinidad and Tobago. They were appointed as members of a tribunal by the President to inquire into the question whether Justice Crone should be removed from office.

Justice Crane had presided in the High Court until 27<sup>th</sup> July, 1990 which was the end of the current term of the court and thereafter he went abroad. Even before he left and without his being informed, the Chief Justice decided that cases shall not be listed before Justice Crane for the term October 1990 to January 1991. The decision was placed before the Judicial

and Legal Service Commission of which the Chief Justice was the chairman and was agreed to by the Commission, again without any information to Justice Crane before he left on vacation. After the judge returned in early September some two weeks before the new term, he found that he was not assigned any cases and he was the only judge not so assigned. He tried to meet the Chief Justice on several occasions but was unsuccessful until 8<sup>th</sup> October, 1990 when he delivered a letter to the secretary of the Chief Justice by hand and thereafter had an interview with the Chief Justice. In that interview, the Chief Justice told him that a communication was sent to him in August, 1990 conveying the decision of the Commission, though Justice Crane was not told of its contents. Later, he was sent a copy of the letter by the Chief Justice on 23<sup>rd</sup> August, 1990. Subsequently, the judge found the original letter in the large number of letters which had piled up during his absence. The letter of the Chief Justice read as follows: “I have to inform you that the Judicial and Legal Service Commission, having considered complaints about your performance in court and doubts about your current state of health, has decided that you should cease to preside in court until further notice”.

Justice Crane wrote back a letter on 9<sup>th</sup> October, 1990 to the Commission stating that there were no valid grounds in the complaint and also that the decision was unlawful. The Commission sent a further reply whereby the only change in the above letter was that instead of stating that the Commission had decided, it was clarified that the Commission agreed

with the decision of the Chief Justice and that, therefore, the Commission would declare that he should cease to preside in court until further notice. Thereafter, meetings of the Commission took place on 15<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> October, 1990. One Mr. Pierre who deposed at the first meeting stated that before the Commission could write to the President under sec. 137(3) of the Constitution, it was necessary for the Commission to have in its possession more detailed and specific evidence in support of the judge's "inability" to perform the functions of his office.

At the second meeting of the Commission, the Chief Justice presented statistics and records relating to Justice Crane's performance in court and then left the meeting when another member took the chair. The Chief Justice returned on 26<sup>th</sup> October, 1990 for the third meeting, by which time the members had a chance to study the material but he did not take part in the discussion.

The Commission then resolved that it could represent to the President under sec. 137(3) that "the question of removing the Hon'ble Mr. Justice Crane from his office of puisne judge are to be investigated", and on 29<sup>th</sup> October, 1990 it did so. On 22<sup>nd</sup> November, 1990 the President appointed the appellants (all Judges) as members of the tribunal to inquire into the question pursuant to sec. 137(3) and (9) of the Constitution. Justice Crane learnt about this letter of the Commission through a television report on that day and issued a written notice on 30<sup>th</sup> November, 1990 when he was told

that a hearing would take place on 3<sup>rd</sup> December, 1990. By a letter dated of 23<sup>rd</sup> November, 1990, the President, pursuant to sec. 137(4) of the Constitution, “suspended” Justice Crane from performing the functions of his office as a judge of the High Court. The judge was given a copy of the order.

Before the President passed these two orders, Justice Crane asked for judicial review stating that the Chief Justice or the Commission could not prohibit him from presiding in court and sought that the decision of the Commission recommending investigation against him be declared ultra vires and should be quashed and the Commission should be prohibited from representing to the President that such a question be investigated and that, in any event, the three appellants should be prohibited from proceeding as a tribunal to inquire into the question of his removal. He also claimed damages. A single judge of the High Court, Blackman J held against Justice Crane while the Court of Appeal by majority, reversed the judgment. Ibrahim and David JJ held in his favour while Sharma J held against him. David J held that the Chief Justice was biased and, therefore, the decision was vitiated, Sharma J rejected the contention. Ibrahim J found it unnecessary to decide the question in view of the other findings given by him in favour of the Judge on the other points. The Commission appealed to the Privy Council and Justice Crane filed a cross appeal to the Privy Council.

It was not disputed before the Privy Council that Justice Crane was not told of the complaints which had been made or of the statistics or records provided by the Commission at its meeting, nor was he told that the Commission had decided to make a recommendation to the President for his removal. On 3<sup>rd</sup> December, 1990, the President's secretary informed Justice Crane about the appointment of the tribunal for deciding the question of his removal on the ground of 'inability' to perform his functions and/or 'misbehaviour'. In other words, while the original allegation was about his physical inability, the reference by the President to the tribunal related not only to that aspect but to his alleged misbehaviour.

We may state that the trial Judge Blackman J, though he held against the Judge, had, in fact, found that the Chief Justice and the Commission had acted ultra vires in suspending Justice Crane (i.e. by non-listing of cases) but he refused relief because of the subsequent order of the President suspending Justice Crane had come into being. In the Court of Appeal, the majority accepted that the suspension was unlawful as the procedure was not followed and that there was breach of natural justice and of the constitutional rights of the judge.

It may be noted that the Commission conducts a preliminary investigation and if it refers the matter to the President, he will appoint a tribunal for a regular inquiry.

In the Privy Council (judgment by Lord Slynn) it was stated that the first question was whether the decision not to assign cases to the judge for the term starting in October was unlawful. It was necessary to decide the question because the Commission agreed with the decision of the Chief Justice.

In the Privy Council, it was stated by Lord Slynn that the first question was whether the decision “not to assign cases” to the judge for the term starting in October, 1990 was lawful. It was clear that, initially, the decision was of the Chief Justice and it was his decision that was implemented by the Commission. The Chief Justice was not only the President of the Court of Appeal but also the ex-officio Member of the High Court. He was also the head of the Judicial Administration of Trinidad and Tobago. He had the powers to give directions regarding listing of cases (Order 34 Rule 4(1)(d) and Rule 21 of the Rules of the Supreme Court, 1975). He also had an overriding power under Order 1 Rule 10(2). Therefore, he did have the power of allocating particular work to a particular judge and he could also not list certain cases before a particular judge if that judge had backlog of reserved judgments or if the judge was ill or was involved in an accident or was not able to function effectively due to family or other public obligations.

Lord Slynn agreed that it may also be necessary where allegations are made against a judge, that his work programme should be reoriented so that, e.g., he was assigned only particular type of work for a period and did not sit

in another type of cases or even if he did not sit at all temporarily. However, this kind of arrangement could also be and should be capable of being made by way of agreement or at least after frank and open discussion between the Chief Justice and the judge concerned. Lord Slynn then observed as follows:

“The exercise of these powers, however, must be seen against the specific provisions of the Constitution relating to the suspension of a judge’s activities or the termination of his appointment. It is clear that sec. 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways. The issue in the present case is thus whether what the Chief Justice did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.”

In this connection, it is necessary to refer to sec. 137 subclause (4) of the Constitution of Trinidad and Tobago, which reads as follows:

“Sec. 137(4):

Where the question of removing a judge from office has been referred to a tribunal under subsection (3), the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a judge, other than the Chief Justice,

may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a judge, other than the Chief Justice, and shall in any case cease to have effect-

- (a) where the tribunal recommends to the President that he should not refer the question of removal of the judge from office to the Judicial Committee; or
- (b) where the Judicial Committee advises the President that the judge ought not to be removed from office.”

In this context, it may be useful to refer to the other clauses (1), (2) and (3) of sec. 137 which deal with the procedure for removal from office of the judge. Under the Act, a commission investigates and it could thereafter recommend to the President that an inquiry is warranted. The President then appoints a tribunal for an inquiry. The tribunal inquires and recommends to the President. The President consults the Privy Council and then passes orders. Sec. 137(1) to (3) read thus:

“Sec. 137:

- (1) A judge may be removed from office only for inability to perform the functions of his office, (whether arising from infirmity of mind or body or any other cause), or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(2) A judge shall be removed from office by the President where the question of removal of that judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the judge ought to be removed from office for such inability or for misbehaviour.

(3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a judge, other than the Chief Justice, represents to the President that the question of removing a judge under this section ought to be investigated, then-

(a) the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, selected by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a judge, from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;

(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that judge from office to the Judicial Committee; and

(c) where the tribunal so recommends, the President shall refer the question accordingly.”

‘Judicial Committee’ here means the Judicial Committee of the Privy Council.

After referring to the specific procedure in the Constitution for ‘removal’ and ‘suspension’ pending inquiry, the Privy Council observed that the majority in the Court of Appeal were correct inasmuch as what happened here went beyond mere administrative arrangement which the Chief Justice was otherwise entitled to make. Despite the fact that the respondent continued to receive the salary and theoretically (as has been argued) would have exercised some power (e.g. to grant an injunction if approached directly to do so), the respondent was effectively barred from exercising these functions as a judge sitting in court. He was left out of the October to January roster and there was no indication that he would thereafter sit again. It was in effect an indefinite suspension. This in their Lordships’ view was outside the powers of the Chief Justice. Such action of the Chief Justice was not retrospectively corrected by the subsequent order of the President. The suspension by the Commission was wrongful as long as it lasted and the majority of the Court of Appeal were entitled and right to quash the Chief Justice’s decision.

Similarly, the Commission whether it purported to confirm the decision of the Chief Justice or whether it purported to suspend judge under its own powers, it was clear that it had no power to do so and its decision should also be set aside as done by the majority of the Court of Appeal.

Further, the judge was not informed about the proposal for removal nor was he given any notice of the complaints made against him nor was he given any chance to reply to them.

It may be that, as held in a number of cases, that generally a person who is being investigated, has no right to be given an opportunity in preliminary or initiating proceedings. That right may arise at a later stage when he has a right to know about the complaint. This raises the question whether in this case, the right to be informed about the complaint and to reply at a later stage, dispenses with the obligation or duty to inform the judge at the stage of the investigation before the charges are framed by the Commission. It is true that natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. The reason leading the courts to this principle was the fact that the investigation was purely preliminary, that there would be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim would be justified by urgency or administrative necessity, that no penalty or serious damage to reputation should be inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.

Having stated as above that there is no such right to know about the gist of the complaints at a preliminary stage, Lord Slynn, however, observed that in some cases, an opportunity to send a representation could be given at the stage of investigation. He stated as follows:

“But in their Lordships’ opinion, there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As de Smith’s *Judicial Review of Administrative Action* (4<sup>th</sup> edn, 1980 p.199) puts it: Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person’s interests, the courts will generally decline to accede to that person’s submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage.”

Lord Slynn then stated that while considering whether this general practice should be followed, the court should not be bound by rigid rules. It may have to take into account all the circumstances of the case. After stating so, Lord Slynn made the following important observations in favour of giving a right to represent during the investigation and before framing charges. He said:

“Plainly in the present case there would have been an opportunity for the respondent to answer the complaint at a later stage before the

tribunal and before the Judicial Committee. That is a pointer in favour of the general practice but it is not conclusive. Sec. 137 which sets up the three-tier process is silent as to the procedure to be followed at each stage and as a matter of interpretation is not to be construed as necessarily excluding a right to be informed and heard at the first stage. On the contrary its silence on procedures in the absence of other factors indicates, or at least leaves open the possibility, that there may well be circumstances in which fairness requires that the party whose case is to be referred should be told and given a chance to comment. It is not a priori sufficient to say, as the appellants in effect do, that it is accepted that the rules of natural justice apply to the procedure as a whole but they do not have to be followed in any individual stage. The question remains whether fairness requires that the audi alteram partem rule be applied at the commission stage.”

“... the Commission is not intended simply to be a ‘conduit pipe’ by which complaints are passed on by way of representation....”. “The Commission before it represents, must be satisfied that the complaint has prima facie sufficient basis in fact and the charge must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the Commission must act fairly.”

In the present case, the Commission did not simply act as a conduit pipe. On the contrary, it decided that he needed more detailed and specific evidence in support of the judge's inability to perform the functions of his office. It is not shown that there would have been unnecessary delay in case the material was shown to the judge and his reply was sought for". Therefore, there were no circumstances which required dispensing with calling for a reply from the Judge at that stage.

The Privy Council further observed "Nor is it right to say that the Commission's action is analogous to the decision of a police officer to charge a defendant in a criminal process. The composition of the commission and the nature of the process made what happened here more akin to a quasi-judicial decision."

The Privy Council also observed:

"it is true as the appellants contend, that a decision to make a representation is not itself a punishment or penalty and that the eventual dismissal requires two further investigations, i.e. before a tribunal to which the President will refer for inquiry and before the Privy Council to which the President will refer. That in their Lordships' view, is too simplistic an approach in resolving the present questions. There was obviously considerable publicity for the decision to make a representation (to the President) even if the detailed charges

were not publicized. Indeed, it was reported on the television news on 22<sup>nd</sup> November that the President had appointed a tribunal to investigate whether the respondent should be removed as a judge, apparently even before the respondent received from a policeman in the street a copy of the President's decision suspending him from office."

The manner in which a representation to the President was made by the Commission and a tribunal was appointed by the President and the respondent was suspended was bound to raise suspicion that the commission and even the President was already satisfied that the charges were made out. If the respondent had been given a chance to reply to such charges and had been given the opportunity to do so before the representation was made to the President, the suspicion and damage to his reputation might have been avoided. (p. 847) The Privy Council said that a judge though by no means uniquely, is in a particularly vulnerable position both for the present and for the future if suspicion of the kind referred to is raised without foundation. Fairness, if it can be achieved without interference with the due administration of the courts, requires that the person complained of should know at an early stage what is alleged so that, if he has an answer, he can give it.

The Privy Council, in this context, referred to the representation of the Committee of Investigation to the Canadian Judicial Council (1982 (28)

McGill LJ 380) and a representation to the Senate Judiciary Committee hearing against a judge in the US in 1984, where the judge was given even during the preliminary investigation, an opportunity to rebut what was being said against him. They also made reference to the rules of procedure of the Wisconsin Judicial Commission (1976 Wisconsin Law Reports 563 at 575) which it is said are typical of the rules in many States of the US, where there is a clear requirement that, in the course of a preliminary investigation and before a formal charge is made or hearing held, the judge be given an opportunity to respond either by making a personal appearance or by letter. Lord Slynn further observed “it might indeed be thought to be in the interests of the good administration of justice that such a course should be taken before unjustified charges are laid before the tribunal with its inevitable publicity not just for the judge but for the court system as a whole”.

On the basis of the above said reasons, the Privy Council stated that Justice Crane was not treated fairly, he ought to have been told of the allegations made to the Commission and given a chance to respond to the allegations though not necessarily by oral hearing at that stage of investigation. They affirmed the judgment of the Court of Appeal.

## CHAPTER XIII

### PROCEDURES IN SINGAPORE, NEW ZEALAND, ISRAEL AND ZAMBIA

#### SINGAPORE :

According to the Constitution of Singapore (1963), the investigation into conduct of Judges of Supreme Court is entrusted to Judges. Part VIII of the Constitution deals with Judiciary. Art 98(2) of the Constitution states that a Judge of the Supreme Court may resign but shall not be removed from office except in accordance with clauses (3), (4), (5) of Art 98.

Art 98(3) to (5) read as follows:

“98(3): If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the President that a Judge of the Supreme Court ought to be removed on the ground of misbehavior or of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office, the President shall appoint a tribunal in accordance with clause (4) and shall refer that representation to it; and may on the recommendation of the tribunal remove the Judge from office.

- (4) The tribunal shall consist of not less than 5 persons who hold or have held office as a Judge of the Supreme Court, or, if it appears to the President expedient to make such an appointment, persons who hold or have held equivalent office in any part of the Commonwealth, and the tribunal shall be presided over by the member first in the following order, namely, the Chief Justice according to their precedence among themselves and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date).
- (5) Pending any reference and report under clause (3), the President may, if he, acting in his discretion, concurs with the recommendation of the Prime Minister and, in case of any other Judge, after consulting the Chief Justice, suspend a Judge of the Supreme Court from the exercise of his functions.”

NEW ZEALAND:

New Zealand Constitution (Part 4, Art.23) says that Judges shall not be removed except by the Sovereign or the Governor-General, acting upon an address of the House of Republic on the ground of ‘misbehavior’ or ‘incapacity’ to discharge functions of the office.

In New Zealand, the Parliament passed the Judicial Conduct Commissioner and Judicial Conduct Panel Act, 2004.

Section 4 of the Act states that the purpose of the Act is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by (a) providing a robust investigation process to enable informal decisions to be made about the removal of Judges from office, (b) establishing an office for the receipt and assessment of complaints about the conduct of judges, and (c) providing a fair process that recognises and protects the requirements of the judicial independence and natural justice.

Section 5 defines a “Judge” as Judge of the Supreme Court or Judge of the Court of Appeal or Judge or an Associate Judge of the High Court or District Judge etc. It includes a person who holds office as a temporary Judge, temporary Associate Judge or acting Judge, but does not include a retired Judge or a former Judge.

The Act provides for the appointment of a Judicial Conduct Commissioner under sec 7 and for a Judicial Conduct Panel under sec 21(1).

Section 7 states that the Commissioner will be appointed by the Attorney General in consultation with the Chief Justice. Section 8 defines the functions and powers of the Commissioner and states that the Commissioner shall receive complaints about Judges and will deal with them

in the manner required by the Act. He will conduct the preliminary examination of complaints and, in appropriate cases, recommend that a Judicial Conduct Panel be appointed to inquire into any matter or matters concerning the conduct of a Judge. It states that it is not the function of the Commissioner to challenge or call into question the legality or correctness of any instruction, direction, order, judgment or other decision given or made by a Judge in relation to any legal proceedings. The Commissioner shall have all powers necessary for carrying out his or her functions. Section 9 states that the Commissioner must act independently.

Section 11(1) states that the complaint may relate to the conduct of a Judge relating to exercise of judicial duties or otherwise or may relate to a criminal offence, whether or not dealt with or is being dealt with by a court. The Commissioner must deal with a complaint (a) taking the steps set out in sec 14, (b) conduct a preliminary examination under sec 15, and (c) take other appropriate steps set out in sections 16 to 19. The section is subject to sec 34.

Section 14 states that the Commissioner must acknowledge the complaints and deal with them promptly without delay. He has to send a copy to the concerned Judge about whom the complaint is made. He has also to consult the relevant Head of the Bench. “Head of the Bench” is defined in sec 5 as the Chief Justice of the Supreme Court, the President of the Court of Appeal or Chief District Court Judge etc. If the Commissioner is satisfied,

after such consultations, that the matter is being or will be dealt with by a court or there is any other good reason, the Commissioner may defer dealing with the complaint. Under sec 15 the Commissioner must conduct a preliminary examination and form an opinion as to whether the complaint, if proved, warrants consideration of the removal of the Judge or if there are any grounds for dismissing the complaint under sec 16(1). In the course of the preliminary examination, the Commissioner may seek the response of the Judge. The Commissioner must act in accordance with principles of natural justice. He may make inquiries which are appropriate, obtain court documents that are relevant or consult the Head of the Bench. Thereafter, he may form his opinion and either dismiss the complaint as stated in sec 16 or he may refer the complaint to the Head of the Bench as stated in sec 17 or may recommend that the Attorney General appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the conduct of a Judge as stated in sec 18.

Before we go to other sections, it will be necessary to refer to sec 12 which refers to the complainant. A complaint may be by any person or may be by the Attorney General or the Commissioner may on his or her own initiative, treat as a complaint any matter or matters concerning the conduct of a Judge. Section 13 deals with the manner in which a complaint has to be made to the Commissioner. It should be in writing. It should identify the judge, and the complainant must identify himself and he must state the

subject matter of the complaint. The Commissioner may require a complainant to fill up a statutory declaration form.

We shall now refer to sections 16 to 19. The Commissioner may dismiss a complaint that fails to meet the required threshold. The conditions for dismissal are where the complaint is not within the jurisdiction of the Commissioner or has no bearing on the Judge's judicial functions or his judicial duties or where the requirements of sections 12 and 13 have not been complied with or the complaint is frivolous, vexatious or not in good faith or the subject matter of the complaint is trivial or the complaint is about a judicial decision or other judicial function or the person complained of is no longer a Judge or the complaint was already considered by the Head of the Bench or where the Commissioner has previously considered the same and there are no grounds for taking any steps under sec 17 or 18.

Where the Commissioner dismisses a complaint he must inform the complainant along with the grounds on which the dismissal is based.

The Commissioner may refer complaints to the Head of the Bench (i.e. Chief Justice) under sec 17 where either a complaint is not dismissed by him or where he considers that it is not a fit case for referring the complaint to the Judicial Conduct Panel, i.e. where some corrective measures can be taken by the Head of the Bench. Where the Commissioner refers the complaint to the Head of the Bench, he must inform the complainant about such a reference.

Section 18 is important and deals with the Commissioner's power to recommend that the Attorney General appoint a Judicial Conduct Panel. This section states that he will so recommend where he thinks that such an inquiry by the Panel is necessary or justified and where the alleged conduct, if established, may warrant consideration of removal of the Judge. The Commissioner must give reasons for the recommendation and must communicate the same to the complainant.

Sections 19 relates to the Commissioner's duty of confidentiality in the preliminary inquiry aforesaid.

Section 20 states that while the Commissioner recommends that the panel be appointed, he must make the files available to the Attorney General and the special counsel.

Section 21 enables the Attorney General to appoint a Judicial Conduct Panel (It would mean that under the New Zealand Act, the Panel is not a permanent Panel but is constituted in relation to each case). Before appointing the Panel, the Attorney General must consult the Chief Justice of the Supreme Court whether a Panel should be appointed.

Section 24 refers to the functions of the Panel which reads as follows:

- “(1) A Judicial Conduct Panel must inquire into, and report on, the matter or matters of judicial conduct referred to it by the Attorney-General on the recommendation of the Commissioner.
- (2) The Panel must conduct a hearing into the matter or matters referred to it by the Attorney-General.
- (3) The Panel may also inquire into, and report on, any other matters concerning the conduct of the Judge that arise in the course of its dealing with the referral from the Attorney-General.
- (4) The Panel must give the Attorney General a report in accordance with section 32.

Section 26 refers to the powers of the Panel while conducting the hearing and inquiry and reads as follows:

- “(1) For the purpose of performing its functions and duties, a Judicial Conduct Panel has and may exercise the same powers as are conferred on Commissions of Inquiry by sections 4 and 4B to 8 of the Commissions of Inquiry Act 1908.
- (2) Sections 4 and 4B to 9 of the Commissions of Inquiry Act, 1908 apply to all persons involved in any capacity in any hearing or inquiry under this section as if it were an inquiry conducted by a Commission under that Act.
- (3) The Panel must act in accordance with the principles of natural justice.

Sections 27 states that the judge concerned is entitled to appear and be heard at the hearing and be represented by counsel. The reasonable costs of such representation by counsel must be met by the office of the Commissioner. The special Counsel appointed under sec 28 is entitled to appear and be heard at the hearing. Any other person may be permitted to appear personally or through counsel.

Section 28 deals with the appointment of “special counsel” during the inquiry and such counsel must present allegations about the conduct of the judge and make submissions on questions of procedure or law. The special counsel must perform duties impartially and in public interest.

Section 29 provides that the Panel must hear the matter in public unless it is of the view that in the interest of the person and also in public interest that it should be heard in private.

Section 30 imposes restrictions on publication and is quite important and reads as follows:

“(1) If a Judicial Conduct Panel is of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant) and to the public interest, the Panel may make any one or more of the following orders:

- (a) an order prohibiting the publication of any report or account of any part of the proceedings before the Panel, whether held in public or in private:
  - (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
  - (c) an order prohibiting the publication of the name or any particulars of the affairs of the Judge concerned or any other person.
- (2) An order made under subsection (1) continues in force –
- (a) until the time specified in the order; or
  - (b) if no time is specified in the order, until revoked under subsection (3) or section 31.
- (3) Any person may, at any time, apply to a Panel for an order revoking, on whole or in part, an order made by it under subsection (1), and the Panel may grant or refuse the application as the Panel thinks fit.
- (4) If a person is unable to apply to the Panel for an order under subsection (3) because the Panel has ceased to function, the person may apply to the Court of Appeal for an order revoking, in whole or in part, an order made by the Panel under subsection (1).

- (5) A person commits an offence if he or she acts in contravention of any order made under this section by a Panel.
- (6) A person who commits an offence against subsection (5) is liable on summary conviction,-
- (a) in the case of an individual, to a fine not exceeding \$3,000:
- (b) in the case of a body corporate, to a fine not exceeding \$10,000.

Section 31 permits appeals to the Court of Appeal against orders of the Panel under sec 29 during the course of the hearing or orders made in regard to publication under sec 30.

The Panel as provided in sec 32 shall submit its report to the Attorney General with its findings of fact and as to whether the Judge has to be removed from his office along with its reasons.

Section 33 grants a discretion to the Attorney General to initiate removal of the Judge on receipt of the report and reads as follows:

“(1) If a Judicial Conduct Panel concludes that consideration of the removal of a Judge is justified, the Attorney-General must determine, at his or her absolute discretion, whether to take steps to initiate the removal of that Judge from office.

(2) A Judge must not be removed from office unless a Judicial Conduct Panel has reported to the Attorney-General that it is of the opinion that consideration of the removal of the Judge is justified.

Section 34 gives independent power to the Attorney-General to take action if a Judge is convicted of a serious offence punishable for imprisonment for two or more years.

Section 35 amends the Official Information Act, 1982 and states that “Official Information” does not include any evidence, submissions, or other information given or made to the Judicial Conduct Commissioner or Judicial Conduct Panel or the Judicial complainant’s Lay Observer.

## ISRAEL

In Israel also, the Court of Discipline consists only of Judges, sitting or retired. In Israel the Basic law, Chapter II deals with the Judiciary. Section 7 states that the tenure of a judge shall begin upon his declaration of allegiance and shall end only on:-

- (1) upon retirement on pension; or
- (2) upon his resignation; or
- (3) upon his being elected or appointed to one of the positions the holders of which are debarred from being candidates for the Knesset; or

- (4) upon a decision of the Judges' Election Committee prepared by the Chairman of the Committee or the President of the Supreme Court and passed by a majority of at least seven members; or
- (5) upon a decision of the Court of Discipline.

The Judges of Israel cannot be removed from office except by a decision of the Court of Discipline, consisting of judges appointed by the President of the Supreme Court.

Section 13 of the Constitution which deals with disciplinary proceedings reads as follows:-

- “13. (a) A judge shall be subject to the jurisdiction of a Court of Discipline.
- (b) A Court of Discipline shall consist of judges and judges retired on pension appointed by the President of the Supreme Court.
- (c) Provisions as to the grounds for instituting disciplinary proceedings, the modes of filing complaints, the composition of the bench, the powers of the Court of Discipline and the disciplinary measures it shall be authorized to impose shall be prescribed by Law. The rules of procedure shall be in accordance with Law.

Section 14 provides for suspension of a judge which reads as follows:-

“14. Where a complaint or information is filed against a judge, the President of the Supreme Court may suspend him from office for such period as he may prescribe.”

## ZAMBIA

In Zambia too, the disciplinary Jurisdiction against Judges is granted to Judges only. The Constitution of Zambia 1991 as amended by the Constitution (Amendment) Act of 1996 deals with the Judiciary in Part VI. Section 91 deals with the classification of the courts, namely, the Supreme Court of Zambia, the High Court of Zambia, the Industrial Relations Court, the subordinate courts and the local courts. The disciplinary procedure, the tenure of the Judges are referred to in article 98. Article 98(1) says that a person holding office of a Judge of the Supreme Court or a Judge of a High Court shall vacate office on attaining the age of 65 years. Sub-section (2) of section 98 states that a Judge of the Supreme Court or a High Court may be removed from office only for inability to perform the functions of office whether arising from infirmity of body or his incompetence or misbehaviour and shall not be so removed except in accordance with the provisions of this article. Section 98(3) reads as follows:-

“98(3). If the President considers that the question of removing a Judge of the Supreme Court or of the High Court under this article are to be investigated, then –

- (a) He shall appoint a tribunal which shall consist of a chairman and not less than two other members who hold or have held high judicial office;
- (b) The tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the Judge are to be removed from office under this article for inability as aforesaid or for misbehaviour.”

Thereafter, section 98(4) and (5) state as follows:-

“(4) Where a tribunal appointed under clause (3) advises the President for a Judge of the Supreme Court or of the High Court are to be removed from office for inability or incompetence or for misbehaviour, the President shall remove such judge from office;

(5) If the question of removing a Judge of the Supreme Court or of the High Court from office has been referred to a tribunal under clause (3), the President may suspend the Judge from performing the functions of his office, and any such suspension may at any time be revoked by the President and shall in case cease to have effect if the tribunal advises the President that the Judge are to be removed from office.”

The Judicial (Code of Conduct) of 1999 of Zambia states in section 20 that there will be a complaints committee which shall consist of five members who will or are qualified to hold high judicial office.

## CHAPTER XIV

### **PROCEDURES IN BANGLADESH, PAKISTAN AND MALAYSIA:**

#### BANGLADESH:

In Bangladesh, the Judicial Council which conducts inquiries against Judges of the Supreme Court and High Courts consists of Judges only and not others. Section 96 of the Constitution deals with the subject matter of inquiries which is applicable to Judges of the Supreme Court as well as High Courts. This is clear from sec 94 which states that there shall be a Supreme Court of Bangladesh, comprising of the Appellate Division (i.e. Supreme Court) and the High Court Division. Clause (4) of Art 94 states that subject to the provisions of the Constitution, the Chief Justice and other Judges shall be independent in the exercise of their judicial functions.

According to sec 96 of Bangladesh Constitution, a Judge of the Supreme Court shall hold office until he attains the age of 65 years. He shall not be removed from office except in accordance with the provisions of Art 96 subclauses (3) to (8). These Articles provide for the constitution of a Supreme Judicial Council which shall consist of the Chief Justice of Bangladesh and the two next senior Judges provided that if the inquiry is against a Judge who is a member of the Council, then the next senior most Judge shall act as a member. The Council shall prescribe a Code of Conduct

to be observed by the Judges and shall also inquire into the capacity of conduct of a Judge or any other functionary who is not removable from office except in like manner as a Judge. Sub clause (5) provides that upon any information received from the counsel or from any other source, if the President has reason to apprehend that a Judge may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity or that a Judge may have been guilty of gross misconduct, the President may direct the Council to inquire into the nature and report its findings. Sub clause (6) states that if after the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall remove the Judge from office. Sub clause (7) enables the Council, for the purpose of such an inquiry, to regulate its procedure and shall have, in respect of issue and execution of processes the same power as the Supreme Court. Sub clause (8) permits a Judge to resign in writing by letter addressed to the President.

Section 96 reads as follows:

“96. Tenure of office of Judges

(1) Subject to the other provisions of this article, a Judge shall hold office until he attains the age of sixty-five years.

(2) A Judge shall not be removed from office except in accordance with the following provisions of this article.

(3) There shall be a Supreme Judicial Council, in this article referred to as the council, which shall consist of the Chief Justice of Bangladesh, and the two next senior Judges:

Provided that if, at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or other cause, the Judge who is next in seniority to those who are members of the Council shall act as such member.

(4) The function of the Council shall be –

(a) to prescribe a Code of Conduct to be observed by the Judges; and

(b) to inquire into the capacity or conduct of a Judge or of any other functionary who is not removable from office except in like manner as a Judge.

(5) Where, upon any information received from the Council or from any other source, the President has reason to apprehend that a Judge:--

(a) may have ceased to be capable of properly performing the functions of his office by reason of physical or mental incapacity, or

(b) may have been guilty of gross misconduct, the President may direct the Council to inquire into the matter and report its findings.

(6) If, after making the inquiry, the Council reports to the President that in its opinion the Judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct, the President shall, by order, remove the Judge from office.

(7) For the purpose of an inquiry under this article, the Council shall regulate its procedure and shall have, in respect of issue and execution of processes, the same power as the Supreme Court.

(8) A Judge may also resign his office by writing under his hand addressed to the President.

It will be seen that in Bangladesh, the procedure for removal by address of the Houses of Parliament to the President is not in existence and the only procedure for 'removal' is the one pursuant to recommendation of the Judicial Council, which consists only of Judges.

## PAKISTAN

According to the Constitution of Pakistan, there is a procedure for inquiry into the inability or conduct of the Judges of the Supreme Court and the High Courts and this procedure is contained in Art 209. It is significant that the Supreme Judicial Council which conducts these inquiries consists only of Judges. The basic procedure before the Council is also spelt out. Article 209 to 211 read as follow:

“209 (1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of,

- (a) the Chief Justice of Pakistan;
- (b) the two next most senior Judges of the Supreme Court;
- and
- (c) the two most senior Chief Justices of High Courts

Explanation:- For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice [otherwise than as acting Chief Justice], and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a

member of the Council is absent or is unable to act due to illness or any other cause, then

(a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and

(b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information [from any source, the Council or] the President is of the opinion that a Judge of the Supreme Court or of a High Court,

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to, [or the Council may, on its own motion, inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,

- (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and
  - (b) that he should be removed from office, the President may remove the Judge from office.
- (7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.
- (8) The Council shall issue a Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts.

210 (1) For the purpose of inquiring into any matter, the Council shall have the same power as the Supreme Court has to issue directions or orders for securing the attendance of any person or the discovery or production of any document; and any such direction or order shall be enforceable as if it had been issued by the Supreme Court.

(2) The provisions of Article 204 shall apply to the council as they apply to the Supreme Court and a High Court.

211 The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court.

It will be noted that, as in Bangladesh, the Constitution of Pakistan does not provide for removal by address of the House to the President. The only

procedure for removal is on the recommendation of the Judicial Council, which consists only of Judges.

MALAYSIA:

Malaysian judges are accountable for their misconduct or inability to perform the functions of their office. They can be removed by the procedure provided by Article 125 of the Malaysian Federal Constitution. The Prime Minister or the Chief Justice after consultation with the Prime Minister will represent to the King that a particular judge should be removed. A tribunal will be set up to hear the representation and complaints against the judge. This tribunal must consist of not less than five persons who hold or have held office as a judge of the Federal Court or Court of Appeal or High Court or if it appears to the King to be expedient, he could appoint such persons who hold or have held equivalent office in any other of the Commonwealth.”  
Thus all the members of the tribunal are or have been Judges.

Article 125 prescribes that judges of the Federal Court, Court of Appeal and High Court may be removed from office on grounds of “misbehaviour” or if they cannot “properly discharge the function of their office” because of their “inability, from infirmity of body or mind or any other cause”. “Misbehaviour” has been construed as extending to conduct outside the court. Thus, there is in place a Constitutional mechanism for removing a judge who has misbehaved or is incapacitated. Inability to

perform judicially for “any other cause” has been given a liberal construction. The judiciary has recently introduced a Code of Ethics for judges to reinforce this aspect of accountability.

In Malaysia, the procedure for removal by Address is retained but the inquiry is conducted by a tribunal consisting only of Judges and it makes recommendation for ‘removal’.

In Malaysia, the conduct of a Judge cannot be discussed in any State Parliamentary assembly. This is absolute. In Parliament it cannot be discussed in either House except on a substantive motion of not less than one quarter of the members of either House. Article 127 of the Federal Constitution states:

“The conduct of a judge of a Federal Court, Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Parliamentary Assembly of any State.”

It has been stated in Malaysia that judges cannot be held accountable for making wrong decisions. There is no civil liability or penalties for wrong decisions made bona fide by judges. In this regard section 14(1) of the Courts of Judicature Act states:

“No judge or other person *acting judicially* shall be liable to be sued in any civil court for *any act done or ordered to be done by him* in the discharge of his judicial duty, *whether or not within the limits of is jurisdiction*, nor shall any order for costs be made against him, *provided that he at the time in good faith believed himself to have jurisdiction* to do or order the act complained of”.

This protection is essential to enable judges to decide fearlessly. This protection is only for civil liability and judges are still subject to the criminal law of the land. The section does not shield a judge for acts done outside the court in the discharge of his judicial functions. (See *Judges and Judicial Accountability*, edited by Cyrus Das and closing address by Rt. Hon. Justice Tan Sri Datak Steve Shim Lip Kiong, Chief Judge, Sabah and Sarawak).

## CHAPTER XV

### PROCEDURES IN UNITED STATES OF AMERICA

#### FEDERAL JUDGES

(1939,1980,2002 Acts)

#### United States of America – Judges of Federal Courts:

Federal Judges, according to Art. III of the US Constitution “hold their offices during good behaviour”. Federal Judges are also accountable as provided in Art. II as civil officers of United States who could be removed from office on impeachment for conviction of treason, bribery or other high crimes and misdemeanor. The Constitution specifies only one method of removal of a Federal Judge from office, namely by the impeachment process. It may be that every type of conduct may not warrant impeachment. Peer influence has had a salutary effect on the conduct of brother judges.

Before the statute of 1939, there is not much of case-law, but the case of Justice Chase which went to the Senate in proceedings for impeachment was unsuccessful and will be referred to in detail later.

The 1939 Act:

A Bill was presented in 1937 to establish a court of three circuit Judges who would “try district judges on charges of misbehaviour not included in, or justified by charge of impeachment”. Speaking for the bill in the House of Representatives, Mr. Kitchens from Arkansas argued that a person taking the appointment of a Federal Judge agrees to hold his office during good behaviour, but if he engages in behaviour which is not considered ‘good’, it amounts to a breach of contract and could result in removal outside the impeachment procedure”.

He further argued:

“It seems clear that the question of ‘good behaviour’..... was not intended to be included in the words ‘treason, bribery or other high crimes or misdemeanors’. These words are not connected with, but are exclusive of the causes for impeachment..... The terms ‘during good behaviour’ do not reach the dignity of charges justifying impeachment. This ‘behaviour’ clause is not in the impeachment article. There are those who would transpose this clause, erase it from Art III and insert the same in Article II as a ground for impeachment. This cannot be done ..... The charges, as stated, in such a case must amount to treason or bribery or high crimes and misdemeanors. It seems clear that there is a plain line of demarcation between a charge of breach of contract for misbehaviour and a charge justifying an impeachment proceeding.”

While Mr. Kitchens presented a good argument, he did not gain enough support in the Congress to bring forward a law. Impeachment still remains the only method available for removal of a Judge sitting on the Federal Bench. There has been also a debate whether there is a need for conviction for “other high crimes and misdemeanour”. Further, the nature of the crime in respect of which a Judge is convicted may also be of importance in as much as if a Judge is convicted of a petty offence such as a traffic violation, it is unlikely to be treated as good enough warranting impeachment. There are also situations where a Judge engages in conduct that is not becoming of his position, but yet the actions may not be criminal. A review of the history of impeachment proceedings in the Congress shows that out of 15 cases that reached the trial stage in the Senate, 12 involved Federal Judges. Some, including Justice Chase in 1805, were accused because though their conduct was reprehensible, it was held not good enough for impeachment. Thus historically in some cases the US Congress did not consider the constitutional requirement of good behaviour and high crimes and misdemeanor as being conjoined. The question naturally arose as to how to deal with behaviour which was not good for impeachment but which was not a crime or a impeachable offence. It was noticed that the impeachments were in fact intended to act as a check primarily on the executive rather than on the judiciary. “If good behaviour is not the complete converse of high crimes and misdemeanor” then a constitutional category of “not good” behaviour must apply to Judges not subject to impeachment. The

cumbersome impeachment process will not be effective on the case of minor offences.

Judicial Councils of the Circuit were finally brought into being by an Act 53 stat 1223 of August 7, 1939 (Title 28 USC 332) which was titled “An act to provide for the Administration of the US Courts and for other purposes”. The major purpose of the Act was to free the Federal Courts from their previous reliance on the Judicial Department in budgetary matters and to furnish to the Federal Courts, the administrative machinery for self improvement, through which those courts would be able to scrutinize their own work and develop efficiency and promptness in their administration of justice. For that purpose, the Act established the Administrative Office of US Courts. The Act further established two new bodies in each of the judicial circuits; the Judicial Council, consisting of all the active circuit judges and the Judicial Conference, consisting of the Chief Justice of the U.S. Supreme Court and Judge of the circuit and district judges along with participating members of the Bar. The functions of the Council were to consider the reports of the district administrative office and take such action as might be necessary. The purpose of the Judicial Conference was to meet annually to consider the state of the business of the Courts and advise ways and means of improving the administration.

During the debate when the 1939 Act was introduced, Chief Justice Groner of the Court of Appeals for the District of Columbia, who was

chairman of the committee of circuit judges, pointed out that prior to the 1939 statute, the circuit judges had no authority to require a district judge to speed up his work or to admonish him or to take any other action, but under the proposed Act, the Administrative Office could bring to the notice of the Judicial Council any thing that was wrong in the administration of justice. Under the 1939 Act the Judicial Council was given authority for continuous supervision of the work of the District Courts. The Bill which preceded the 1939 Act was to allow compiling of information and provide a legal method by which, if necessary, the courts may clean their own house.

The Act thus established Circuit Judicial Councils through which the Courts of Appeal Judges would review the case load reports of the newly established Administrative Office of the US Courts and instruct Judges on what was necessary to do to expedite the Courts' business. It also mandated annual circuit conferences at which circuit and district judges would meet with members of the bar to discuss judicial administration. Sec 306 of the Act stated:

“Sec 306. To the end that the work of the district Courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit Judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a Council composed of circuit Judges for such circuit, who are hereby designated a Council for that purpose, at which Council the senior circuit Judge shall preside.

The same Judge shall submit to the Council quarterly reports of the Director required to be filed by the provisions of section 304, clause (3), and such action shall be taken thereon by the Council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the Council as to the administration of the business of their respective Courts.”

Section 307 said that the Conference may advise ‘ways and means of improving the administration of justice within the circuit’.

Section 332 of the 1939 Act (28 USC 332) (as quoted in Chandlers’ case 1970) reads as follows:

“Section 332. Judicial Councils: The Chief Judge of each circuit shall call, a least twice in each year and at such places as he may designate, a council of the circuit Judges for the circuit, in regular active service, at which he shall preside. Each circuit Judge, unless excused by the Chief Judge, shall attend all sessions of the Council. The Council shall be known as the Judicial Council of the Circuit. ‘The Chief Judge shall submit to the Council the quarterly reports of the Director of the Administrative Office of the United States Courts. The Council shall take such action thereon as may be necessary. The Judicial Council shall make all necessary order for the effective and expeditious administration of the business of the Courts within its circuit. The

district Judges shall promptly carry into effect all the orders of the Judicial Council’.

It will be seen that the Judicial Councils of the Circuits were established by an Act of 7<sup>th</sup> August 1939 (28 USC 332) for “self-improvement, through which those Courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice”. The Bill was intended to see that ‘the Courts may clean their own house’.

The Act did not expressly refer to any ‘minor measures’ that the Judicial Council might resort to against the Judges. But, the general powers given to the Courts implied taking various minor measures. That indeed happened in Chandlers’ case.

(1970) Chandler’s case under 1939 Act: Non-listing of Cases

(1970) 398. US 74:

Under the 1939 Act, a question arose in Chandler vs. Judicial Council as to whether a lesser measure imposed by the Council, namely, non listing new cases before the Judge and “depriving him of both pending and future cases” was constitutional. The majority speaking through Burger CJ, did not decide the question whether the 1939 statute in so far as it was general and impliedly permitted lesser measures – like not allocating fresh cases – was

constitutional or not. They simply refused to intervene stating it was not a fit case for deciding the issues.

Harlan J, however, wrote a detailed judgment giving exhaustive reasons upholding the 1939 statute under which the Judicial Council was imposing lesser measures to be imposed. He said that the procedure under the 1939 Act provided for Intra-Judiciary supervision and that lesser measures other than removal were not prohibited by the Constitution. He held that the statute was one which enabled the judiciary to set its own house in order, and that non-listing of fresh cases did not amount to 'removal'. (Douglas & Black JJ dissented).

Justice Harlan after tracing the history of the Judicial Councils under the 1939 Act, w.e.f. August 7, 1939 observed that the Judicial Council acted as a 'judicial' Tribunal. He quoted elaborately from the speech of Chief Justice Groner of the Court of Appeal for the District of Colombia, who was the Chairman of the Committee of Circuits, who participated in the drafting of the Bill which preceded the 1939 Act. He said that the architect of the Judicial Council, Chief Justice Groner regarded the authority granted to the Councils was closely bound up with the process of the judges judging themselves. Judge Groner explained that under the existing law, (i.e. prior to 1939), the Circuit Judges had "no authority to require a distinct Judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is not expected to bear, or to take action as to any other matter

which is the subject of criticism... for which he may be responsible.” As to the kind of action a Judicial Council might be expected to take under the 1939 Act, Judge Groner stated that where there were arrears in a District, the Judicial Council would see to it, either that the particular Judge who is behind his work catches up with his work, or that assistance is given to him whereby the work may be made current”. If it appeared that a particular Judge “has been sick for 4 or 5 months and had been unable to hold any court, or had been unable, by reason of one thing or another, to transact any business..., immediate action could be taken to correct that situation.’ The discussion of the Council would be ‘final’. Judge Parker, it appears stated that if a Judge did not deliver judgment for 2 years, then under the 1939 Act, the Council could correct him.

According to Harlan J, the Act of 1939, in short, proposes to fill up the hiatus that existed in the law so that corrective action could be taken short of recommending removal’. He said:

“This Parliamentary history lends support to a conclusion that, at least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a Judicial tribunal for purposes of this Court’s appellate jurisdiction under Art III.... Any problems unearthed by the Director’s studies were to be “corrected by the Courts themselves.”

The House Report, Harlan J pointed out, shows that several speakers stated that “the corrective power would be exercised by the Courts themselves. The Report quoted the endorsement of the Bill by the American Judicature Society that “there is no way to fortify judicial independence equal to that of enabling the Judges to perform their work under judicial supervision.” It is a judicial power, “one to be entrusted only to a judicial body”.

Harlan J observed: “Because the Parliamentary history shows Congress intended the Councils to act as Judicial bodies in supervising the district Judges, there is no need to decide whether placement of this authority in a non-judicial body would violate the constitutional separation of powers, as Chief Justice Groner seems to have believed. It is sufficient to conclude from reason and analogy that this responsibility is of such a nature that it may be placed in the hands of Art III Judges to be exercised as a Judicial function.

It is clear that Justice Groner was definitely of opinion that entrusting such supervision to a non-judicial body would offend the principle of separation of powers. In fact, he said that the Director of the Administration office created under the 1939 Act would gather statistics of arrears etc. would have no power to issue any directives to the District Judges. That power is vested only in the Judicial Councils.

He observed as follows:

“For these reasons, I would conclude that the actions challenged by Judge Chandler sufficiently affect matters within this court’s appellate jurisdiction to bring his application for an extraordinary writ within our authority under sec. 1651(a) and that his charges, if sustained, would present an appropriate occasion for the issuance of such a writ.

In the present posture of this case, Judge Chandler, in my opinion, is not entitled to the relief he seeks. The order of December 13, 1965 which prompted his recourse to this court, has been superseded by the order of February 4, 1966, which I am satisfied is entirely within the authority of the Council. I am wholly unable to regard the latter order either as a “removal” of Judge Chandler from judicial office, or as anything other than an effort to move along judicial traffic in the District Court. In this state of affairs, I can find no room for the constitutional argument so vigorously made by my Brothers Black and Douglas.”

Harlan J further observed as follows:

“Throughout Judge Chandler’s briefs, and in the dissents of my Brothers Black and Douglas, there are strong assertions of the importance of an independent federal judiciary. I fully agree that this principle holds a profoundly important place in our scheme of government. However, I can discern no incursion on that principle in

the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business. The February 4 Order, entered pursuant to this statutory authority, is a supportable exercise of the Council's responsibility to oversee the administration of federal justice.”

However, Douglas and Black JJ dissented. But, in view of the opinion of the majority, the appeal was dismissed.

### The 1980 Act

The 1939 Act was replaced by the Judicial Councils Reform and Judicial Conduct and Disability Act 1980 (title 28 USC 372 (c)). This Act was intended to ‘provide a simple and clear procedure for the resolution of alleged disability or misconduct of a Federal Judge’. The Act is grounded on the principle of self determination. Congress sought to devise a ‘fair and proper procedure whereby the Judicial branch can keep its own house in order (S. Rep. No. 362, 96<sup>th</sup> Congress, (1<sup>st</sup> session, 2, 11 (1979)). The Senate Report stated that the Act was intended to reach

“wilful misconduct in office, habitual interference, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute’.

The 1980 Act contained sec 28 USC 372(c)(6)(b) states that the Judicial Council may take:

“such action as is appropriate to assure the effective and expeditious administration of the business of the Courts within the circuit”.

The 1980 Act does not apply to the Judges of the US Supreme Court. It applies only to Judges of the District Courts and the Appellate (Circuit) Courts in federal system or a bankruptcy Court Judge, or a magistrate.

The Judicial Council of the Circuit Court consists of (1) the Chief Judge of the Court of Appeals for the Circuit (2) upto seven appellate Court Judges in active service (chosen by seniority by majority vote of all such Judges) and (3) an equal number of district Court Judges of the Circuit in active service (chosen by seniority).

Section 372(c)(1) authorizes “any person alleging that any federal Judge “has engaged in conduct prejudicial to the effective and expeditious administration of business of the Courts” or alleging that such Judge is “unable to discharge all the duties of office by reason of mental or physical disability” to complain in writing through the office of the clerk of the Court of Appeals of the circuit in which the Judge sits.

Under sec 372(c)(3)A, a complaint can be dismissed by the Chief Judge of the Circuit if it is frivolous or it ‘directly related to the merits of a decision or procedural ruling’. Under sec 372(c)(3)(B), the Chief Judge may also conclude the proceeding if he finds that corrective action has been taken or that intervening events have made the complaint infructuous. Otherwise, sec 372(c)(4)(A) directs the Chief Judge to convene a special committee, comprising the Chief Judge himself and equal number of circuit and district Judges, to “investigate the facts and allegations contained in the complaint”.

The special committee is empowered by sec 372(c)(5) to ‘conduct an investigation as extensive as it considers necessary’ and at the conclusion of the investigation, the special committee “shall expeditiously file a comprehensive written report” with the Judicial Council of the Circuit. The section says that the report presents the findings of the investigation and the special committees recommendations for ‘necessary and appropriate action’ by the Judicial Council.

Following receipt of the special committee’s report, the Judicial Council may conduct additional investigation which it considers necessary [(sec 372(1)(6)(A)]. Under sec 372(c)(6)(C), if the Judicial Council determines that no action is required, it may dismiss the complaint under sec 372(1)(6)(B). otherwise, it may take ‘such action as is appropriate to assure the effective and expeditious administration of the business of the Courts within the circuit.’”

Under section 372 (c)(B)(iii) to vii), the Council may certify disability or take action including

- (i) a request to the Judge to voluntarily retire;
- (ii) censure or reprimand the Judge, either privately or publicly;
- (iii) order that the Judge not be assigned further cases, but only ‘on a temporary basis for a time certain’; or
- (iv) order ‘such other action as it considers appropriate under the circumstances’.

‘Privately means by private communication. The name of the complainant and the name of the Judge is not published. But the nature of misbehaviour and the nature of the measure imposed can be published.

‘Publicly’ means that there will be a public announcement referring to the name of the complaint and the name of the Judge, along with nature of complaint and the nature of the measure imposed.

Alternatively, under sec 372(c)(7)(A), the Judicial Council may refer the complaint together with the record and recommendations for appropriate action to the Judicial Conference, i.e. where the allegations proved may require ‘removal’ by impeachment. Under sec 372(c)(8)(A), in the event of such referral, the Judicial Conference may conduct ‘such additional

investigation as it considers appropriate' and may take the same remedial steps available to the Judicial Council.

Section 372(c)(6)(B)(vii)(I) & 372(c)(8)(A) expressly prohibit the Judicial Council or Judicial Conference from passing an order of 'removal'.

Under sec 372(c)(B)(i), if a Judicial Council determines that an Art III Judge 'may have engaged in conduct' that 'might constitute one or more grounds for impeachment; the Council is required to certify that determination to the Judicial Conference.

Under sec 372(c)(8)(A), if the Judicial Conference concurs in the Judicial Council's determination, or makes such a determination itself, it is directed to transmit the determination and record to the House of Representatives, which may take 'whatever action it considers necessary'.

National Commission on Judicial Discipline and Removal (1993):

In 1990, the National Commission on Judicial Discipline and Removal was appointed to examine the working of the 1980 Act. The Commission started its work in January 1992 and gave an elaborate report (running into 200 pages), after a large consultation process. It made recommendations for changes in the 1980 Act. On that basis, the 1980 Act was replaced by the Act of 2002.

**The Judicial Improvements Act, 2002 ( U.S.C. 351 to 364).**

This Act of 2002 came into being as a result of the Report of National Commission on Judicial Discipline and Removal (1993) and replaced the 1980 Act. The Act authorises the Judicial Council to take

“ such action as is appropriate to assure the effective and expeditious administration of branches of the courts within the circuit”

(The 2002 Act does not also apply to the Judges of the American Supreme Court. It applies to the District Judges and the appellate Circuit Court Judges in the federal system).

Section 354(a)(1)(C) states that the Judicial Council, if the complaint is not dismissed, shall take ‘such action as is appropriate to assure the effective and expeditious administration of the branches of the courts ‘ within the circuit section 354(a)(2) bears the title, “ description of possible action if complaint is not dismissed”. It provides as follows;

(A) In general , - Action by the Judicial Counsel under paragraph (1)(C) may include -

(i) ordering that, on a temporary basis for a certain time, no further cases be assigned to the Judge whose conduct is the subject of a complaint.

(ii) censuring and reprimanding such Judge by means of a private communication; and

(iii) censuring or reprimanding such Judge by means of a public announcement.”

(B) For Article III Judges: If the conduct of a Judge appointed to hold office during good behaviour is the subject of the complaint, action by the Judicial Councils under paragraph (1)(C) may include-

- i) Certifying disability of the judge pursuant to the procedures and standards provided under section 372(b); and
- ii) requesting the Judge voluntarily retire, with the provision that the length of service requirements under sec. 371 of this title shall not apply.

(C) For magistrate Judges:.....”

So far as ‘removal’ is concerned, Sec.354(3) does not permit the Judicial Council to order ‘removal’ an Art. III Judge but it has to refer to the

Judicial Conference (which is a superior body) to remove an Art III Judge under Sec. 354(b)(2) if is of the view that Judge appointed to hold office during good behaviour may have engaged in conduct –

- (A) which might constitute one or more grounds for impeachment under Art II of the Constitution, or
- (B) which, in the interest of justice, is not amendable to resolution by the Judicial Council”

Section 355(b)(1) provides for action by the superior body, namely, the Judicial Conference, “ if impeachment is warranted” where it agrees with the Judicial council to that effect. Its opinion will then be transmitted to the House of Representatives for whatever action the House of Representatives considers to be necessary.”

Section 355(2) provides that in case of ‘felony conviction’, the Judicial Conference may vote by majority, “ for whatever action the House of Representatives considers necessary”

The Act of 2002 makes special provision in Sec. 353(b) to cover ‘change in status or death of Judges in the special committee where a Judge is elevated or dies or retires. It states that “ Judge appointed to a special committee under sub section (a) may continue to serve on that committee after the becoming a senior Judge or in the case of the Chief Judge of the Circuit after

his or her turn as Chief Judge terminates under subsection (a)(3) or (c) of section 45. If a Judge appointed to a Committee dies, or retires from office under Sec. 371(a) while serving on the committee, the Chief Judge of the Circuit may appoint another Circuit or district Judge, as the case may be, to the committee”

These are the provisions of the Act of 2002, presently in force.

## CHAPTER XVI

### THREE IMPORTANT ISSUES DECIDED BY U.S. FEDERAL JUDICIARY

There are three important Constitutional issues which have been decided by the American Federal Judiciary. They are as follows:

- (A) For imposition of “minor measures” by the Judicial Council, no amendment of the U.S. Federal Constitution is necessary. “Minor corrective measures” can be taken by the Judicial Branch as part of In-House procedure as per the 1939 and the 1980 Statutes. The said principles laid down under the 1980 Act equally applies to the Statute of 2002 which replaced the 1980 Statute.
  
- (B) The manner in which a case has been decided by Judge on merits cannot be the subject matter of an impeachment proceeding. This principle can be drawn from the failure of the impeachment proceedings against Justice Chase in 1805.
  
- (C) Once the impeachment is successful in the Senate, it cannot be challenged by the Judge concerned, before the U.S. Supreme Court. This was so decided in the case of Justice Nixon.

We shall now deal with these three aspects one after the other.

(A) Whether “minor measures” can be imposed by the Judicial Councils without an amendment to the Federal Constitution? (See also Chapter XX).

The American Federal Courts, in a series of Judgments have held that the Act of 1980 by which the Judicial Councils are constituted to inquire into ‘misbehavior’ for the purpose of (a) imposing ‘minor measures’ like request for retirement, withdrawal of cases, public or private censure etc or (b) recommending to the Judicial Conference of United States to propose impeachment, is constitutionally valid.

Their reasoning is that, though minor measures are not specifically referred to in the Federal Constitution still, no such express provision is necessary in as much as the Judicial Branch has general or inherent power to impose minor measures of internal corrective mechanisms. The Judicial Council is one such mechanism. However, where the Judicial Council considers that ‘removal’ by impeachment is the proper punishment in a given case, it cannot pass final orders of ‘removal’ but has to recommend to the higher body, namely, the Judicial Conference of United States to propose ‘removal’ by address in Senate. The Judicial Council could also recommend for removal to the Senate. Removal order can be passed by the Senate if there is ‘misbehaviour’ proved. But the Constitution does not prohibit imposition of minor measures by any other mechanism within the Judicial Branch and therefore, the procedure prescribed in the 1980 Act for imposition of minor

measures by the Judicial Council, is valid. So far as 'removal' is concerned, the constitutional procedure for impeachment remains and the power of the Senate cannot be transferred to Judicial Council or Judicial Conference by way of an ordinary law. If the Council or the Conference were to be empowered to remove a Federal Judge otherwise than by way of impeachment, only then a constitutional amendment will be necessary.

When we come to the disciplinary procedure in respect of Judges of the State Courts, (which will be dealt with in detail in the next chapter), we shall presently show that several State Constitutions have been amended to enable a State Judicial Commission or a State Supreme Court to direct 'removal' of a Judge and this is an additional method of 'removal', apart from impeachment or address. Several State Constitutions have still retained the procedure for 'removal' of State Judges by the parliamentary process of impeachment as well as address by the State Senate to the State Governor. But for the amendment of the Constitution enabling the State Judicial Commission or the State Supreme Court to 'remove' a Judge, such a procedure would have been unconstitutional. That is why the procedure for 'removal' by the State Judicial Commission or the State Supreme Court is expressly provided in the State Constitution.

We may, however, point out that the State Constitutions also provide for minor measures to be taken by the State Judicial Commissions but the existence of such a provision in the State Constitutions does not mean that

but for that provision in the State Constitutions, the imposition of minor measures would have been ultra-vires of the Constitution. As held by the Federal Appellate Courts, minor measures can be imposed by the Judicial Branch as a matter of self-regulation within the Judicial Branch's general or inherent powers by way of ordinary law, and there is no need for a Constitutional amendment. Indeed, the State Constitution amendments were for a different purpose, namely, from being in another method of removal, apart from impeachment or address and not because imposition of minor measures would have otherwise been void without constitutional sanction.

These aspects, being quite important, will be considered in detail, (including the Judgment of the American Federal Courts), in Chapter XX. To avoid reputation, we are not referring to the Judgments of the American Federal Courts upholding the validity of the laws which permitted imposition of minor measures by the Judicial Council.

(B) Impeachment cannot be resorted to on the basis that the decision on the merits of a case decided by a Judge is erroneous

Justice Samuel's Chase: (1805)

It is now well settled in United States that impeachment proceedings cannot be initiated on the basis that the decision of a Judge on the merits of a case is erroneous. This is illustrated by the failure of impeachment process in relation to Justice Chase in 1805.

Justice Samuel Chase was appointed to the US Supreme Court by a Federalist President John Adams. Before that, he was Chief Judge of the Maryland General Court. It appears that he was a federalist and believed in a strong central government. But in his decisions, he also reflected a concern for the rights of individuals and protection of the citizen's rights by due process.

Thomas Jefferson, who was swept into power in 1800 by the Republicans, initiated an impeachment motion against Justice Samuel Chase and the trial began in March 1805 in the US Senate which was under the control of the Republicans. The then Vice President of the United States Aaron Burr was the head of the Senate. He was also a Republican. The impeachment failed because the charges related to the merits of cases decided by Justice Chase. There were 8 Articles of charges all relating to the manner in which Justice Chase dealt with a case of treason in a trial. Article 1 contained a charge that Justice Chase, in his judicial capacity, conducted himself in a manner highly arbitrary, oppressive and unjust. The charge contained 3 parts which stated that in delivering an opinion on a question of a law he was wrong; he had unduly restricted the counsel for the accused from referring to citations of some statutes and that he debarred the accused from his constitutional privilege of addressing the Court on the question of law as well as on facts. Other Articles of charge related to exclusion of some testimony, failure to follow Virginia law, irregularity in the grand jury

proceedings and in his address to the Jury. There was voting on the charges. Charge 1 fell 16 to 18, Charge 2 fell 10 to 24, Charges 3, 4 and 8 by 18(19) to 16, and did not get the required 2/3<sup>rd</sup> verdict, Charge 5 fell 0 to 34, Charge 6 fell 4 to 30, and Charge 7 fell 10 to 24. All these charges related to the merits of the case. The impeachment failed. If Justice Chase's impeachment had succeeded, there was a possibility of impeachment of Chief Justice John Marshall also, but the failure of the impeachment put an end to any such proposal.

This principle of non-impeachment in relation to merits of the case was carried into the 1980 Act and later into the Act of 2002.

The 1980 Act encoded in US 28 USC sec 372(c)(3)(A) provided that the Chief Judge may dismiss a complaint, "if he finds it to be..... directly related to the merits of a decision or procedural ruling." Again D.C. CIR JUD. MISCONDUCT R (1)(b) states "Conduct prejudicial to the effective and expeditious administration of the business of the Courts.... Does not include making wrong decisions – even very wrong decisions – in cases".

In the Judicial Improvements Act of 2002, it is stated in sec 352(b)(1) (A)(ii) that the Chief Judge may dismiss the complaint if it is 'directly related to the merits of a decision or procedural ruling'.

Further, on January 1, 2005, US Chief Justice William Rehnquist issued the Annual Report of the year 2004 of the Federal Judiciary. The long Chapter of that Report was entitled “Criticism of Judges based on Judicial acts”. In that Chapter, the Chief Justice pointed out that the authority of Congress to impeach and remove Judges should not extend to decisions from the Bench. He pointed out that the principle was established 200 years ago when the US House of Representatives impeached Justice Chase but the Senate did not remove him from office. He pointed out “The Senate’s failure to convict him represented a judgment that impeachment should not be used to remove a Judge for conduct in the exercise of his judicial duties. The political precedent set by Justice Chase’s acquittal has governed the use of impeachment to remove Federal Judges from that day to this: the Judges’ judicial acts may not serve as a basis for removal. Any other rule could destroy judicial independence – instead of trying to apply the law fairly, regardless of public opinion, Judges would be concerned about inflaming any group that might be able to muster the votes in the Congress to impeach and convict them.”

(C) Appeal to US Supreme Court does not lie against removal by impeachment as it is a political question.

In US, an appeal does not lie to the Supreme Court against removal by impeachment in the Senate. (Nixon vs. US: (1993) 506 US 224). Judge Nixon

was removed by the President after the Senate took note of his conviction, and the Senate also convicted him.

In India, our Supreme Court has decided in the case of Justice V. Ramaswami case that the procedure by a Committee of Judges appointed under the Judges (Inquiry) Act, 1968, is judicial but inchoate as the Committee can only recommend and that the address procedure is a political one and that an appeal lies to the Supreme Court after final order of removal is passed by the President. It was pointed out that in America it is a political question throughout and hence was not justiciable. In India, it is statutory judicial procedure blended later with political procedure and hence justiciable after the removal order is passed.

Nixon, the Chief Judge of a Federal District Court was convicted of federal crime and sentenced to imprisonment. The House of Representatives adopted articles of impeachment and presented the same to the Senate. After the report of a committee of Senators who voted to convict Nixon, the Presiding Officer entered a judgment for removal of Judge Nixon. The Judge filed a suit in the District Court for a declaratory judgment and reinstatement of his salary and privileges on the ground that Senate Rule XI which permits delegation of the inquiry to a Senate Committee violates Articles I and III of the Constitution in as much as the Constitution requires the entire Senate to deal with impeachment.

The District Court in which the suit was filed came to the conclusion that the dispute was not justiciable as it involved a political question which could not be resolved by the Courts. The dismissal of the suit was affirmed by the Court of Appeal for the District of Columbia Circuit. The Supreme Court of United States dismissed the appeal holding that the claim of Judge Nixon that Senate Rule XI violated the provisions of the Constitution was not justiciable. Notwithstanding the use of the word 'try' used in the Constitution in the clause, "Senate shall have the full power to try all impeachments", the Supreme Court held that it was a political issue. While holding that the issue was political, the Court referred to two earlier judgments in Baker vs. Carr (1962) 369 US 186 and Powell vs. McCormack (1969) 395 US 486. (These judgments have been referred to by Supreme Court of India in Justice V. Ramaswami's cases).

But, as pointed earlier, in Chapter VI, the Supreme Court of India has held that the final order of removal passed by the President is justiciable.

These are three important issues that arose in the US Federal system and they are relevant in the present discussion.

**CHAPTER – XVII**  
**PROCEDURES IN U.S. STATE COURTS, CALIFORNIA, IDAHO,**  
**CONNECTICUT, TEXAS AND WISCONSIN**

We shall now refer to the procedure for removal and ordering other minor measures against the Judges of some of the State Courts in U.S. We shall start with the State of California.

CALIFORNIA STATE COURT JUDGES:

Removal of Judges by Impeachment:

Article 4, clause (a) section 18 of the California Constitution deals with sole power of impeachment. Impeachment shall be by the Senate. A person may not be convicted unless, by roll call vote entered in the journal, two-thirds of the membership of the Senate concurs.

Art 4, sec. 18(b) refers to impeachment of Judges of the State Courts ‘for misconduct in office’. It states:

“ 18(b): State officers elected on a state wide basis, members of the State Board of Equalization, and Judges of State Courts are subject to impeachment for misconduct in office. Judgment may extend only to removal from office and disqualification to any office under the State, but the person convicted or acquitted remains subject to criminal punishment according to law’.

Another method of removal provided in the Constitution:

Art 6, Sec. 18: Second method: Judicial Performance Commission:

California was also the first State in USA to constitute a Commission on Judicial Performance. This happened in the year 1960. The Commission's authority was first spelt out in Article 6, Sections 8, 18, 18.1, and 18.5 of the California Constitution. There have been amendments to the State Constitution in 1966, 1976, 1988, 1994 and 1998 bringing in various changes in regard to the Commission's work. The Commission, is subject to the Government Code which is called the Code of Civil Procedure. Sections 68701 upto 68755 deal with this subject.

The Commission can impose 'minor measures' or retire or direct removal of a Judge straightaway.

Article 6, Section 18 deals with the powers of the Judicial Performance Commission. It reads as follows:-

“Section 18. (a). A Judge is disqualified from acting as a Judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under California or federal law, or (2) a petition

to the Supreme Court to review a determination by the Commission on Judicial Performance to remove or retire a judge.

(b) The Commission on Judicial Performance may disqualify a judge from acting as a judge, without loss of salary, upon notice of formal proceedings by the commission charging the judge with judicial misconduct or disability.

(c) The Commission on Judicial Performance shall suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed, suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final, the Commission on Judicial Performance shall remove the judge from office.

(d) Except as provided in subdivision (f), the Commission on Judicial Performance may (1) retire a judge for disability that seriously interferes with the performance, or (2) censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or (3) publicly or

privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the Commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge. When the Supreme Court reviews a determination of the Commission, it may make an independent review of the record. If the Supreme Court has not acted within 120 days after granting the petition, the decision of the Commission shall be final.

(e) A judge retired by the Commission shall be considered to have retired voluntarily. A judge removed by the Commission is ineligible for judicial office, including receiving an assignment, appointment, or reference of work from any California State court, and pending further order of the court is suspended from practicing law in this State. The State Bar may institute appropriate attorney disciplinary proceedings against any judge who retires or resigns from office with judicial disciplinary charges pending.

(f) A determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court shall be reviewed by a tribunal of 7 Court of Appeal Judges selected by lot.

(g) No court, except the Supreme Court, shall have jurisdiction in a civil action or other legal proceeding of any sort brought against the Commission by a judge. Any request for injunctive relief or other provisional remedy shall be granted or denied within 90 days of the filing of the request for relief. A failure to comply with the time requirements of this section does not affect the validity of Commission proceedings.

(h) Members of the Commission, the Commission staff and the examiners and investigators employed by the commission shall be absolutely immune from suit for all conduct at any time in the course of their official duties. No civil action may be maintained against a person, by any employer, public or private, based on statements presented by the person to the Commission.

(i) The Commission on Judicial Performance shall make rules implementing this section, including, but not limited to, the following:

(1) The Commission shall make rules for the investigation of judges. The commission may provide for the confidentiality of complaints to and investigations by the commission.

(2) The Commission shall make rules for formal proceedings against judges when there is cause to believe there is a disability or wrongdoing within the meaning of subdivision (d).

(j) When the Commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and

proceedings shall be open to public for all formal proceedings instituted after February 28, 1995.

- (k) The Commission may make explanatory statements.
- (l) The budget of the Commission shall be separate from the budget of any other State agency or court.
- (m) The Supreme Court shall make rules for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics.”

It will be noticed that a Judge is disqualified under this section in Art. 6 pending a criminal charge or pending formal proceedings charging the Judge with penal misconduct or disability. The Commission shall suspend a Judge without salary in case the Judge pleads guilty or there is no contest or is found guilty of a crime involving moral turpitude. The other punishments that can be imposed by the Commission are (i) retirement for disability, (ii) censure, or (iii) removal of a Judge in respect of any action of the Judge prior to six years before the commencement of the Judge’s current term or for willful misconduct or persistent failure or inability to perform his duties, habitual intemperance in the use of intoxicants or drugs or conduct prejudicial to the administration of justice which brings the Judicial office into disrepute; (iv) admonishing. The Commission may also bar a former Judge who has been censured from receiving an assignment, appointment or reference of work from any California State Court. A Judge, relieved by the

Commission is to be treated as one under voluntary retirement. Pending further orders of the Court, he may be suspended from practicing law in the State.

A decision by the Commission is subject to appeal to a Tribunal consisting of seven Judges of the Court of Appeal who are selected by lot. No Court except Supreme Court shall have jurisdiction in civil action or other legal proceeding of any sort brought against the Commission by a Judge. Members of the Commission have personal immunity from suit for all acts. The Commission issues formal proceedings giving notice of the charges. The Supreme Court has to make rules for conduct of the Judges for the Code of Judicial Ethics.

In view of the amendment in Art. 6 permitting the Commission even to pass orders of removal, this provides a second method of removal, apart from the procedure of impeachment covered by Art.4. The Commission itself is now empowered, by Art. 6 of the Constitution as stated above, to pass orders of removal subject to right of appeal, and other measures as stated above.

Section 18.5 provides that the Commission may provide the Governor of the State with a text of any private admonishment, advisory letter, or other

disciplinary action. Section 18.5 (d) states that all information released under this section shall remain confidential and privileged.

We shall now refer to the history of some of the amendments to Art. 6 in California. In 1966, it appears that the amendment to the Constitution brought in public censure as a sanction which could be imposed in addition to removal from office. In 1976 the Commission on Judicial Qualifications was renamed as Commission on Judicial Performance. Private admonishment was also added. Use of intoxicants or drugs as an act for judicial intemperance was also added. Further, “willful and persistent failure to perform judicial duties” was changed into “persistent failure or inability to perform the Judge’s duties”. The 1988 amendment gave the Commission authority to conduct open hearings at the request of the Judge or where the charges involved moral turpitude, corruption or dishonesty and when to do so would be in the pursuit of public confidence and in the interests of justice. Public ‘reproval’ was also added as another sanction. In 1994 the amendment mandating open hearings in all cases involving formal charges conferred authority for censure and removal on the Commission rather than on the Supreme Court. Further, ‘reproval’ was removed in 1994 (<http://cjp.ca.gov/manadtehist.htm>).

Among the various types of misconduct the following categories appear from the Annual Reports of California Courts:-

<p><b>Abuse of contempt</b>  Administrative malfeasance  Alcohol or drug related criminal conduct  Bias/appearance of bias toward particular class  Bias/appearance of bias (not directed toward a particular class)  Comment on pending case  Decisional delay/tardiness/other dereliction of Duty</p>	<p>Demeanor/decorum  Disqualification/disclosure and related retaliation  Ex parte communications  Failure to cooperate/lack of candor w/regulatory authorities  Failure to ensure rights  Gifts/loans/favours/ticket fixing  Improper business activities  Improper political activities  Miscellaneous off-bench conduct</p>	<p><b>Misuse of court resources</b>  Non-substance abuse criminal conduct  Off-bench abuse of office  On-bench abuse of authority in performance of judicial duties  Pre-bench misconduct  Sexual harassment/inappropriate workplace gender comments  Sleeping  Substance abuse</p>
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### **IDAHO STATE COURT JUDGES:**

#### Impeachment: Art 5 (Sec.3)

Article 5 of the Idaho Constitution, section 3 speaks of impeachment by the Senate. Judgment shall not extend beyond removal or disqualification to hold office. Section 28 of Article 5 provides that rules as to retirement, discipline and removal from office of Judges and Justices shall be ‘as provided by law’. Thus, the Constitution itself permits a law to be made for ‘removal’ (i.e. by any other mode).

As a specific law for removal otherwise than by impeachment is permissible, such a law has been made in Idaho. The Constitution provides for another method of removal by law. A law has been passed for the constitution of a Judicial Council for recommending action to the Supreme Court, which passes the final orders.

Art. 5( Sec.28): Judicial Council recommends to Supreme court, minor and major measures:

The Idaho Judicial Council has been constituted to discipline the Judges including Judges of the Court of Appeals. Upon receiving a written complaint, the Council investigates and upon finding good cause, it recommends disciplinary action to the Supreme Court. Cause may include wilful, misconduct in office, wilful and persistent failure to perform duties, habitual intemperance, prejudicial conduct that brings the judicial office into disrepute or violations of the Code of Judicial Conduct. The Justice or Judge may also be a retired for disability that seriously interferes with the performance of judicial duties.

The final decision on discipline and removal is made by the Supreme Court. All investigations by the Council are confidential under the statute but, after the Council files its findings and recommendations with the Supreme Court, the file becomes public and is available with the clerk of the Supreme Court.

The Rules of Idaho Judicial Council provide that the Judicial Council may make a report to Supreme Court and the Legislature at intervals of not more than two years, submit to the Governor the names of Judges for appointment and also recommend removal, discipline or retirement of Judicial Officers.

These duties are contained in Rule 2 of the General Rules of Procedure. Subject of Removal, discipline or retirement of Judges starts with Rule 21. Rule 21 contains the definitions. Rule 22 confers power on the Council to summon and examine witnesses and compel their attendance, failing which their property can be attached by way of an application to the Supreme Court or to any court or a Judge thereof, as done in cases of contempt. Under the same Rule, if the accused Judge is in default, depositions and discovery procedures may be taken and used without notice to him or affidavits of witnesses may be used in evidence. Rule 24 provides for confidentiality of the proceedings before the Council. It states that all papers filed with and proceedings before the Council, shall be confidential until the record is filed by the Council in the Supreme Court, provided, however, that if allegations against a Judge are made public by the complainant or the Judge or third persons, the Judicial Council, and/or the Judge may comment on the existence, nature and status of any investigation and may correct any false or misleading information including false or misleading information regarding the actions taken by the Judicial Council.

Rule 25 provides for confidentiality and for privilege in respect of defamatory materials. It states that papers filed with the Council or testimony given to the Council shall be privileged. The record filed by the Council in the Supreme Court continues to be privileged but on such filing, it loses its confidential character. The writing which was privileged prior to its filing with the Council does not lose privilege by such filing.

Rule 28 deals with the grounds for discipline, removal or retirement and for the initial inquiry and for preliminary investigation. Sub-clause (a) states that the Council, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a Judge is guilty of willful misconduct in office, willful and persistent failure to perform the duties of a Judge, habitual intemperance, or of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or violation of the Code of Judicial Conduct or a Judge has a disability that seriously interferes with the performance of the Judge's duties which is or is likely to become of a permanent character, shall make an initial enquiry or investigation to determine whether formal proceedings shall be instituted and a hearing held. The Council, without receiving a verified statement, may make such a preliminary investigation of its own motion.

Sub-clause (1) of clause (a) of Rule 28 deals with initial enquiry. It says that after notifying the Judge informally, the Council or its

representative shall make an initial enquiry to determine whether or not the complaint contained in the verified statement is obviously unfounded or frivolous. In making that initial enquiry, the Council or its representative may obtain and consider any information which it deems pertinent.

Sub-clause (2) of clause (a) of Rule 28 deals with preliminary investigation. It says that if the Council concludes that the complaint set out in the verified statement is not obviously unfounded or frivolous, the Council shall conduct a preliminary investigation, after first notifying the Judge in writing of the investigation and the nature of the charge, and shall afford reasonable opportunity in the course of such preliminary investigation for the Judge or the Judge's counsel to present evidence on behalf of the Judge. In conducting the investigation, the Council may consider any information obtained during the course of the initial enquiry. If the Council determines that the physical or mental health of the Judge is in issue, it may order physical and/or mental examination of the Judge by independent examiners.

Sub-clause (b) of Rule 28 states that if the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the Judge, complainant and other parties in the discretion of the Council shall be so notified.

Sub-clause (c) of Rule 28 states that if the preliminary investigation does disclose sufficient cause to warrant further proceedings, the Council may:

- (1) continue the case for further action, investigation or review;
- (2) require personal appearance of the Judge before the Council;
- (3) recommend a remedial course of conduct to the Judge and require the Judge's acquiescence thereto;
- (4) institute formal proceedings; or
- (5) take or direct such other action as the Council may determine will reasonably curtail or eliminate the conduct of the Judge which involves any matter within the jurisdiction of the Council.

Rule 29 deals with formal proceedings. Clause (a) states that after the preliminary investigation has been completed, if the Council concludes that formal proceedings should be instituted, the Council shall, without delay, issue a written notice to the accused Judge advising of the institution of formal proceedings to enquire into the charges against the Judge.

Sub-clause (b) of Rule 29 states that notice shall specify in ordinary and concise language the charges against the Judge and the alleged facts upon which such charges are based and shall advise the Judge of the right to file a written answer to the charges within a specified time.

Rule 30 deals with the answer of the Judge and Rule 31 deals with hearing before the Council. Council may hear the matter concerning the

removal, discipline or retirement or may delegate the hearing to special masters.

Rule 32 deals with the hearing. It says that the failure of the Judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for removal, discipline or retirement. The failure of the Judge to testify in the Judge's own behalf or to submit to a medical examination may be considered, unless it appears that such failure was due to circumstances beyond the Judge's control.

Rule 33 deals with the procedural rights of the Judge. Sub-clause (a) states that an accused Judge shall have the right and reasonable opportunity to defend against the charges, to be represented by counsel and to examine and cross-examine witnesses. The Judge shall also have the right to the issuance of the subpoenas for attendance of witnesses to testify or to produce books, papers or other evidentiary matter. In case the Judge is adjudged insane or incompetent, the Council shall appoint a guardian ad litem unless the Judge has a guardian who will represent him.

Rule 41 states that if the Council finds good cause, it shall recommend to the Supreme Court for the removal, discipline or retirement of the accused Judge. Rule 44 states that the accused Judge may request the Supreme Court to review the Judicial Council's findings as confirmed by the Supreme Court.

Rule 52 states that all Judicial Performance Evaluations, records, documents and reports relating to an individual Judge shall be considered to be confidential and shall not be disclosed by the Judge or a Judicial Council to any third party.

### CONNECTICUT STATE COURT JUDGES:

#### Three methods of removal:

Art. 5, section 2 provides two methods of removal: Impeachment & Removal by address to Governor (sec. 2):

Art. V of the Connecticut Constitution deals with the “Judicial Department” and contains six sections. Sec. 2 states that the judges shall hold office for a term of eight years but that they may be removed by impeachment. The Governor shall also remove them on the address of two-thirds of each House of the General Assembly. Thus, there are two procedures, (i) removal by impeachment and (ii) removal by address to the Governor.

Third method: Art V Sec.7: Minor measures by Council and Major ones by Supreme Court.

Sec. 7 of Art. V was added in 1976, providing a third method of removal. Sec. 7 applies to judges of all courts, except those courts to which judges are elected. They may, in such manner as shall by law be prescribed, be removed or suspended by the Supreme Court. The General Assembly may establish a Judicial Review Council which may also, in such manner as shall by law be prescribed, censure any such judge or suspend any such judge, for a definite period not longer than one year. (w.e.f. Nov. 24, 1976 introduced by amending Art. V)

Sec. 1 of Art. IX states that the House of Representatives shall have the sole power of impeachment. Sec. 2 states that all impeachments shall be tried by the Senate. When sitting for that purpose, there shall be an oath or affirmation. No person shall be convicted without the concurrence of at least two-thirds of the members present. When the Governor is impeached, the Chief Justice shall preside.

Sec. 3 of Art. IX states that the Governor and all other executive and judicial officers, shall be liable to impeachment; but judgments in such cases shall not extend further than to removal from office and disqualification to hold any office of honour, trust or profit under the State. The party convicted shall, nevertheless, be liable and subject to indictment, trial and punishment according to law. Sec. 4 deals with the procedure in case of treason.

Art. XI contains the general provisions and sec. 5 thereof states that all officers holding the office by election or appointment shall continue to exercise the duties thereof, according to their respective commissions or appointments, until their office shall have been abolished or their successors selected and clarified in accordance with the Constitution or the laws enacted pursuant thereto.

**Connecticut statute referable to Art. V (sec. 7):**

Under the above powers granted by the Constitution, a law has been made by the legislature.

Chapter 872(a) of the Connecticut statute (41 CS 1) deals with removal, suspension and censure of judges.

Sec. 51-51(g) declares the object of the statute in the following manner. It states that the General Assembly finds that for the impartial and effective administration of justice in the State (1) the continued independence of the judiciary is indispensable, (2) it is in the public interest to foster the dignity and integrity of the judiciary, (3) to the foregoing ends it is desirable to establish appropriate mechanisms and procedures for the maintenance of judicial discipline, and (4) the mere making of unpopular or erroneous decisions is not a ground for judicial discipline or for a finding of want of judicial integrity.

Sec. 51 – 51(h) states that the chapter shall apply to judges of the Superior Court, Appellate Court, judges of the Supreme Court, compensation commissioners and family support magistrates. Sec. 51(i) deals with grounds for removal, suspension and censure, which it is expressly stated will be in addition to removal by impeachment and removal by the Governor on the address of two-third of members of each House of the General Assembly. Clause (a) states that a judge is liable for censure, suspension or removal from office for the following reasons:

“(1) conduct prejudicial to the impartial and effective administration of justice which brings the judicial office into disrepute, (2) wilful violation of sec. 51-39(a) or any canon of judicial ethics, (3) wilful and persistent failure to perform the duty of a judge, (4) neglectful or incompetent performance of the duties of a judge, (5) final conviction of a felony or of a misdemeanor involving moral turpitude, (6) disbarment or suspension as an attorney-at-law, (7) wilful failure to file a financial statement or the filing of a fraudulent financial statement required under sec. 51-46(a), or (8) temperament which adversely affects the orderly carriage of justice.”

Sec. 51 – 51(j) deals with removal or suspension by the Supreme Court. Sub-clause (a) thereof states that the Supreme Court may remove or suspend any judge or family support magistrate for any period upon the

recommendation of the Judicial Review Council established under sec. 51-51 (k) or its own motion. Upon receipt of such recommendation or on its own motion, the Supreme Court shall make an investigation of the conduct complaint of and hold a hearing thereon, unless such an investigation and hearing has been held by the Judicial Review Council. Sub-clause (c) thereof states that the hearing shall not be public unless requested by the judge or the family support magistrate under investigation. 51 - 51(i) enables the Judicial Review Council to make regulations.

Sec. 51 – 51(l) deals with investigation of conduct of a judge, compensation commissioner or family support magistrate by the Council. The section combines procedure for preliminary investigation as also a regular inquiry.

“Sec.51-51(l). Investigation of conduct of judge, compensation commissioner or family support magistrate. (a) Except as provided in subsection (d), the Judicial Review Council shall investigate every written complaint brought before it alleging conduct under sec. 51-51 (i), and may initiate an investigation of any judge, compensation commissioner or family support magistrate if (1) the council has reason to believe that conduct under sec. 51-51(i) has occurred or (2) previous complaints indicate a pattern of behaviour which would lead to a reasonable belief that conduct under sec. 51-51(i) has occurred. The Council shall, not later than five days after such initiation of an

investigation or receipt of such complaint, notify by registered or certified mail any judge, compensation commissioner or family support magistrate under investigation or against whom such complaint is filed. A copy of any such complaint shall accompany such notice. The council shall also notify the complainant of its receipt of such complaint not later than five days thereafter. Any investigation to determine whether or not there is probable cause that conduct under sec. 51-51(i) has occurred shall be confidential and any individual called by the council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council on whether probable cause exists, unless the respondent requests that such investigation and disclosure be open, provided information known or obtained independently of any such investigation shall not be confidential. The judge, compensation commissioner or family support magistrate shall have the right to appear and be heard and to offer any information which may tend to clear him of probable cause to believe he is guilty of conduct under sec. 51-51(i). The judge, compensation commissioner or family support magistrate shall also have the right to be represented by legal counsel and examine and cross-examine witnesses. In conducting its investigation under this subsection, the Council may request that a court furnish to the Council a record or transcript of court proceedings made or prepared by a court reporter, assistant court reporter or

monitor and the court shall, upon such request, furnish such record or transcript.

(b) The Council shall, not later than three business days after the termination of such investigation, notify the complainant, if any, and the judge, compensation commissioner or family support magistrate that the investigation has been terminated and the results thereof. If the Council finds that conduct under sec. 51-51(i) has not occurred, but the judge, compensation commissioner or family support magistrate has acted in a manner which gives the appearance of impropriety or constitutes an unfavourable judicial or magisterial practice, the Council may issue an admonishment to the judge, compensation commissioner or family support magistrate recommending a change in judicial or magisterial conductor practice. If an admonishment is issued, the Council shall inform the complainant, if any, that an admonishment was issued, provided the admonishment is the result of misconduct alleged in the complaint and the substance of the admonishment shall not be disclosed.

(c) If a preliminary investigation indicates that probable cause exists that the judge, compensation commissioner or family support magistrate is guilty of conduct under sec. 51-51(i), the Council shall hold a hearing concerning the conduct or complaint. All hearings held pursuant to this subsection shall be open. A judge, compensation

commissioner or family support magistrate appearing before such a hearing shall be entitled to counsel, to present evidence and to cross-examine witnesses. The Council shall make a record of all proceedings pursuant to this subsection. The Council shall not later than thirty days after the close of such hearing publish its findings together with a memorandum of its reasons therefore.

(d) No complaint against a judge, compensation commissioner or family support magistrate alleging conduct under sec. 51-51(i) shall be brought under this section but within one year from the date the alleged conduct occurred or was discovered or in the exercise of reasonable care should have been discovered, except that no such complaint may be brought more than three years from the date the alleged conduct occurred.

Sec.51-51(m). Vote of Council. Findings to be indexed. (a) The Judicial Review Council may take any action upon a majority vote of its members present and voting, except that twelve members of the Judicial Review Council shall constitute a quorum for any action to publicly censure a judge, compensation commissioner or family support magistrate, suspend a judge, compensation commissioner or family support magistrate for any period, refer the matter to the Supreme Court with a recommendation that a judge or family support magistrate be suspended for a period longer than one year or refer the

matter to the Supreme Court with a recommendation that a judge or family support magistrate be removed from office or to the Governor with a recommendation that a compensation commissioner be removed from office and the concurring vote of seven of such members shall be required.

(b) The Council shall make its findings in writing and all such findings shall be compiled and indexed.

Sec.51-51(n). Authority of Council. (a) The Judicial Review Council may, after a hearing pursuant to subsection (c) of sec. 51-51(l), (1) publicly censure the judge, compensation commissioner or family support magistrate, (2) suspend the judge, compensation commissioner or family support magistrate for a definite term not to exceed one year, (3) refer the matter to the Supreme Court with a recommendation that the judge or family support magistrate be suspended for a period longer than one year, (4) refer the matter to the Supreme Court with a recommendation that the judge or family support magistrate be removed from office or to the Governor with a recommendation that the compensation commissioner be removed from office or (5) exonerate the judge, compensation commissioner or family support magistrate of all charges.”

Sec. 51 - 51(o) compels the witnesses to testify before the Supreme Court or the Judicial Review Council. Sec. 51 - 51(p) deals with suspension

of salary during the period of suspension. Sec. 51 - 51(q) deals with the recommendation of the Council regarding appointment or reappointment of judges.

Sec. 51 - 51(r) state that any judge aggrieved by the decision of the Judicial Council may appeal to the Supreme Court.

Summarising the position, it is to be seen that the Constitution provides for two methods, namely, impeachment through the Legislature and removal by the Governor by address. According to the Constitution, other modes of removal can be prescribed by law, as stated in amended Art. 5, sec. 7. On the recommendation of the Judicial Review Council, the removal can be made by the Supreme Court as provided by law. Chapter 872(a) of the law provides not only for minor punishments but also for removal by the Supreme Court upon recommendation of the Judicial Review Council.

### **TEXAS STATE COURT JUDGES:**

Art. 15 of the Constitution provides for three methods of removal.

Two methods are provided by Art. 15.

(A) Art.15 Section 1, 2: Impeachment:

Art. 15, section 1, 2 of the Constitution deal with Impeachment in general. Sec. 2 says that the Governor, Judges of the Supreme Court, Court of Appeals and District Judges can be impeached. This is done by House of Representatives (sec. 1).

(B) Art.15 Section 8: Address by House:

Sec. 8 thereof deals with another mode of removal of judges by Governor on address of two-third of each House of Legislature. That section reads as follows:

“Art. 15

Sec. 8 – Removal of Judges by Governor on address of two-thirds of each House of Legislature.

The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense

before any vote for such address shall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each House respectively.”

(C) Art. 5, sec. 1A: Third method by Supreme Court:

Art. 5 (Judicial Department) sec. 1A of the Texas Constitution refers to retirement, censure, removal and compensation of justices and judges and also refers to the State Commission on Judicial Conduct and Proceeding. It contains very elaborate provisions, to which we shall presently refer.

Art. 5, sec. 1A, subsection (6) deals with the procedure for discipline and removal. Subsection (6) states that a judge can be removed from office for wilful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, wilful violation of the Code of Judicial Conduct, or wilful or persistent conduct that is glaringly inconsistent with the proper performance of the judges’ duties or where such conduct casts public discredit upon a judiciary or the administration of justice. It further says that a judge may be disciplined or censured in lieu of removal from office or may be suspended with or without pay immediately on being indicted by a State or Federal Grand Jury for a felony offence or charged with a misdemeanor involving official misconduct. On the filing of a complaint, the Commission will give notice to the judge concerned, and also an opportunity to appear and be heard by the

Commission and it may recommend to the Supreme Court for suspension of the judge from office. The Supreme Court after considering the record of such appeals and the recommendation of the Commission may suspend the person from office with or without pay, pending final disposition of the charge.

This is contained in sub-clause (a) of subsection (6) of sec. 1A of Art. 5.

Sub-clause (b) states that any person holding the office referred to in sub-clause (a), who is eligible for retirement benefits, may be involuntarily retired and any person who is not so eligible, may be removed from office, for disability seriously interfering with the performance of his duties which is, or is likely to become permanent in nature. Subsection (7) empowers the Commission to conduct preliminary investigations or order attendance of witnesses and production of documents.

Subsection (8) says that after such investigation as deemed necessary, the Commission may in its discretion, issue a private or public admonition, warning, reprimand or requirement that the person obtain additional training or education or if the Commission determines that the situation merits such action, it may institute formal procedure and order a formal hearing to be held before it concerning public censure, removal or retirement of a person. Subsection (8) states that the Commission may issue an order of public

censure or recommend to a Review Tribunal, the removal or retirement, as the case may be.

Subsection (9) refers to the Review Tribunal which shall consist of seven justices or judges of the Court of Appeals who are selected by lot by the Chief Justice of the Supreme Court. The said tribunal shall review the Commission's recommendations for the removal or retirement of the judge.

Subsection (10) provides that all papers filed and procedures before the Commission shall be confidential, unless otherwise provided by law and the filing of papers with and the giving of testimony before the Commission shall be privileged unless provided by law. However, the Commission may issue a public statement any time during any of its proceeding when sources within the Commission cause notoriety concerning the judge or the Commission and the Commission determines that the best interests of the judge or of the public will be served by issuing such statement.

Subsection (11) states that the Supreme Court may provide for the rules before the Commission and before the Review Tribunal and the Supreme Court.

Subsection (13) states that sec. 1A is alternative to and cumulative of methods of removal of persons holding an office provided elsewhere in the Constitution.

Thus, Texas Constitution provides three methods for removal of Judges, one by impeachment (Art. 15, ss. 1, 2); one by Address to the Governor (Art. 15, sec. 8) and a third by the Commission recommending to the Supreme Court (Art. 5, IA).

Texas Rules:

We shall next refer to the procedural rules for the removal or retirement of judges. As stated earlier, the Commission has been authorized to pass minor measures but if it considers necessary that the judge should be removed or retired, it has to refer the matter to the Supreme Court which refers it to the Review Tribunal. The rules which we shall now refer to are those that have to be followed for the purpose of removal or retirement of judges.

Rule 3 deals with preliminary investigation. This may be made upon receipt of a verified statement or by the Commission on its own motion or otherwise. This is meant to find out if the allegation of misconduct or disability is unfounded or frivolous. If it is so, the Commission shall terminate the procedure. Under Rule 4 the procedure for full investigation is indicated. If the preliminary investigation discloses that the allegations are not unfounded or frivolous or if sufficient cause exists to warrant full inquiry as to whether the judge is guilty of wilful or persistent conduct which is

clearly inconsistent with the performance of his duties or casts public discredit upon the judiciary or the administration of justice or where the disability seriously interferes with the performance of his duties, which is or is likely to become permanent in nature, then the Commission shall conduct a full investigation. It shall then inform the judge and seek his response. Rule 5 provides for issuance of notice, service and return of sub-poenas. Rule 6 enables the Commission to make an offer to the judge to appear informally and this is kept confidential.

Rule 9 enables the judge to ask the Chief Justice of the Supreme Court to appoint a special Court of Review which may conduct the hearing. The Special Court may dismiss, affirm or modify the order of the Commission or may direct formal proceedings to be initiated.

Rule 10 deals with formal proceedings after the investigation is completed by the Commission where it is considered that formal proceedings are necessary. Then there is a procedure for filing a reply by the judge and then a hearing to find out whether there are grounds for removal or retirement. All legal evidence shall be received as in the trial of civil cases. Among the procedural rights of the judge are a right to reasonable opportunity by introducing evidence, right to be represented by counsel and right to examine and cross-examine witnesses or produce oral or documentary evidence or seek the attendance of witnesses. If the judge is adjudged insane or incompetent then a guardian ad litem may be appointed.

The Commission may vote one way or the other and recommend to the Review Tribunal for removal or retirement or the Commission may dismiss the case or publicly order a censure, reprimand, warning or admonition. Out of seven members of the Review Tribunal, six votes are required for a recommendation of the removal or retirement.

Under Rule 13, an appeal is provided to the Supreme Court of Texas against the order of the Review Tribunal.

Rule 15 provides for suspension of a judge in case of indictment by a State or Federal Grand Jury for a felony offence or where he is charged with misdemeanor involved with official misconduct.

Rule 17 provides for confidentiality and privilege of proceedings in respect of all papers filed with and proceedings before the Commission.

Texas has passed a separate code of Judicial Conduct consisting of several canons.

It will thus be seen that, as in Connecticut, there are three methods of removal of judges in Texas.

**Wisconsin State Courts:**

Here also, the Constitution provides for three methods of removal.

1<sup>st</sup> Method: Impeachment:

Article VII of the Wisconsin's Constitution which deals with the Judicial Branch refers to impeachment trial in section 1. That section states that the trial of impeachment shall be in the Senate. The assembly of the Senate shall have the power of impeaching all civil officers of the State for corrupt conduct in office, or for crimes and misdemeanor. It says that impeachment shall be by majority of all the members elected. No judicial officer shall exercise his office, after he has been impeached, until his acquittal. Before the trial of impeachment, the members of the Court shall take an oath or affirmation, truly and impartially to try the impeachment according to the evidence. No person shall be convicted without the concurrence of 2/3<sup>rd</sup> members present. Judgment in cases of impeachment shall not extend further than to removal from office, or disqualification to hold any office of honour, profit or trust under the State. But the party impeached shall be liable to indictment, trial and punishment according to law.

2<sup>nd</sup> Method: Address:

Section 13 of Article VII refers to removal of Justices and Judges by Address (as amended in April 1974 and April 1979). It states that any Justice

or Judge may be removed from office by Address of both Houses of the legislature, if 2/3<sup>rd</sup> of all members elected to each House concur therein, but no removal shall be made by virtue of this section unless the justice or the judge complained of is served with a copy of the charges, as the ground of address, and he has had an opportunity of being heard. On the question of removal, ayes and noes shall be entered on the journals.

3<sup>rd</sup> Method: The Constitution of Wisconsin permits all types of measures including removal by the Supreme Court:

Section 11 of Art VII of the Constitution, as introduced from April 1977, states that each Justice or Judge shall be subject to reprimand, censure, suspension, removal for cause or for disability by the Supreme Court pursuant to procedure established by the legislature by law. No Justice or Judge who has been removed for cause, shall be eligible for reappointment or temporary service. This section is alternative and cumulative with the methods of removal provided in sections 1 and 13 of this Article and sec 12 of Art XIII. (Section 12 of Art XIII does not concern judges as it deals with recall of elective officers.)

The Wisconsin legislature made a law in 1976 creating the Judicial Commission as an agency independent of the Supreme Court. The statutory procedure is found at sections 757.81 to 757.99 of the Wisconsin Statutes.

The Commission has made rules, adopted guidelines for internal policies and procedures.

Section 757.83 of the Statutes deals with the Constitution of the Judicial Commission. Sec 757.85 deals with investigation (with giving notice to Judge) and prosecution as stated in the judgment of the Privy Council already referred to in the case of the Judge from Trinidad and Tobago (Rees vs. Crane, 1994(1) All ER 833). The above section provides for an opportunity to the Judge even at the stage of investigation. It reads:

“757.85 Investigation; prosecution.

(1) (a) The Commission shall investigate any possible misconduct or permanent disability of a judge or circuit or supplemental court commissioner. Misconduct constitutes cause under article VII, section 11, of the Constitution. Except as provided in para (b), judges circuit or supplemental court commissioners, clerks, court reporters, court employees and attorneys shall comply with requests by the Commission for information, documents and other materials relating to an investigation under this section.

(b) The judge or circuit or supplemental court commissioner who is under investigation is not subject to the request procedure under part.

(a) but is subject to the subpoena procedure under sub. (2)

(2) The Commission may issue subpoenas to compel the attendance and testimony of witnesses and to commend the production of books,

papers, documents or tangible things designated in the subpoena in connection with an investigation under this section.

(3) The Commission may notify a judge or circuit or supplemental court commissioner that the commission is investigating possible misconduct by or permanent disability of the judge or circuit or supplemental court commissioner. Before finding probable cause, the commission shall notify the judge or circuit or supplemental court commissioner of the substance of the complaint or petition and afford the judge or circuit or supplemental court commissioner a reasonable opportunity to respond. If the judge or circuit or supplemental court commissioner responds, the Commission shall consider the response before it finds probable cause.

(4) The Commission may require a judge or circuit or supplemental court commissioner who is under investigation for permanent disability to submit to a medical examination arranged by the Commission.

(5) The Commission shall, upon a finding of probable cause that a judge or circuit or supplemental court commissioner has engaged or is engaging in misconduct, file a formal complaint with the Supreme Court. Upon a finding of probable cause that a judge or circuit or supplemental court commissioner has a permanent disability, the Commission shall file a petition with the Supreme Court. If the Commission requests a jury under s. 757.87 (1), the request shall be attached to the formal complaint or the petition.

(6) The Commission shall prosecute any case of misconduct or permanent disability in which it files a formal complaint or a petition.

(7) Insofar as practicable, the procedures applicable to civil actions apply to proceedings under ss. 757.81 to 757.99 after the filing of a complaint or petition.”

Section 757.89 states that the allegations of the complaint or petition must be proved with a standard of “reasonable certainty by evidence that is clear, satisfactory, and convincing.” If the hearing is by a panel, the panel shall make findings of fact, conclusions of law and recommendations regarding appropriate discipline for misconduct or appropriate action or permanent disability and shall file the findings, conclusions and recommendation with the Supreme Court.

Section 757.99(1) states that the Supreme Court shall review the findings of fact, conclusions of law and recommendations under sec 757.89 and determine appropriate discipline in cases of misconduct and appropriate action in cases of permanent disability. The rules of the Supreme Court applicable to civil cases in the Supreme Court govern the review proceedings of this section.

Section 757.93 relates to confidentiality of proceedings. Sub clause (a) of sub sec (1) thereof states that all proceedings under sections 757.81 to 757.99 relating to misconduct or permanent disability prior to the filing of a

petition or formal complaint by the Commission are confidential unless a judge or circuit waives the right to confidentiality in writing to the Commission. Any such waiver does not affect the confidentiality or the identity of a person providing information under sub clause (b).

Sub clause (b) of sub sec (1) of sec 757.93 states that any person who provides information to the Commission concerning probable misbehaviour or permanent disability may request that the Commission not disclose his or her identity to the judge or circuit prior to the filing of a petition or a formal complaint before the Commission.

Sub section (2) of section 757.93 states that in case, prior to the filing of a formal complaint or a petition, an investigation of possible misconduct or permanent disability becomes known to the public, the Commission may issue statements in order to confirm pendency of the investigation to qualify the procedural aspects of the disciplinary proceedings, to explain the right of a judge or circuit to a fair hearing without prejudgment, to state that the judge or circuit denies the allegations, to state that an investigation has been completed and no probable cause has been found out in order to correct public misinformation.

Section 757.94 deals with privileges and immunity. Sub section (1) states that a complaint or communication alleging judicial misconduct or permanent disability with the Commission or its staff or Panel and testimony

in an investigation under sec 757 is privileged. The members of the Commission or Panel shall be immune from public liability for any conduct in the course of their official duties under sections 757.81 to 757.99

Section 757.95 deals with temporary suspension by the Supreme Court. It states that Supreme Court may, following the filing of a formal complaint or a petition by the Commission, prohibit a judge or a circuit from exercising the powers of a judge or circuit pending formal determination of the proceedings.

It will be seen, therefore that Wisconsin provides for a two-tier system. The investigative functions are before the Judicial Commission which determines whether there is probable cause for coming to the conclusion that there is misconduct or disability. In case there is prima facie proof of misconduct or disability, the Commission initiates a complaint against the judge in Wisconsin Supreme Court for which purpose a panel of Judges will be formed from among the Supreme Court Judges to decide issues of fact and law and the panel makes its recommendations to the Supreme Court which reviews the same to pass final orders. The judge is represented by counsel at all stages, including the stage of investigation. Sometimes, before referring a matter to a panel, the Commission which has investigated into the complaint initially may even invite the Judge to a meeting to discuss specific concerns arising out of the investigation.

Formal advisory opinions on questions judicial conduct or code of judicial ethics are not rendered by the Commission. Such opinions are given by the Judicial Conduct Advisory Committee as outlined in the appendix to Supreme Court Rules, chapter 60.

## CHAPTER XVIII

### **SUPREME COURT OF INDIA : RESTATEMENT OF VALUES OF JUDICIAL LIFE AND INHOUSE PROCEDURE (1997)**

In this chapter, we shall deal with two important resolutions of the Supreme Court of India, on (A) Restatement of Values of Judicial Life and (B) Inhouse Procedure within the Judiciary passed in 1997.

#### **(A) RESTATEMENT OF VALUES OF JUDICIAL LIFE**

#### **“RESOLUTION**

The following two Resolutions have been ADOPTED in the Full Court Meeting of the Supreme Court of India on May 7, 1997.

RESOLVED that an in-house procedure should be devised by the Hon’ble Chief Justice of India to take suitable remedial action against Judges who by their acts of omission or commission do not follow the universally accepted values of judicial life including those indicated in the “Restatement of Values of Judicial Life”.

RESOLVED FURTHER THAT every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her

in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made should be similar declaration for the purpose of the record. The declaration made by the Judges or the Chief Justice, as the case may be, shall be confidential.

WHEREAS by a Resolution passed in the Chief Justices' Conference held at New Delhi on September 18-19, 1992, it was resolved that it is desirable to restate the pre-existing and universally accepted norms, guidelines and conventions reflecting the high values of judicial life to be followed by Judges during their tenure of office;

AND WHEREAS the Chief Justice of India was further requested by that Resolution to constitute a Committee for preparing the draft restatement to be circulated to the Chief Justices of the High Courts for discussion with their colleagues, which was duly circulated on 21.11.1993;

AND WHEREAS suggestions have been received from the Chief Justices of the High Courts after discussion with their colleagues;

AND WHEREAS A Committee has been reconstituted by the Chief Justice of India on April 7, 1997, to finalise the 'Restatement of Values of

Judicial Life' after taking note of the draft Restatement of Values of Judicial Life prepared by a Committee appointed pursuant to the Resolution passed in the Chief Justices' Conference 1992 and placed before the Chief Justices' Conference in 1993;

AND WHEREAS such a Committee constituted by the Chief Justice of India has prepared a draft restatement after taking into consideration the views received from various High Courts to the draft which was circulated to them;

NOW, THEREFORE, on a consideration of the views of the High Courts on the draft, the restatement of the pre-existing and universally accepted norms, guidelines and conventions called the 'RESTATEMENT OF VALUES OF JUDICIAL LIFE' to serve as a guide to be observed by Judges, essential for an independent, strong and respected judiciary, indispensable in the impartial administration of justice, as redrafted, has been considered in the Full Court Meeting of the Supreme Court of India on May 7, 1997 and has been ADOPTED for due observance.

### **RESTATEMENT OF VALUES OF JUDICIAL LIFE**

- (1) Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary.

Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.

- (2) A Judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.
- (3) Close association with individual members of the Bar, particularly those who practise in the same court, shall be eschewed.
- (4) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.
- (5) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.
- (6) A Judge should practise a degree of aloofness consistent with the dignity of his office.
- (7) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
- (8) 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.
- (9) A Judge is expected to let his judgments speak for themselves. He shall not give interview to the media.

- (10) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.
- (11) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.
- (12) A Judge shall not speculate in shares, stocks or the like.
- (13) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).
- (14) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.
- (15) A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.
- (16) Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of a high office he occupies and the public esteem in which that office is held.

These are only the “*Restatement of the Values of Judicial Life*” and are not meant to be exhaustive but illustrative of what is expected of a Judge”.

The Law Commission recommends that till a statutory Code of Conduct is published in accordance with the proposed law, the above 'Restatement of Judicial Values' approved by the Supreme Court on May 7, 1997 shall be the Code of Conduct to be followed, the breach of which shall be treated as amounting to 'misbehaviour'. This has been reiterated by us in Chapter XX.

## **(B) DISCIPLINE AND REMOVAL OF JUDGES:**

### **“IN-HOUSE PROCEDURE**

This Committee has been constituted with a view to devise an In-House Procedure for taking suitable remedial action against Judges who, by their acts of omission or commission, do not follow universally accepted values of Judicial life including those included in the Restatement of Values of Judicial Life.

Complaints are often received containing allegations against a Judge pertaining to the discharge of his judicial functions. Sometimes complaints are received with regard to the conduct and behaviour of the Judge outside the Court. The complaints are generally made by a party to the proceedings who feels dissatisfied with the adverse order passed by the Judge or by persons having a personal grudge against the Judge. Most of these complaints are found to be false and frivolous. But there may be complaints

which cannot be regarded as baseless and may require deeper probe. A complaint casting reflection on the independence and integrity of a Judge is bound to have a prejudicial effect on the image of the higher judiciary of which the Judge is an honoured member. The adoption of the In-House Procedure would enable a complaint against a Judge being dealt with at the appropriate level within the institution. Such a procedure would serve a dual purpose. In the first place, the allegations against a Judge would be examined by his peers and not by an outside agency and thereby the independence of the judiciary would be maintained. Secondly, the awareness that there exists a machinery for examination of complaints against the Judge would preserve the faith of the people in the independence and impartiality of the judicial process. The Committee has approached the task assigned to it in this perspective.

#### **HIGH COURT JUDGE:**

A complaint against a Judge of a High Court is received either by the Chief Justice of that High Court or by the Chief Justice of India (CJI) directly. Sometimes such a complaint is made to the President of India. The complaints that are received by the President of India are generally forwarded to the CJI. The Committee suggests the adoption of the following procedure for dealing with such complaints:-

- (1) Where the complaint is received against a Judge of a High Court by the Chief Justice of the High Court, he shall examine it. If it is found by him that it is frivolous or directly related to the merits of a substantive

decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file the complaint and inform the CJI accordingly. If it is found by him that the complaint is of a serious nature involving misconduct or impropriety, he shall ask for the response thereto of the Judge concerned. If on a consideration of the allegations in the complaint in the light of the response of the Judge concerned, the Chief Justice of the High Court is satisfied that no further action is necessary he shall file the complaint and inform the CJI accordingly. If the Chief Justice of the High Court is of the opinion that the allegations contained in the complaint need a deeper probe, he shall forward to the CJI the complaint and the response of the Judge concerned along with his comments.

- (2) When the complaint is received by the CJI directly or it is forwarded to him by the President of India the CJI shall examine it. If it is found by him that it is either frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file it. The complaint shall then be sent by the CJI to the Chief Justice of the concerned High Court for his comments. On the receipt of the complaint from the CJI the Chief Justice of the concerned High Court shall ask for the response of the Judge concerned. If on a consideration of the allegations in the complaint in the light of the response of the Judge concerned the Chief Justice of the High Court is satisfied that no further action is necessary or if he is of the opinion that the allegations

contained in the complaint need a deeper probe, he shall return the complaint to the CJI along with a statement of the response of the Judge concerned and his comments.

- (3) After considering the complaint in the light of the response of the Judge concerned and the comments of the Chief Justice of High Court, the CJI, if he is of the opinion that a deeper probe is required into the allegations contained in the complaint, he shall constitute a three member Committee consisting of two Chief Justices of High Courts other than the High Court to which the Judge belongs and one High Court Judge. The said Committee shall hold an inquiry into the allegations contained in the complaint. The inquiry shall be in the nature of a fact finding inquiry wherein the Judge concerned would be entitled to appear and have his say. [But it would not be formal judicial inquiry involving the examination and cross-examination of witnesses and representations by lawyers].
- (4) For conducting the inquiry the Committee shall devise its own procedure consistent with the principles of natural justice.
- (5) After such inquiry the Committee may conclude and report to the CJI that (a) there is no substance in the allegations contained in the complaint, or (b) there is sufficient substance in the allegations contained in the complaint and the misconduct disclosed is so serious that it calls for initiation of proceedings for removal of the Judge, or (c) there is substance in the allegations contained in the complaint bu

the misconduct disclosed is not of such a serious nature as to call for initiation of proceedings for removal of the Judge.

A copy of the Report shall be furnished to the Judge concerned by the Committee.

(6) In a case where the Committee finds that there is no substance in the allegations contained in the complaint, the complaint shall be filed by the CJI.

(7) If the Committee finds that there is substance in the allegations contained in the complaint and the misconduct disclosed in the allegations is such that it calls for initiation of proceedings for removal of the Judge, the CJI shall adopt the following course:-

- (i) the Judge concerned should be advised to resign his office or seek voluntary retirement;
- (ii) In case the Judge expresses his unwillingness to resign or seek voluntary retirement, the Chief Justice of the concerned High Court should be advised by the CJI not to allocate any judicial work to the Judge concerned and the President of India and the Prime Minister shall be intimated that this has been done because allegations against the Judge had been found by the Committee to be so serious as to warrant the initiation of proceedings for removal and the copy of the report of the Committee may be enclosed.

(8) If the Committee finds that there is substance in the allegations but the misconduct disclosed is not so serious as to call for initiation of

proceedings for removal of the Judge, the CJI shall call the Judge concerned and advise him accordingly and may also direct that the report of the Committee be placed on record.

**CHIEF JUSTICE OF THE HIGH COURT:**

A complaint against the Chief Justice of a High Court is normally received either by the CJI or by the President of India who forwards it to the CJI. On receipt of such a complaint the CJI shall examine it and if it is found by him that it is either frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file the complaint without any further action. In case it is found by the CJI that the complaint is of a serious nature involving misconduct or impropriety, he shall ask for the response of the Chief Justice concerned about the allegations contained in the complaint. If, on a consideration of the allegations in the light of the response of the Chief Justice concerned, the CJI is satisfied that no further action is necessary he shall file the complaint. If, however, he is of the opinion that the allegations contained in the complaint need a deeper probe, he shall constitute a three member Committee consisting of a Judge of the Supreme Court and two Chief Justices of other High Courts. The Committee shall hold an inquiry on the same pattern as the Committee constituted to examine a complaint against a Judge of the High Court and further action in the light of the findings of the Committee shall be taken by the CJI on the same lines.

**JUDGE OF THE SUPREME COURT:**

If a complaint is received against a Judge of the Supreme Court by the CJI or if such a complaint is forwarded to him by the President of India, the CJI shall first examine it and if it is found by him that it is either frivolous or directly related to the merits of a substantive decision in a judicial matter or does not involve any serious complaint of misconduct or impropriety, he shall file the complaint without any further action. In case it is found by him that the complaint is of a serious nature involving misconduct or impropriety, he shall ask for the response thereto of the Judge concerned. If, on a consideration of the allegations in the light of the response of the Judge concerned, the CJI is satisfied that no further action is necessary he shall file the complaint. If, however, he is of the opinion that the matter needs a deeper probe, he would constitute a Committee consisting of three Judges of the Supreme Court. The said Committee shall hold an inquiry on the same pattern as the Committee constituted to examine a complaint against a Judge of a High Court and further action on the same lines in the light of the findings of the Committee shall be taken by the CJI.

The Committee feels that the In-House Procedure suggested herein will allay the misgivings in certain quarters that the members of the higher judiciary are not accountable for their conduct. At the same time, it will also serve as a safeguard for the members of the higher judiciary from being

maligned or being subjected to vilification by false and frivolous complaints. The Committee earnestly hopes that the occasions for invoking the In-House Procedure will seldom arise”.

**CHAPTER XIX**  
**SUPREME COURT OF INDIA: IN-HOUSE PROCEDURE IN**  
**JUSTICE A.M.BHATTACHARJEE'S CASE**

On the question of In-House procedure, within the Judicial Branch, the Supreme Court has laid down the procedure in the case reported in C. Ravichandran Iyer v. Justice A.M. Bhattacharjee (1995 (5) SCC 457). We shall refer to the principles laid down in that case.

In the year 1994-95, certain allegations were made against the then Chief Justice of Bombay High Court, Justice A.M. Bhattacharjee. The allegations related to monies allegedly paid by certain publishers to the Judge in respect of some books authored by the judge but published from outside India. It is not necessary to go into the nature of allegations against the Judge but it is sufficient to state that various Bar Associations in Bombay sought the resignation of the judge. They also sought action under the Judges (Inquiry) Act, 1968. A practising advocate filed a writ petition in the Supreme Court under Art. 32 of the Constitution seeking inquiry against the Judge or his resignation, in the form of a PIL.

The Supreme Court took up the matter and after giving a notice to the various parties, it laid down various principles relating to In-House procedure, particularly as to what is to be done if the conduct of the Judge

was not such as to warrant removal by address by the Houses of Parliament to the President.

The Supreme Court considered the scope and meaning of the word 'misbehaviour' in Art. 124(4) and observed that the word 'misbehaviour' is advisedly not defined. It is a vague and elastic word and embraces within its sweep different faces of conduct as opposed to good conduct. The Court referred to the meaning of the word 'misconduct' and adverted to its meaning in cases of professional misconduct, such as in the Full Bench decision of the Madras High Court in First Grade Pleader, Re (AIR 1931 Mad 422), and to 'misconduct' of arbitrators. It quoted from an earlier judgment in Krishna Swami v. Union of India, 1992 (4) 605 to the effect that 'every act or conduct or even error of judgment or negligent acts by higher judiciary per se does not amount to misbehaviour. Wilful abuses of Judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude would be 'misbehaviour'. Persistent failure to perform judicial duties of the Judge or wilful abuse of office dolus malus would be misbehaviour. Misbehaviour would extend to conduct of the Judge in or beyond the execution of Judicial office. Even administrative actions or omissions too are accompaniment of mens rea.

The Supreme Court considered various principles relating to judicial independence, judicial individualism. It stated that the procedure for removal by address under Art. 124(4) and (5) was cumbersome and that in

some cases where the conduct does not warrant removal, some other mechanism must be innovated.

The observations of the Supreme Court in para 15 (p. 471) in this behalf are as follows:

“15. The Founding Fathers of the Constitution advisedly adopted a cumbersome process of impeachment as a mode to remove a Judge from office for only proved misbehaviour or incapacity which implies that impeachment process is not available for minor abrasive behaviour of a Judge. It reinforces that independence to the Judge is of paramount importance to sustain, strengthen and elongate rule of law. Parliament sparingly resorts to the mechanism of impeachment designed under the Constitution by political process as the extreme measure only upon a finding of proved misbehaviour or incapacity recorded by a committee constituted under section 3 of the Act by way of address to the President in the manner laid down in Art. 124(4) and (5) of the Constitution, the Act and the Rules made thereunder.”

The Supreme Court reiterated the need for a mechanism to correct behaviour which did not warrant removal by address to the President. It observed again in paras 25 and 26 as follows:

“25. Guarantee of tenure and its protection by the Constitution would not, however, accord sanctuary for corruption or grave misbehaviour. Yet every action or omission by a judicial officer in the performance of his duties which is not a good conduct necessarily, may not be misbehaviour indictable by impeachment, but its insidious effect may be pervasive and may produce deleterious effect on the integrity and impartiality of the Judge. Every misbehaviour in juxtaposition to good behaviour, as a constitutional tautology, will not support impeachment but a misbehaviour which is not a good behaviour may be improper conduct not befitting to the standard expected of a Judge. Threat of impeachment process itself may swerve a Judge to fall prey to misconduct but it serves disgrace to use impeachment process for minor offences or abrasive conduct on the part of a Judge. The bad behaviour of one Judge has a rippling effect on the reputation of the judiciary as a whole. When the edifice of judiciary is built heavily on public confidence and respect, the damage by an obstinate Judge would rip apart the entire judicial structure built in the Constitution.

26. Bad conduct or bad behaviour of a Judge, therefore, needs correction to prevent erosion of public confidence in the efficacy of judicial process or dignity of the institution or credibility to the judicial office held by the obstinate Judge. When the Judge cannot be removed by impeachment process for such conduct but generates widespread feeling of dissatisfaction among the general public, the question would

be who would stamp out the rot and judge the Judge or who would impress upon the Judge either to desist from repetition or to demit the office in grace? Who would be the appropriate authority? Who would be the principal mover in that behalf? The hiatus between bad behaviour and impeachable misbehaviour needs to be filled in to stem erosion of public confidence in the efficacy of judicial process. Whether the Bar of that Court has any role to play either in an attempt to correct the perceived fallen standard or is entitled to make a demand by a resolution or a group action to pressurize the Judge to resign his office as a Judge? The resolution to these questions involves delicate but pragmatic approach to the questions of constitutional law.”

The Supreme Court observed that except under the provisions of the Judges Inquiry Act 1968 and the procedure for Address indicated in the Constitution in Art. 121, 124(4) and 124(5), by necessary implication, no other “forum” or a platform is available for “discussion” of the conduct of the judge in the discharge of his duties as a judge of the Supreme Court or High Court, much less. The Bar Council or groups of practising advocates could not publicly discuss the issue. However, it observed (para 34) that the office bearers of the Bar Association could meet the Judge in his chambers and apprise him of the relevant information in its possession to see whether the Judge would mend himself. If that does not yield results, they could approach the Chief Justice of the High Court concerned. (If the behaviour of

a Chief Justice of a High Court was in question, they could approach the Chief Justice of India.)

The Supreme Court suggested that the mechanism to deal with behaviour which does not warrant removal by address of the Houses of the Parliament to the President, is self-regulation within the Judicial Branch. The Supreme Court observed (para 35 p. 479):

“It is of importance to emphasise here that impeachment is meant to be a drastic remedy and needs to be used in serious cases. But there must exist some other means to ensure that Judges do not abuse the trust the society has in them. It seems to us that self-regulation by the judiciary is the only method which can be tried and adopted.”

The Supreme Court then suggested that the position of the Chief Justice of India is a unique position as the head of the Judiciary and that he could be approached for appropriate action within the Judicial Branch. The Court referred to an article by Irving R. Kaufman, Chief Justice, US Court of Appeals for the Second Circuit [(Vol. 88) 1978-79, p. 681 Yale Law Journal “Chilling Judicial Independence”] wherein it was stated that “pressure by peers” would yield salutary effect on the erring Judge and that the judicial system can better survive by pressure of the peers instead of disciplinary action.

The Supreme Court also referred to another article by Harry T. Edwards, Chief Justice, US Courts of Appeal for the District of Columbia Circuit (Vol. 87, Michigan Law Review, p. 765 (1989)) “Regulating Judicial Misconduct and Divining ‘Good Behaviour’ for Federal Judges”, in which this aspect of “self-regulation” was emphasized. Judge Edwards stated:

“I believe that federal judges are subject to some measure of control by peers with respect to behaviour or intimidation that adversely affects the work of the court and that does not rise to the level of impeachable misconduct. ‘I would submit that the ideal of judicial independence is not compromised when judges are monitored and are regulated by their own peers.’ This limited system of judicial self-regulation resists no constitutional dilemma as long as removal power remains with Congress. ‘I argue that judiciary alone should monitor this bad behaviour through a system of self-regulation.’”

Having thus pointed out that in cases where the behaviour of a judge of the Supreme Court or High Court does not warrant removal by way of address of Houses of Parliament to the President, “self-regulation” within the judiciary by way of an In-House procedure is appropriate, the Supreme Court indicated the procedure as follows:

“40. Bearing all the above in mind, we are of the considered view that where the complaint relates to the Judge of the High Court, the Chief

Justice of that High Court, after verification, and if necessary, after confidential enquiry from his independent source, should satisfy himself about the truth of the imputation made by the Bar Association through its office-bearers against the Judge and consult the Chief Justice of India, where deemed necessary, by placing all the information with him. When the Chief Justice of India is seized of the matter, to avoid embarrassment to him and to allow fairness in the procedure to be adopted in furtherance thereof, the Bar should suspend all further actions to enable the Chief Justice of India to appropriately deal with the matter. This is necessary because any action he may take must not only be just but must also appear to be just to all concerned, i.e., it must not even appear to have been taken under pressure from any quarter. The Chief Justice of India, on receipt of the information from the Chief Justice of the High Court, after being satisfied about the correctness and truth touching the conduct of the Judge, may tender such advice either directly or may initiate such action, as is deemed necessary or warranted under given facts and circumstances. If circumstances permit, it may be salutary to take the Judge into confidence before initiating action. On the decision being taken by the Chief Justice of India, the matter should rest at that. This procedure would not only facilitate nipping in the bud the conduct of a Judge leading to loss of public confidence in the courts and sustain public faith in the efficacy of the rule of law and respect for the judiciary, but would also avoid needless embarrassment of contempt proceedings against the office-bearers of the Bar Association and group libel against all concerned. The independence of judiciary and the stream of

public justice would remain pure and unsullied. The Bar Association could remain a useful arm of the judiciary and in the case of sagging reputation of the particular Judge, the Bar Association could take up the matter with the Chief Justice of the High Court and await his response for the action taken thereunder for a reasonable period.”

## CHAPTER XX

### DISCUSSION, VIEWS AND RECOMMENDATIONS ON POINTS REFERRED TO IN CHAPTER II

The various issues which call for discussion and recommendations in regard to the proposed draft of the JUDGES (INQUIRY) BILL, 2005 have been enumerated in Chapter II. We shall deal with them one after the other in this Chapter and give our views and recommendations.

(I) Is judicial independence absolute and are not judges accountable?

This question has been dealt with elaborately in Chapter III. It has been pointed out that the Constitution is supreme and each of the three branches have their respective allocated powers under the Constitution. None of the three branches can claim supremacy over the other. The principle that Parliament is supreme, a principle advocated by Prof. Dicey is today not accepted even in England where that principle originated. Recent judgments of Laws J. in England, and Judge Iacobucci of Canada clearly state that it is the Constitution, whether written or convention bound, that is supreme and that each of the three wings must work in harmony. Our Supreme Court has also stated so in *Special reference No.1 of 1964 Keshav Singh's Case* (1965) 1 SCR 413 and in *Peoples' Union for Civil Liberties v. Union of India* AIR

2003 SC 2363. Each of the branches is put in check by the other as indicated in the Constitution and in fact, the Constitution's main purpose is to create checks and balances. Merely because the Supreme Court exercises power of judicial review over Parliamentary and executive action, the Courts cannot claim supremacy over other branches. Judicial review is again a basic feature of the Constitution. Judges are limited in their powers and functions by the provisions of the Constitution and the laws, by precedents, conventions and by traditional judicial values or judicial ethics. Further there are implicit restrictions by the manner in which the people perceive them or expect them to behave or to conduct themselves.

As regards disciplining judges of the superior courts who may be guilty of misbehaviour, the Constitution contains express provisions. Art. 124 (4) of the Constitution provides for a Motion for removal of a judge being moved in either House of Parliament by a requisite number of Members of Parliament, followed by 'investigation and proof' of misbehaviour and thereafter an address for removal if the misbehaviour was proved. The Judges (Inquiry) Act and the Rules of 1969 thereunder provide that the exercise of investigation and proof would be by a three-member Inquiry Committee of two judges and a jurist, to whom the reference would be made by the Speaker/Chairman of either House as the case may be.

This was felt inadequate and cumbersome to deal with all kinds of misbehaviour and therefore, in the year 1997, the Supreme Court of India

formulated the **‘Restatement of Values of Judicial Life’** for all Judges of the Supreme Court and High Courts, to follow. The reason why the word ‘Restatement’ was used was that these values were already there, some written, some unwritten and some followed over centuries as a matter of tradition or convention. In as much as they were not newly created or born, the Supreme Court called them 'Restatement of Values of Judicial life'. One more reason was that the Court felt the need to inform incumbent Judges or those freshly appointed, that there is a Code of Conduct which they are expected to follow. The need to apprise the Judicial Branch of these values was perhaps felt as a necessity to prevent a fall in the standards of conduct.

Along with the ‘Restatement of Values of Judicial Life’, an ‘In-House Procedure’ for dealing with misbehavior or even ‘deviant behaviour’ was issued. The mechanism provided therein is to have such misbehavior or deviant behaviour corrected by ‘peers’ within the Judicial Branch, a procedure which is in vogue in a number of countries. Any breach of the Code of Conduct or Values of Judicial Life could be the cause for correction by the peers.

Under the present Bill of 2005 in the above address procedure is retained and, the investigation and proof of charges will have to be taken up by a five-judge National Judicial Council to whom the matter may be referred by the Speaker/Chairman of either House as the case may be, upon a Motion. If on such reference, the Judicial Council finds that the charge of misbehaviour is

proved it will send its Report with its recommendation to the Speaker/Chairman whereupon the House will take it up under Art. 124 (4).

Under the Bill of 2005 an additional procedure by way of a complaint is now prescribed. The complaint can be by any person. It will be scrutinized and verified by the same National Judicial Council of five judges and if it decides to proceed further it will frame charges and conduct a regular investigation. If it finds that the charges that are proved warrant removal of the judge concerned, it will send its Report to the President to be placed before both Houses of Parliament. Thereafter the same procedure as in the case of removal by address is to be followed.

In the view of the Law Commission, deduced in the background of the Constitution and the law and the principles of judicial accountability referred to in the earlier chapters, the broad features of the present Bill of 2005 cannot be described as an encroachment on the independence of the Judicial Branch. The Bill of 2005 appears to provide an additional procedure which may ultimately, in some cases, lead to 'removal' by address. The provisions of the Bill of 2005 are by and large consistent with what has been stated in the Judgment of the Supreme Court in Justice V.Ramaswami's case. The proposals in the Bill also facilitate statutory recognition, with some minor changes, to the Restatement of Judicial Values and the In-House procedure already approved by the Full Court of the Supreme Court in 1997.

Therefore, it will not be correct to view this Bill as an attempt by the Executive or the Legislature to encroach upon independence of the Judiciary.

As stated in Chapter III, judicial independence is not absolute and judicial accountability is and must go, hand in hand, with the independence of the judiciary.

In this Report, the Law Commission is further recommending that the new statute must provide for the imposition of one or other of certain 'minor measures' by the Judicial Council against any Judge found guilty of 'misbehaviour' which may not warrant removal. Such minor measures would include issuing advisories, warning, request to resign, withdrawal of work, public or private censure or admonition etc. Such minor measures, short of removal, are in vogue in several countries. The incorporation of such provisions for 'minor measures' by statute has been upheld by the federal courts in U.S.A. even though there is no express provision therefor in the US Federal Constitution. As already noticed in the earlier Chapters, there are similar provisions in the U.K., Canada and Germany and in almost all the States in the U.S. We have also referred to some of those provisions as found in the Constitution and statutes of California, Idaho, Connecticut, Texas etc. This is on the principle that it is for the judiciary to set its own house in order. This is not to be viewed as an encroachment by the Executive or the Legislature so long as the disciplinary control is vested in 'peers' within the

Judicial Branch. This aspect will be elaborated with reference to judicial precedents, hereinbelow.

In the context of s.21 of the Bill of 2005 which provides for stoppage of assigning judicial work to a judge pending investigation and inquiry, a question arises whether withdrawal of cases from the Judge's list or suspension pending the inquiry proceedings is permissible. This question also will be discussed in detail in this Chapter.

**The Law Commission reiterates that judicial independence is not absolute, judicial independence and accountability are two sides of the same coin and that the present proposals in the Bill of 2005 together with our recommendations for enabling the Judicial Council to impose 'minor measures' including stoppage of assignment of judicial work are constitutional. They ought not to be viewed as an encroachment on Judicial Independence by the Executive or by the Legislature.**

(II) What are the principles of Constitutional law laid down by the Supreme Court in the cases relating to Justice V. Ramaswami?

In Chapter VI, the four judgments of the Supreme Court of India and the background facts in the cases of Justice V.Ramaswami have been fully discussed and in this chapter we propose to give a summary of the principles of law laid down in those cases.

(i) Initially, the then Chief Justice of India appointed a Committee of Judges of the Supreme Court (B.C.Ray, K.J.Shetty and M.N.Venkatachalaiah JJ) to go into the facts and to find out if there was any prima facie case against the Judge which required the Judge not to exercise his judicial functions pending the investigation proceedings. The Committee held that a Judge could not be required not to exercise his judicial functions unless the appropriate authority had given a finding that the Judge's conduct involved moral turpitude and the Chief Justice of India was satisfied that such inference was reasonable.

(ii) Thereafter, there were four judgments of the Supreme Court, namely Sub Committee on Judicial Accountability vs Union of India: 1991(4) SCC 699; Sarojini Ramaswami (Mrs) vs Union of India 1992(4) SCC 506; Krishnaswamy v. Union of India 1992 (4) SCC 605 and Lily Thomas vs Speaker, Lok Sabha 1993 (4) SCC 234. We have referred to these judgments in detail in Chapter VI.

The following principles of Constitutional law were laid down in the above Judgments:

(1) The Motion referred to in Sec 3(1) of the Judges (Inquiry) Act, 1968 is only in the nature of a complaint by a group of Members of Parliament and is not part of the Parliamentary process. The stages at which the Motion is initiated, admitted by the Speaker/Chairman and when an

Inquiry Committee inquires into the allegations and finds that the allegations of misbehaviour are proved, are all not part of the Parliamentary process. Parliamentary process is the political process. The inquiry before the Inquiry Committee is judicial. The Parliamentary process starts only after the Inquiry Committee submits its Report to the House of Parliament that a case of misbehavior or incapacity on the part of the Judge is proved. The motion once admitted by the Speaker does not lapse upon the dissolution of the Lok Sabha.

- (2) Inasmuch as the process till the Report is submitted by the Committee to the House is not part of the Parliamentary process, the discussion on the Judge's conduct when the Motion is initiated or admitted and the discussion before and in the Inquiry Committee and in its Report, does not offend Art 121 of the Constitution which prohibits discussion in Parliament "with reference to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided".
- (3) Art. 121 lifts the bar against discussion about the conduct of the Judge, once the Report is submitted by the Inquiry Committee to the House and at that stage for the first time, during the Parliamentary process, it is permissible to discuss the conduct of the Judge. In fact, it is necessary at that stage to give the judge a copy of the Report of the Inquiry Committee

and an opportunity to the Judge to meet the findings. The judge is not entitled to a copy of the Report at any anterior stage.

- (4) The words 'proved misbehavior or incapacity' indicate that the misbehavior or incapacity has to be proved initially before a forum outside Parliament. The Inquiry Committee appointed under sec. 3(1) of the 1968 Act is meant to go into the 'proof' of the misbehavior or incapacity and as that procedure is outside the Parliamentary process as stated above, it satisfies the requirement of the proof being established outside the Parliament. Thus the procedure before the submission of Report and thereafter is a blend of judicial and Parliamentary processes.
- (5) The passing of a law for the purpose of prescribing the procedure for removal as visualised by Art. 124(5) is a condition precedent for initiating any Motion in Parliament. Thus, Art 124(5) is not merely a provision for enabling a law to be passed. Unless such a law is passed, no Motion can be initiated under Art. 124(4).
- (6) The Committee of Judges appointed under Sec. 3(1) performs a judicial function. In fact under the proviso to sec. 200(2) of the Government of India Act, 1935, a Judge could not be removed except by the decision of a disciplinary committee of the Privy Council. The Privy Council was the highest judicial body so far as the British colonies were concerned at that point in time.

- (7) At the stage of admission of the Motion under s. 3 (1) of the 1968 Act, the Speaker or the Chairman can take a decision after consulting such persons as he may deem fit, as provided in sec. 3(1) of the 1968 Act. One of the best persons whom he could consult is the Chief Justice of India. The Chief Justice of India, as the head of the Judiciary, could give the necessary advice.
- (8) Once the motion is admitted and a reference is made under Sec. 3(2) to the Committee, the Motion is kept in abeyance and it gets activated only when a report of the Inquiry Committee is given with the finding that the Judge is guilty of misbehavior or that he is incapacitated.
- (9) The 1968 Act and the Rules made thereunder provide for a judicial process for determination of facts and supersede the rules, if any, made by the House of Parliament under Art. 118 of the Constitution of India. The procedure laid down in the Rules made under Art. 118 for appointing committees is part of the Parliamentary process but in as much as those Rules are superseded by the 1968 Act and Rules made under that Act, the procedure becomes judicial and the Parliamentary process starts only after a Report of 'proved misbehavior or incapacity' is submitted by the Inquiry Committee to the House. Thereafter, the Motion which is kept in abeyance, gets activated and the Parliamentary process commences.

- (10) On receiving a notice of Motion under sec. 3 of the 1968 Act, only where the Speaker/ Chairman forms an opinion that there is a prima facie case for investigation, he will constitute an Inquiry Committee as prescribed.
- (11)(a) At the stage of admitting the Motion under Section 3(1) of the Act and before referring the allegations to a Committee, the Judge is not entitled, as of right, to an opportunity. It is open to the Speaker or Chairman, to give an opportunity to the Judge, if he feels that in the facts and circumstances of the case, it is appropriate to give such opportunity.
- (b) During the course of the inquiry before the Committee, the judge is entitled to cross-examine witnesses and also examine witnesses on his side.
- (12) Once the Inquiry Committee in its Report holds that the ‘misbehaviour or incapacity’ is not proved, the matter ends there and the Speaker/Chairman cannot thereafter proceed with the Motion. This is because under Art. 121 there can be no discussion in Parliament about the conduct of a Judge if misbehaviour or incapacity is not proved outside the Parliament.
- (13) But where the Inquiry Committee holds that the ‘misbehaviour or incapacity’ is proved, Parliament is not bound by that verdict and it is open to it to go into the matter and come to a different conclusion, namely, that ‘misbehaviour or incapacity’ has not been proved.

(14) Parliament is entitled to go into the probative value of the evidence on which the Committee has relied.

(15) Among the three Members in the Committee constituted under Section 3(1) of the 1968 Act, as per the Rules of 1969 made under that Act, if two members hold that the charges are not proved and one holds that the charges are proved, the dissenting note need not be forwarded to the House. But, when two Members hold that the charges are proved and one Member dissents and holds that the charges are not proved, then the dissent also must be forwarded to the House.

(16) The Judge concerned cannot interdict or seek an injunction to restrain the Speaker/Chairman from admitting the Motion or making a reference to the Committee, nor can the Judge obtain stay of the proceeding before the Committee or on the submission of its Report to the House.

(17) The Judge can only challenge the final order of 'removal' passed by the President after the address by the Houses inasmuch as the proceedings before the Committee are 'inchoate' till such order is passed by the President. The Inquiry Committee is not a 'tribunal' for the purposes of Art. 136 of the Constitution because it is only a recommendatory body.

(18) A copy of the Report of the Inquiry Committee cannot be given to the Judge immediately after the Report is made. The Judge is entitled to the copy of the Report only after the Report is submitted to the Speaker/Chairman.

(19) Pending the Motion as well as inquiry before the Committee or before the final order of removal is passed, the Judge cannot, in the light of the provisions of the 1968 Act, be 'suspended' from office and no court can stop the Judge from exercising judicial functions. Nor can work be withdrawn.

(20) Till a Judge is removed from office or retires, his salary and allowances cannot be withheld, even if an inquiry is pending against him.

(21) The Judge is entitled to be heard during the debate in Parliament after the submission of Report by the Committee and he has also a right to be represented by counsel, if he so desires.

(22) It is only in case the Report is accepted and the Motion for removal is passed after hearing the Judge that the misbehaviour or incapacity is "deemed to be proved".

(23) In Parliament, if the required number of Members accept that the misbehaviour or incapacity has been proved, Parliament need not assign

any reasons while passing a resolution recommending removal of the Judge to the President.

(24) After a removal order is passed by the President, the judge who is removed can approach the Supreme Court on limited grounds such as whether adequate opportunity was given to the judge or whether there was any illegality in the proceedings. The scope of the proceedings before the Parliament are wider and there are no such limitations and this is one reason why the judge should not be permitted to approach the court even before the report is submitted to Parliament.

The above principles settled by the Supreme Court of India account for the need to balance the concepts of both judicial independence and judicial accountability.

(III) What are the points arising out of the Report of Justice Sawant Committee:

We have referred to this report in Chapter VI. The Justice Sawant Committee stated as follows:

“(1) (i) The word “misbehaviour” as applicable to judges of the Supreme Court and the High Courts, in the context of Articles 124(4) and (5) and other relevant provisions of the Constitution, means conduct or a course of conduct on the part of a judge which brings

dishonour or disrepute to the judiciary so as to shake the faith and confidence which the public reposes in the judiciary. It is not confined to criminal acts or to acts prohibited by law. It is not confined to acts which are contrary to law. It is not confined to acts connected with the judicial office. It extends to all activities of a judge, public or private.

(ii) The act or omission must be **wilful**. The wilful element may be supplied by culpable recklessness, negligence, disregard for rules or an established code of conduct. Even though a single act may not be wilful, a series of acts may lead to the inference of wilfulness.

(iii) Monetary recompense would not render an act or omission any the less 'misbehaviour' if the person **intentionally** committed serious and grave wrongs of a clearly unredeeming nature and offered recompense when discovered.

(iv) 'Misbehaviour' is not confined to conduct since the judge assumed charge of the present judicial office. It may extend to acts or omissions while holding prior judicial office, if such act or omissions makes him unworthy of holding the present judicial office.

(2) The proceedings under the 1968 Act, read with Art. 124(4) before the Committee are 'quasi-criminal' because of the word 'charge' 'guilty' and 'not guilty', 'plea of judge' used in the Act. In fact, as far back as

1870, the Privy Council, which was the authority conducting inquiries against High Court Judges in the colonies, issued a Memorandum in relation to removal of Judges where it described that the proceeding for removal is 'quasi-criminal'.

- (3) The standard of proof is proof beyond reasonable doubt and not on preponderance of probabilities. The 'misbehaviour' must be held proved accordingly by the Inquiry Committee constituted under the Judges (Inquiry) Act.
  - (4) The judge against whom an inquiry is being held is under a constitutional obligation to cooperate with the inquiring authority and not to raise petty-fogging objections to obstruct the inquiry in which case an adverse inference may be legitimately drawn against him.
- (IV) Is the proposed provision in the Bill of 2005 for establishing a National Judicial Council consisting only of Judges consistent with the concept of judicial accountability?

The 1968 Act envisages a Committee of two Judges and a Jurist whereas the proposed Bill of 2005 envisages a National Judicial Council consisting only of Judges. The provision in the 1968 Act is that the Committee under sec. 3(1) of that Act shall consist of three Members:

- (a) one shall be chosen from among the Chief Justice of India and other Judges of the Supreme Court;

- (b) one shall be chosen from among the Chief Justices of the High Courts;
- (c) one shall be a person who is, in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist.

Under the proposed Bill, the Judicial Council is to consist of

- (a) Chief Justice of India, Chairperson;
- (b) Two senior-most Judges of the Supreme Court, to be nominated by the Chief Justice of India – Members;
- (c) Two senior-most Chief Justices of the High Courts to be nominated by Chief Justice of India – Members.

In our view this proposal in the Bill of 2005 is consistent with international traditions and conventions and is supported by similar provisions in other countries providing for peer review so far as disciplinary action is concerned as stated hereinbelow.

At the outset we refer to the **international traditions and conventions** relating to peer review in the matter of disciplinary enquiries against judges of superior courts.

(1) According to the principles laid down for the Independence of the Judiciary, known as Siracusa Principles (May 25-29, 1981), it is stated in respect of ‘Discipline’ in Arts. 13 and 14 as follows:

“Art. 13: Any disciplinary proceedings concerning Judges should be before a court or a board composed of and selected by members of the judiciary.

Art. 14: All disciplinary action should be based upon standards of judicial conduct promulgated by law or on established rules of court.”

(2) According to the Latimer guidelines for the Commonwealth 1998, on ‘Parliamentary Supremacy, Judicial Independence – towards a Commonwealth Model’, it is stated in para VI(1)(i) that the disciplinary action must be taken by an ‘independent judicial tribunal. It is further stated in sub-para (ii) thereof that “in all matters, the process should be conducted by the Chief Judge of the Courts”.

(3) According to the Beijing Statement of Principles of Independence of Judiciary, 1995, it is stated in principle 24 that where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of Judges must be under the control of the Judiciary.

Several countries have a Commission or Judicial Council comprising only of Judges:

(1) The United Kingdom has recently passed the ‘Constitutional Reform Act, 2005’. Chapter 3 of Part 4 deals with ‘discipline’. Sec. 108 deals with ‘removal’, formal advice, or a formal warning or reprimand, for disciplinary purposes (but this section does not restrict what he may do informally or for other purposes or where any advice or warning is not addressed to a particular office-holder). Under sec. 108, powers are vested in the Lord Chief Justice to pass these orders with the consent of the Lord Chancellor. But, if it is a case of removal, only the Lord Chancellor can pass orders.

So far as the Lord Chief Justice is concerned, under sec. 119, he is permitted to delegate his functions to a ‘Judicial office-holder’. The definition of judicial office holder includes the Master of Rolls, President of the Queen’s Bench Division, President of the Family Division, Chancellor of High Court, Lord Chief Justice of Appeal and puisne judge of the High Court. These are the persons to whom the enquiry can be delegated by the Lord Chief Justice.

Thus in UK, the disciplinary process is fully within the control of the Judiciary.

(2) Canada:

In Canada, sec. 59(1) of the Judges Act, 1985 provides for the constitution of a Judicial Council consisting of:

- (a) the Chief Justice of Canada (Chairman),
- (b) the Chief Justice and any Senior Associate Chief Justice and Associate Chief Justice of each superior Court or a branch or division thereof,
- (c) the senior Judges of the Supreme Court of Yukon, the Supreme Court of North West Territories and the Nunavut Court of Justice , as defined in sec. 22(3)of the Act, and
- (d) the Chief Justice of the Court Martial Appeal Court of Canada.

Thus, in Canada, all the members of the Judicial Council are Judges.

Australia:

(a) New South Wales: Under the Judicial Officers Act, 1986 the complaints are referred to the Conduct Division of the Judicial Commission. Under sec. 22, the Conduct Division shall comprise of 3 persons who are all Judicial Officers, of whom one may be a retired Judicial Officer.

Judicial Officer is defined in sec. 3(a) as a Judge or associate Judge of the Supreme Court or a Judge of the District Court or a magistrate etc.

Thus, all the members of the disciplinary committee are Judges.

(b) Victoria: The Constitution and other laws have been amended and recently the Courts Legislation (Judicial Conduct) Act, 2005 has been passed.

Sec. 87AAA speaks of a ‘Judicial Panel’ to be constituted under sec. 87AAC.

Sec. 87AAC states that the ‘Judicial Panel’ shall consist of seven members appointed by the Attorney General. A person is eligible for appointment only if he or she has held ‘a qualifying office’ but no longer holds one.

A ‘qualifying office’ is defined as the office of

- (a) a Judge of the Federal Court of Australia,
- (b) a Judge of the Family Court of Western Australia,
- (c) a Judge of the Supreme Court of a State other than Victoria.
- (d) a Judge of the Supreme Court of Australian Capital Territory or Northern Territory.

Thus, all members of the Panel are Judges.

Germany:

According to Art. 97(2) of the Constitution, Judges can be dismissed, suspended or transferred or retired before expiration of their term only under the authority of a ‘judicial’ decision.

Under Art. 98, the Constitution states that a Federal Judge may be transferred or placed in the retired list or dismissed only by the Federal Constitutional Court.

S. 50 of the German Judiciary Act, 1972 states that a Council of Judges composed of 5 Judges of the Federal Courts of Justice and the Patents Court and three Judges of the Court of Administration, the Federal Finance Court and the Federal Labour Court and the Federal Social Court, shall be members. A Council of Judges consisting of three Judges shall also be established for action against Judges of the Military Service Courts.

Thus, all the members in this Council are judges.

Hong Kong:

Under Art. 89 of the Hong Kong Constitution, it is stated in cl. (1) that 'removal' will be investigated only by Judges. The tribunal of Judges shall be appointed by the Chief Justice of the Court of Final Appeal and will consist of not fewer than three local Judges. Clause (2) states that a Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region shall be investigated by a tribunal appointed by the Chief Executive and consisting of not fewer than five local Judges.

Thus, the tribunal consists only of Judges.

Malaysia:

Under Art. 125 of the Malaysian Federal Constitution, the tribunal for investigation into complaints against Judges comprises of 5 persons who hold or have held office as a Judge of the Federal Court or Court of Appeal or

High Court or where expedient, persons holding equivalent office in any other part of the Commonwealth.

Thus, all members of the tribunal are judges.

Pakistan:

Under Art. 209 of the Pakistan Constitution, the Supreme Judicial Council which investigates Judges comprises of

- (a) the Chief Justice of Pakistan,
- (b) two next most senior Judges of the Supreme Court and
- (c) the two most senior Chief Justices of High Courts.

Thus, all members of the Judicial Council are judges.

Sweden:

Under Art. 8 of the Swedish Constitution in Chapter 12, the proceedings will have to be taken up before the Swedish Supreme Court on a complaint by the ombudsman or the Justice Chancellor.

Bangladesh:

Under Art. 96 of the Bangladesh Constitution, it is stated that the Supreme Judicial Council which deals with discipline shall consist of

- (a) the Chief Justice of Bangladesh and
- (b) two next senior Judges.

Thus, all members of are Judges are Judges in the Judicial Council.

Israel:

In Israel, the basic law in Ch.II Sec. 7 (5) speaks of the Court of Discipline and s.13 of that Chapter states that the Court of Discipline shall consist of sitting and retired judges appointed by the President of the Supreme Court. All the members of the Court of Discipline are judges.

Zambia:

In Zambia, the Constitution of 1991 as amended in 1996 provides in Art. 98 (3) that the President shall appoint a Tribunal which shall consist of a Chairman and not less than two members who hold or have held high judicial office.

Thus all members of the Tribunal are judges.

The Judicial (Code of Conduct) Act of 1999 of Zambia states in section 20 that there will be a complaints committee which shall consist of five members who will or are qualified to hold high judicial office.

Thus all the members of the Complaints Committee are judges.

USA:

In the USA, in the federal system, the relevant Acts of 1939, 1980 and 2002 under which Judicial Councils of the Circuit are constituted for each circuit consists only of Judges in the Circuit. This Council can impose 'minor measures'. But, if it considers 'removal' as appropriate, it has to refer the matter to the Judicial Conference of United States which consists of the Chief Justice of US Supreme Court, Judges of the Circuit Courts of Appeal and District Courts.

We have referred to the details of the three Acts of 1939, 1980 and 2002 in extenso earlier.

Thus, in USA in the federal system, all the members of the Judicial Council of the circuits and the Judicial Conference, are Judges.

Peer review alone satisfies constitutional standards of independence:

The importance of the independence of the Judicial Branch is fundamental to the survival of democracy and the rule of law. Independence includes individual independence as well as institutional independence. Without going into a fuller discussion of the principles relating to judicial independence or judicial accountability, which we have elaborated in Chapter III and in this Chapter, we shall confine ourselves to the question of peer review and its importance.

In s.220 (2) (b) of the Government of India Act 1935, it was provided that the investigation against the judges of the High Court shall be conducted by the Privy Council and that it could recommend removal to His or Her Majesty. In 1948 this power stood transferred to the Federal Court which could make a similar recommendation to the Governor General of India. Thus before the Constitution of India came into force, the inquiry into allegations against judges of the superior courts was entirely in the hands of the judiciary.

It is to be noted that Parliament enacted the 1968 Act with a Committee consisting of two judges and a jurist and the present proposal in this Bill is more or less on the same lines.

Our Supreme Court in C.K. Ravichandran Iyer v. A.M. Bhattacharjee, 1995 (5) SCC 457, dealt with the importance of 'peer review'. The Supreme Court referred to several authorities as to why peer review has been considered to be in the best interests of preserving judicial independence and making Judges judicially accountable. This is consistent with international traditions too, as pointed above. In fact the Supreme Court referred to the views of Mr. Irving R Kaufman in (1978-79) Vol. 88 Yale Law Review p.681 and to the views off Judge Henry T Edwards, Chief Justice, U.S. Court of Appeals for the District of Columbia (1989) Vol. 87 Michigan Law Review 765, as to why peer review "will alone be good and consistent with independence of judges." In Canadian Federal Court in *Justice Paul*

*Cosgrove v. Attorney General Ontario* 2005 FC 1454, Justice Madam Mactavish said that this is a kind of “institutional filter”. The Canadian courts have also stated that judges have the necessary expertise to review the conduct of other brother and sister judges.

In the USA, in the preamble to the 1939 Act (28 USC 332) it is stated that the Judicial Councils were being established for ‘self-improvement, through which those Courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice’.

Harlan J in Chandler’s case (1970) 398 US 74 stated that the 1939 Act provided for intra-judiciary supervision and that the statute enabled the judiciary to ‘set its own house’ in order. He quoted from the speech of Chief Justice Groner of the Court of Appeals from the District of Colombia that it was a process of judges judging themselves. As the Congress itself was intending that the Judicial Councils should act as judicial bodies in supervising district judges, there was no need to decide whether the placement of this authority would violate the principle of separation of powers. Such a question would have arisen if the supervising authority was entrusted to a non-judicial body.

This is the crucial aspect. Unless the supervision of the judiciary is wholly allowed to be wholly controlled by a judicial body, it would, according to Justice Groner (as quoted by Justice Harlan), offend the

principle of separation of powers. In fact, Douglas and Black JJ would not agree even for this internal supervision within the judiciary for they would contend that the parliamentary process of impeachment, however difficult and however unsuccessful over centuries, should alone remain. That view, according to us, is an extreme view. On the other hand, we agree with the views of Justice Grover that vesting supervision in a body which consists of non-judicial members would infringe the independence of the judiciary and the doctrine of separation of powers.

**The Law Commission is of the view that S.3(1) of the Bill of 2005 which provides for the establishment of a National Judicial Council consisting only of judges is constitutionally valid and is consistent with the concept of independence of judiciary, judicial accountability and doctrine of separation of powers.**

(V) Should the Chief Justice of India be excluded from the inquiry on a 'complaint' ?

In the Bill of 2005, sections 5, 7 and 8 of Chapter II section 16 of Chapter V apply to the complaint procedure. Sections 9 and 10 of Chapter III and section 17 of Chapter VI apply to the reference procedure. Sections 3, 4 and 6 of Chapter II, section 11 of Chapter IV, sections 12 to 15 of Chapter V, section 18 of Chapter VI, sections 19 to 21 of Chapter VII and sections 22 to 29 of Chapter VIII apply to both the complaint and reference procedures.

The definition of 'Judge' in sec. 2(d) reads as follows:

'Sec.2(d)': 'Judge' means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of a High Court'.

This definition as contained in the Bill applies to the complaint procedure as well as to the reference procedure.

In our view, section 2(d) of the Bill of 2005 has rightly excluded the Chief Justice of India from the definition of the word 'Judge' for the purpose of complaint procedure under section 5 though the Chief Justice of India has been included, by virtue of the proviso to section 3(2) for the purpose of the reference procedure under section 9.

There are good reasons as to why the Chief Justice of India should not be included.

There is considerable difference between the manner in which a complaint is initiated before the Judicial Council and the manner in which Members of Parliament initiate a motion in the House before the Speaker/Chairman seeking a reference to the Judicial Council.

A Motion must be initiated before a House of Parliament by a prescribed number of Members of Parliament for the purpose of 'removal' of any judge of the Supreme Court of India including the Chief Justice of India. Then the matter goes before the Speaker or Chairman who are constitutional functionaries. On the other hand, a 'complaint' can be made by any person,

be it an ordinary litigant or a lawyer or any other person and cannot be placed on the same pedestal as a Motion moved by a responsible group of Members of Parliament.

Further, if any person can file a ‘complaint’, the Chief Justice of India, who is the administrative head of the entire Judiciary, becomes vulnerable to unscrupulous complaints. This will not augur well for the Judiciary which enjoys a high degree of confidence among the people. The Supreme Court, in Supreme Court Advocates–on Record Assn. v. Union of India, 1993 (4) SCC 441, observed that the Chief Justice of India has been given a ‘centre-stage’ position under the Constitution. In the case of Veeraswami v. Union of India: 1991 (3) SCC 655, the Supreme Court referred to the primacy and importance of the office of the Chief Justice of India. In Sub-Committee on Judicial Accountability v. Union of India: 1991 (3) SCC 655 the primacy accorded to the Chief Justice of India was again reiterated. In C.K. Ravichandran Iyer v. Justice A.M. Bhattarcharjee: 1995 (5) SCC 457, the Supreme Court referred to the Chief Justice of India as the ‘head of the Judiciary in the country..... The Chief Justice of India is the first among the Judges’. (For a recent reiteration of this view see Union of India v. Kali Dass Batish (2006) 1 SCALE 190 @ 196, para 14)

**The Law Commission is of the opinion that the Bill takes the correct stand that the Chief Justice of India, for good reasons, should not be subjected to the ‘complaint procedure’. Further, the provision in this**

**behalf is neither discriminatory nor arbitrary inasmuch as the position of the Chief Justice of India as the administrative head of the Judiciary is special and is not the same as other Judges of the Supreme Court or Chief Justices of the High Courts.**

A plain reading of the definition, no doubt, shows that the Chief Justice of India is not included in the proposed 'complaint' procedure. However, the words 'means a judge of the Supreme Court' may give rise to a contention that the Chief Justice of India, being also a Judge of the Supreme Court, comes within the definition.

The Law Commission recommends, by way of abundant caution that after the words, 'Judge of the Supreme Court' in s. 2 (d) of the Bill of 2005, the words 'other than the Chief Justice of India' be inserted.

(b) Definition of the word 'Judge' for the purpose of reference procedure under section 9, 10 and 17 should obviously include the Chief Justice India also. There are some sections in the proposed Bill, as stated above which apply to both procedures, namely, sections 3,4,6,11, 12 to 15, 18, 19 to 21 and 22 to 29.

**We therefore recommend that section 2(d) be substituted by the following definition:**

**“(d) ‘Judge’ means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of a High Court and also the Chief Justice of India for purposes of the reference procedure but shall not include the Chief Justice of India for the purposes of the complaint procedure;**

**We further recommend that there should be a separate definition of the words ‘complaint procedure’ and ‘reference procedure’ as follows:**

**“complaint procedure” means a procedure which is initiated by way of a complaint to the Council under section 5;**

**“reference procedure” means a procedure which is initiated by way of a motion for removal which is referred by the Speaker or Chairman to the Council**

(VI) What should happen when a Supreme Court Judge against whom a complaint has been filed and is pending, becomes the Chief Justice of India during the pendency of the investigation. A related question arises with regard to High Court judges also.

One can visualise situations in which while a complaint is pending against a sitting judge of the Supreme Court, the judge becomes a Chief Justice of India. Or, similarly, when a complaint is pending against a Chief Justice of a High Court, he may be elevated as a Judge of the Supreme Court.

Obviously such complaints cannot be allowed to become infructuous merely because of the elevation of the Judge. Therefore, the Bill of 2005 must contain provisions to meet these contingencies so that the investigation or inquiry is not stalled on that account.

In such an event when a Supreme Court Judge is elevated as Chief Justice of India after a complaint or after a motion initiated in either House leading to a reference before his elevation as Chief Justice of India, he should not be a member of the Judicial Council.

**We recommend that a second proviso to section 3(2) should be inserted to the following effect:**

**“Provided further that where under a complaint is made by any person or a reference is made by the Speaker or Chairman against a Judge of the Supreme Court before his elevation as Chief Justice of India, he shall not be a Member of the Council and the President shall nominate the next senior most Judge of the Supreme Court as the Chairperson and also another Judge of the Supreme Court next in the seniority to be a Member of the Council.”**

**The Law Commission recommends that the Bill of 2005 should be amended to provide that if a complaint has been filed against a Supreme Court Judge, the same can be continued even after the Supreme Court Judge is elevated as Chief Justice of India.**

**An Explanation has to be added to this effect to Sec. 5 below sub-section (1) of section 5 of the Bill of 2005. A similar Explanation should be added below sub-section (1) of Sec. 5 to provide for the continuance or initiation of the enquiry against a Judge or the Chief Justice of the High Court when he is elevated to the Supreme Court in respect of acts of misbehaviour during the period when he was a Judge of the High Court.**

(VII) Whether the remedy of ‘removal’ of a Judge by address is sufficient and whether other ‘minor measures’ such as: advisories, warnings, corrective steps, request for retirement, withdrawal of cases from the Judge’s List, censure or admonition (public or private), should be included in the Bill of 2005 – in cases coming before the Judicial Council under the ‘complaint’ procedure?

The Bill of 2005 provides an additional procedure by way of complaint and provides that the Judicial Council, if it finds the charge of misbehaviour proved, can only recommend ‘removal’.

The Law Commission of India is of the view that Bill of 2005 requires to be amended to include ‘minor measures’ to be imposed in the case of complaint procedure. We propose to explain the basis for this view by detailed reasons.

We have pointed out earlier, while dealing with the question of ‘Judicial Independence and Judicial Accountability’, in Chapter III, that in practice the procedure for ‘removal’ by way of address to the Head of the State, such as the President or Governor General or Her Majesty in U.K. has rarely been successful. In England, there has not been an impeachment since 1805. Even in U.S., impeachment has rarely succeeded. In our country, the solitary instance since independence, i.e. in the case of Justice V. Ramaswami, was not successful.

Harry T. Edwards, Circuit Judge of US Court of Appeals for the District of Columbia, in an article ‘Regulating Judicial Misconduct and Divining “Good Behaviour” for Federal Judges’ (1989) 87 Michigan L R 765 states:

“... the framers designated a deliberately cumbersome removal mechanism, impeachment by the House of Representatives and removal upon conviction by two-thirds of the Senate, to provide additional protection of the Judiciary against congressional politics. The Senate was chosen as the adjudicator...”

Several jurists have, in fact, stated that the procedure for impeachment or removal by address has become a dead letter. The reason is not far to seek. A proceeding in Parliament in regard to impeachment or removal by address is a political question. The legislature cannot be moved except when a

prescribed number of legislators initiate a Motion. It has to be admitted by the Presiding Officer of the House. Even when there is proof, it comes for voting in the legislatures after the Judge is given opportunity to defend himself personally or through counsel. Parliamentarians are not obliged to vote, they may even abstain, as happened in the case of Justice V. Ramaswami. Parliament need not give reasons for deciding either to direct removal or to direct proceedings be dropped. There are, therefore, a number of hurdles for an address procedure to be successful.

The history of the proceedings against Justice Murphy in Australia is another standing example. The Judge, before elevation to the High Court, was a member of the Labour Party and an Attorney General in the State. The Labour Party was in power and it was reluctant to take action. But, because the Labour Party was not in the majority in the Senate, the Senate appointed a Committee for inquiry. There was the first Senate Committee which acquitted the Judge. Then the Senate appointed a second committee on a different charge. Meanwhile criminal proceedings were launched against him and ultimately a special commission was appointed under a new law. Later that law was sought to be repealed. During these prolonged proceedings, the Judge did not participate, took the matter to the courts, later became ill with cancer and died.

The cumbersome process is one aspect. The other more important aspect is that not all types of 'misbehavior' may warrant 'removal'. A Judge

may be slack in his work or talkative or not prompt in writing judgments, or may use abusive language. There may still be other types of conduct not involving bribery or crime involving moral turpitude. In all such cases, taking an overall picture of the Judge's career and his willingness to rectify his defects, it may not be necessary to direct 'removal' from office. Certain defects can be cured by proper advice, certain others could be corrected by 'minor measures' other than 'removal'.

Yet another aspect is that a Motion for 'removal' of a Judge for 'deviant behavior' not involving bribery or crime involving moral turpitude may simply fail in the Houses of Parliament because the Parliamentarians may feel that 'removal' is too disproportionate a punishment vis-à-vis the gravity of the misconduct proved.

Judge J Clifford Wallace, at a Senate hearing on judicial discipline in 1986 suggested that not all crimes are considered so serious that they should mandate automatic forfeiture of office. Some kinds of misbehaviour do not call for total disqualification of an otherwise competent Judge. Judge Harry T. Edward, Circuit Judge, US Court of Appeals for District of Columbia (see (1987) Vol 87 Mich LR 765 at 775 says:

“Thus, one potential implication of the 'hiatus' line of reasoning is that an alternative to impeachment must exist for removing a misbehaving Judge if Congress chooses not to impeach for bad behaviour.”

R. Berger stated that ‘impeachment is not an exclusive remedy’ (Impeachment: The Constitutional Problem: 122-80 (1973)). All impeachable behaviour is not good and all criminal behaviour is not good; but all ‘not good’ behaviour is not criminal, nor is it impeachable. If there is a ‘hiatus’ between ‘impeachable’ behaviour and ‘not good’ behaviour, the ‘not good’ behaviour must be regulated and can be regulated only by minor measures.

Chief Justice Gleeson of Australia stated that:

“The difficult cases tend to be those in which the complaint, even if it is made out, would not justify removal. The complainant is likely to assume there must be some other sanction available. (‘Public Confidence in the Judiciary, (2002) 76 Aust LJ 558 at 563)

Chief Justice J.J. Spigelman of New South Wales sated in April 2003 at the 5<sup>th</sup> Worldwide Common Law Judiciary Conference, that the New South Wales disciplining sanctions which do not provide any sanction other than removal require review because the lack of a provision for minor sanctions in the law has made the law a ‘toothless tiger’.

In C. Ravichandran Iyer v. Justice A.M. Bhattacharjee: 1995 (5) SCC 457, the Supreme Court observed (p.471):

“Parliament sparingly resorts to the mechanism of impeachment designed under the Constitution by political process as the extreme measure.....”

The Supreme Court of India, in the above case, referred to the need to correct errant behaviour of Judges by way of imposing ‘minor measures’ and quoted Jeffrey N. Barr and Thomas E. Willging who concluded that “several Chief Judges view the Act (the Act of 1980 in US) as remedial legislation designed not to punish Judges but to correct aberrant behaviour and provide for corrective action as a central feature of the Act.”

The Supreme Court further stated that in US, between 1980 to 1992, 2388 complaints were filed. 95 per cent thereof resulted in dismissal. 1.7 per cent of the complaints ended in either dismissal from service or corrective action of reprimand. These were two public reprimands and one private reprimand. Two cases were reported to Judicial Conference by the Judicial Councils certifying that the grounds might exist for impeachment.

The Court also observed (p.475):

“The hiatus between bad behaviour and impeachable behaviour needs to be filled in to stem erosion of public confidence in the efficiency of the judicial process.”

The Supreme Court referred to Chandler v. Judicial Council: (1970) 398 US 74 as a case where when the Judicial Council imposed a ‘minor

measure' of withdrawal of pending and future cases from a Judge's list, the same was upheld by the US Supreme Court.

The National Commission for Review of the Constitution (2001) also enumerated certain deviant behaviour and recommended that there was a need to provide for imposition of minor measures inasmuch as the removal procedure was cumbersome and may not appropriate in most cases.

In Vol. I, Ch. VII of the Report of the National Commission to Review the Working of the Constitution, in para 7.3.8 it was suggested that the Committee must consist of the Chief Justice of India and two senior-most judges and that they be empowered to examine deviant behaviour of judges of the High Court and the Supreme Court and where the conduct did not warrant a recommendation for removal, the Committee could administer a warning or issue directions that no judicial work be allotted to the judge or that the judge be transferred to some other High Court. It also recommended that in appropriate cases the Chief Justice of the High Court or the Chief Justice of India, as the case may be, may withdraw judicial work after the Inquiry Committee recorded a finding against the judge.

In the Consultation Paper Vol. II, Book I, the National Commission referred to the various types of deviant behaviour in paras 14.4 and 14.5 in respect of which minor measures alone would be appropriate.

The Constitution provides in Art. 124 (4) for 'removal' in case 'misbehaviour' is proved on the part of a judge. But 'misbehaviour' may not always be of a serious type which warrants removal. There may be 'bad behaviour', or 'deviant behaviour' which needs only correction but not removal. In some countries the Constitutions specifically say that judges hold office during 'good behaviour'. Though our Constitution does not say so explicitly, it is, in our view, implicit in the oath that Judges take that they assure us of their 'good behaviour'. Therefore, when there are deviations from 'good behaviour' or there is bad behaviour, not amounting to 'misbehaviour', and not warranting removal, an internal mechanism for correction thereof requires to be provided by law and is not prohibited by the Constitution.

Minor Measures have been provided in the statutes of other countries like U.S.A etc.

Historically, the proposals to impose 'minor measures' on the Judge started in the Federal system in U.S.A. in 1939 when the law under the Title 28 USC 332 was passed with effect from August 7<sup>th</sup>, 1939. That Act, in fact, did not expressly contain specific provisions for awarding 'minor measures' but only contained sec.306 to the effect that the 'Judicial Council' shall take such action 'as may be necessary'. Likewise, sec. 332 of that Act also stated that the Council shall take such action 'as may be necessary'. In exercise of this general power under ss 306 and 332, the Judicial Council started imposing several 'minor measures' to speed up the disposal of cases and to

improve the efficiency of the Judges. In fact, the long title of the Act stated that the Act was intended for

“self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of Justice”.

The powers conferred by the 1939 statute indicated a kind of intra-Branch self-regulation in a general fashion and the Judicial Council used those provisions to impose ‘minor measures’.

The 1939 Act was replaced by the 1980 Act (Act 28 USC 372). It was called the Judicial Councils Reform and Judicial Conduct and Disability Act, 1980. It carried the matter further by expressly enlisting ‘minor measures’ which could be imposed by the Judicial Council. The Act, however, stated that in the event the Judicial Council felt that the conduct warranted ‘removal’, it should forward the papers to the Judicial Conference of United States. The Judicial Conference is a higher body and only that body can recommend to the Senate for ‘removal’ by impeachment.

The 1980 Act of U.S. was based upon the principle of self-regulation. Congress sought to devise a ‘fair and proper procedure’ whereby the Judicial Branch can keep its own house in order (S.Rep.No.362, 96<sup>th</sup> Congress 1<sup>st</sup>

Session, 2, I.t. 11) (1979). The Judicial Council's power of keeping the "house in order" would include the power to take 'minor measures' also.

The 1980 Act was intended to deal effectively with "wilful misconduct in office, habitual interferences and other conduct prejudicial to the administration of Justice that brings the judicial office into disrepute". Sec. 372 (1)(6)(B) required the Judicial Council to take "such action as is appropriate to assure the effective and expeditious administration of the business of the Courts of the circuit". Sec. 372 (c)(B)(iii) to (vii) provides that the Council may make orders including

- (1) a request to the Judge to voluntarily retire; or
- (2) censure or reprimand of the Judge, privately or publicly;  
or
- (3) order that the Judge be not assigned further cases but only on a 'temporary basis for a certain time'; or
- (4) such other action as it considers appropriate in the circumstances.

In case the Council felt 'removal' was warranted it could, under Section 372 (c) (7) (A) refer the matter to the Judicial Conference. Sections 372 (c) (6) (B) (vii) (I) and Sec. 372 (c) (8) (A) of the 1980 Act expressly prohibited the Judicial Council or Judicial Conference from passing an order of 'removal'.

The complainant could allege, as per Sec.372 (c) (1) that a ‘federal judge has engaged in conduct prejudicial to the effective and expeditious administration of business of the Courts’ or that ‘the judge is unable to discharge all the duties of office by reason of mental or physical disability’. If the complaint is frivolous or is ‘directly related to the merits of a decision or procedural ruling’ it could be dismissed summarily by the Chief Judge of the circuit under Section 372 (c) (3)(A). In other cases, the Chief Judge could take ‘corrective action’ as stated above by imposing ‘minor measures’ and in serious cases, the Judicial Council would refer the matter to the Judicial Conference to consider recommending ‘removal’ to the Senate.

The US Act of 2002, which replaced the 1980 Act, also provides expressly for similar ‘minor measures’ to be imposed by the Judicial Council.

Under the U.K.Act of 2005, under s.108 (3), the Lord Chief Justice could impose minor measures such as formal advice, or formal warning or formal reprimand or even suspend a judge from judicial office.

Further, in the various States of the US, we find such ‘minor measures’ are statutorily permissible to be imposed by the Judicial Councils against State Judges. In Germany and in the Provinces of Canada, the statutes permit imposition of ‘minor measures’.

**Accordingly, the Law Commission recommends that a special provision be inserted in the Bill of 2005 to enable the Judicial Council to impose ‘minor measures’, in the complaint procedure. The omission in the Bill of 2005, in this behalf, needs to be rectified by providing, in the case of a complaint procedure for the imposition of following minor measures by the National Judicial Council, viz.,**

- (1) Issuing advisories;**
- (2) Issuing warnings;**
- (3) Withdrawal of judicial work pending and future for a limited time;**
- (4) Request that the judge may voluntarily retire;**
- (5) Censure or admonition, public or private.**

We may explain that a ‘public censure or admonition’ in the U.S. means that the name of the complainant and of the judge concerned are published in the media and placed on the internet. A ‘private censure or admonition’ is where the name of the complainant and the judge are not disclosed but the public are informed through the media and the internet that upon a complaint against a judge of the particular court, a private censure or admonition was issued.

We do not propose to recommend a separate definition in this behalf but we are of the view that the words “public or private” should be understood in the same manner as stated above.

(VIII) Constitutional validity of a law by Parliament providing for imposition of 'minor measures' by the Judicial Council

This issue is of central importance. A fundamental question generally posed is when the Constitution provides in Art 124(4) (read with Art 124(5) and 217) only for removal by address of the Houses to the President but does not expressly permit any 'minor measures' to be imposed, whether a provision in a law made under Art 124(5) for imposing 'minor measures' will be ultra vires the Constitution? Or can such a provision be justified with reference to Article 246 read with Entry 11-A of List III of the Seventh Schedule of the Constitution which refers to the topic 'Administration of Justice'?

This question has been elaborately considered in a number of cases in USA where too, the Constitution provides only for impeachment. Still, the Courts there have upheld the validity of the provisions in the statute of 1939 which impliedly permitted imposition of minor measures and the validity of the statute of 1980 and 2002 which expressly permitted imposition of 'minor measures'.

We shall now refer to these judgments.

(1) Judge Chandler's case: self-regulation within the Judiciary is valid:

In Chandler vs. Judicial Council (1970) 398 US 74, the Judicial Council acting under the 1939 Act ordered that the pending and future cases in the list of Judge Chandler be removed. This action was upheld by the US Supreme Court. The separate judgment of Harlan J in that case is very enlightening and it gives reasons for upholding imposition of 'minor measures. The reasoning is that it was permissible for the Judiciary to self-regulate, to have intra-judiciary or in-house mechanism and these were not prohibited by the Constitution. The Judiciary has general powers to set its house in order. In respect of such a general or inherent power which exists in a Judicial Council, an ordinary law can expressly provide for 'minor measures' without the need for a Constitutional amendment. Such a law does not violate the Constitution.

It is necessary in this connection to refer to certain passages from the judgment of Harlan J in Chandler emphasizing the principle of inherent powers of the Judicial Council, which consists of members of the judiciary, in the matter of self-regulation, as can be gleaned from the 1939 Act. Harlan J referred to the observations of Chief Justice Groner who participated in the congressional debate which preceded the 1939 Act as follows:

“whatever is wrong in the administration of Justice, from whatever sources it may arise, is brought to the attention of the Judicial Council that it may be corrected by the Courts themselves”.

Harlan J observed:

“The Judicial Council will fill the hiatus of authority that existed under the then current-arrangements (i.e. before 1939) and then “provide a method, a Parliamentarily valid, legal method, by which, if necessary, and when necessary, the Courts may clean their own house.” Any problems unearthed by the Director of the Administrative Office on basis of statistics were to be “corrected, by the Court themselves”.

Harlan J said that there were number of references in the hearings in the Congress and in the Committees “to the fact that the corrective power would be exercised by the Court themselves”. He also quoted the response of the American Judicature Society which stated: “there is no way to fortify judicial independence equal to that of enabling the Judges to perform their work under Judicial supervision”. All these indicated that such a power was to be given ‘only to a judicial body’.

Harlan J then made a very important observation. “Because the Parliamentary history shows Congress intended the Councils to act as judicial bodies in (the) supervision of district Judges, there is no need to decide

whether placement of the authority in a non-judicial body would violate the constitutional separation of powers, as Chief Justice Groner seems to have believed”.

Thus, while dealing with the 1939 Act in a case in 1970 Harlan J pointed out that the basis of the 1939 Act, as disclosed from debates in Congress was that ‘in-house’ Judiciary self-regulation was legitimate and valid and can be inferred from its general powers to improve the efficiency of the judicial administration.

(2) Hastings v. Judicial Conference of U.S.: (1987)829 F. 2d 91 (U.S. Court of Appeals)

This case dealt with the validity or authority of the Judicial Conference to recommend and certify to the Congress that the case was fit for ‘removal’ of the Judge. This power was challenged by Judge Hastings as amounting to an unconstitutional delegation of powers by Congress and the challenge was rejected by the United States Court of Appeals for the District of Columbia by Judgment dated September 15, 1987. The recommendation of the Judicial Council to the Judicial Conference for removal was also upheld.

Judge Alcee Hastings, Judge, U.S. District Court of Florida was initially charged in a criminal case for bribery but was acquitted. (See U.S. v. Hastings (1982) 681 2d 70) Thereafter, at the instance of his colleagues,

impeachment proceedings were commenced against him in the Congress on 17 articles of bribery and perjury. On a recommendation of the Judicial Conference Judge Hastings was convicted, impeached and removed. But before the Judicial Conference took up the matter, he challenged the proceedings on the ground that it was not permissible to delegate the inquiry to the Judicial Council and to the Judicial Conference. This challenge was rejected by the Court of Appeals.

It was observed that the Judicial Council, if it was to certify that impeachment was warranted, it was not exercising unconstitutional delegation of powers but its certification would be “merely informational” to the Congress and that as there could only be a recommendation by the Judicial Conference for removal, Congress still “completely controls all aspects of any impeachment.”

Further, the Court held that the combination of investigative and adjudicatory functions vested in the Judicial Council was not invalid and rejected the argument based on due process relying upon Withrow v. Larkin (1975) 421 US 35.

(3) In the Matter of Complaints under Investigation by the Investigating Committee of the Judicial Council:- (1980) 783 F.2d. 1488.

The Eleventh circuit held that the Intra Court or In-House procedure of the judges to discipline other Judges was not unconstitutional. It stated that

the judicial system had undertaken to 'police itself' within constitutional limits. It held that when the inquiry was placed "within the hands of Judicial colleagues", the independence of the judge is accorded maximum respect.

It referred to the special expertise of Judges in the Judicial Council to deal with judicial discipline,

"The fact that (the Act) places the investigation and a determination of what action to take, entirely within the hands of judicial colleagues, makes it likely that the rightful independence of the complained-against judge, especially in the area of decision making, will be accorded maximum respect. Because of their own experience, other Judges can be expected to understand the demands unique to their profession; and as each is a decision-maker himself, these other Judges may be expected to refrain from applying sanctions that could chill the investigated Judge's freedom to decide cases as he sees it, since such sanctions could be a precedent that could be turned against the Judge. Above all, Judges will certainly be reluctant to take any action that would inhibit the freedom and independent functioning of the Courts".  
(1507-08)

The 11<sup>th</sup> Circuit observed that impeachment alone was not sufficient. Other measures were necessary and were not unconstitutional. With reference to employees of the Executive, the Court stated:

“Yet the impeachment provisions can hardly be thought to furnish the only constitutionally permissible means of punishing misconduct on the part of Executive Branch Offices. The only other courts to address the issue have likewise concluded that that the impeachment provisions of the Constitution do not render the Acts’ disciplinary provisions facially unconstitutional” (1506-07). The same principle would apply to in-house regulation within the Judiciary.

(4) John H. McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of U.S.: (2001) 264 F. 3d. 52 (21<sup>st</sup> Sept. 2001) (Later, the U.S. Supreme Court on October 7, 2002 refused to grant certiorari).

Judge McBryde, a Federal District judge, was investigated under the 1980 Act. The complaint was by an attorney and related to ‘abusive behaviour’ towards lawyers and litigants. The Investigation Committee of the Judicial Council noticed alarming patterns of conduct and after consulting psychiatrists, recommended that if he did not resign, there should be

- (i) a public reprimand (this remained posted on the website of the Fifth Circuit);
- (ii) no new cases be assigned to the Judge for an year;
- (iii) he be not allowed for a period of three years to preside over cases involving 23 named lawyers who had participated in the investigation or were listed as potential witnesses.

The incidents found by the Investigative Committee related to a tendency on the part of the judge to question the integrity of lawyers appearing before him and to overreact to perceived transgressions and to impose abusive sanctions. He evidenced an obsessive need for control and showed disrespect for his fellow judges. The Committee found that his behaviour had a chilling effect on the legal community deterring lawyers from representing their clients properly and this impaired the administration of justice.

The Judicial Council endorsed these recommendations of the Investigation Committee and issued the above directions.

The Judge filed a civil suit in the District Court challenging the recommendations on the ground of violation of due process, violation of separation of powers etc. The suit was dismissed (vide 83 F. Supp 2d 135). The court however struck down s.372 (c) (14) of the 1980 Act which dealt with confidentiality insofar as it allegedly affected the judge's First Amendment rights.

By the time the appeal came up before the Court of Appeals for the District of Columbia circuit, the one year and three year periods mentioned in the order of the Judicial Council expired. However, the Appeals Court felt that the appeal could still be considered because of the public reprimand which continued to remain on the internet. Judge Williams speaking for the

Court (Judge Tatel dissenting in part) observed that intra-judiciary supervision by statute was constitutionally valid. The Court rejected the contention that imposition of measures other than removal by impeachment was not permissible under the Constitution. It vacated the other findings of the District Judge and did not decide whether a long term disqualification from hearing cases would amount to removal.

It was argued for the judge that imposition of lesser sanctions would affect judicial independence and that the fact that Constitution vested the impeachment power in Congress precluded all other methods of disciplining judges. On this theory he argued that the act violated the separation of powers.

Judge McBryde relied upon Northern Pipeline Construction Co. v. Marathon Pipeline Co. (182) 458 US 50 to say that the Constitutional guarantees provided insulation from the legislature and the executive and there could be no supervision within the judiciary. Rejecting this contention, Judge Williams stated as follows:

“Lesser sanctions are common, as the court noted i.e. Chandler’s case at p.85 as follows: ‘Many courts.....have informal, unpublished rules which.....provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his ‘backlog’. These are reasonable, proper and

necessary rules, and the need for enforcement cannot reasonably be doubted.’

“ As there is no basis for Judge McBryde’s core assumption that judicial independence requires absolute freedom from such lesser sanctions, his two claims fall swiftly.”

Then the Court of appeal referred to the argument that the Constitution speaks only of impeachment and other measures are impliedly excluded. The court said:

“But Judge McBryde’s attempt to fudge this distinction between impeachment and discipline doesn’t work. The Constitution limits judgments for impeachment to ‘removal from office’ and ‘disqualification to hold office’ (Art.1 Sec.3 Cl. 7). It makes no mention of discipline generally.”

The court then made a very crucial observation as follows:

“ The Supreme Court recently observed that it accepted the proposition that ‘when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode’(Christensen v. Haris County (2000) 529 US 570 at 583). But application of the maxim depends on the ‘thing to be done’. Here the thing to be done by impeachment is removal and disqualification, not discipline of any sort.”

In other words the Constitution permitted a particular method for impeachment and disqualifications but did not prohibit disciplining judges in a different mode.

The court pointed out that the Constitution retained and did not preclude criminal prosecution (Art. 1, sec 3, Cl 7) and at least three circuits have held that prosecution can precede impeachment. The court pointed out that Douglas and Black, JJ accepted this position in Chandler's as well.

Judge McBryde then relied on Hamilton's statement in the Federalist (No.79) that the impeachment "is the only provision on the point which is consistent with the necessary independence of a judicial character and is the only one which we find in our Constitution in respect of our own judges."

The Court rejected this contention and observed as follows:

" But, even if we assume the remark embraces not merely removal and disqualification but other forms of discipline, it does not seem likely to have been aimed at intra-branch constraints. Hamilton's concern with judicial independence seems largely to have been directed at the threat from the two other branches. "

The Court, after referring to Nixon v. U.S. (1993) 506US 224 stated that impeachment was an exception. It was the sole check that could be

imposed by the legislature on the Judicial Branch and any other check by the legislature was not permissible. But checks within or intra-judiciary were permissible. The Court stated:

“In our Constitutional system, impeachment was designed to be the **only** check on the judicial branch **by the legislature**”

“Hamilton’s concern with judicial independence seems to have been directed against the threat from the two other branches and he (Hamilton) characterized the Judiciary as the ‘least dangerous branch’ (Federalist No.78 at 522). Thus, it seems natural to read Hamilton as seeing the guarantees of life-tenure and undiminished compensation, and the limited means for denying Judges their protection, simply as assuring independence for the Judiciary from other branches..... Indeed, the Hamiltonian concern for protecting the Judiciary from other branches argues for an internal disciplinary powers. Arrogance and bullying by individual Judges expose the Judicial branch to the citizen’s justifiable contempt. The Judiciary can only gain from being able to limit the occasions for such contempt’. [See In Certain complaints of the Judicial Council of the Eleventh Circuit (1986) 783 F 2d 1488 (1507-08)]

The court referred to Myers v. U.S. (1926) 272 US 52, where the Supreme Court held, in respect of government servants that the impeachment article

was not absolute on the subject. The court observed “the Constitution made no difference between government servants and judges.”

Congress, according to the Court, enacted the 1980 Act merely for enabling Intra- branch efforts of control by the Judiciary of its own members. \_

The Court said:

“Given the benefit to the Judiciary from intra-branch efforts to control the self-indulgence of individual judges, we see no basis for inferring structural limits on Congress enabling such efforts”.

Earlier it said:

“..... We see nothing in the Constitution requiring us to view the individual Art.III Judge as an absolute monarch restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself. We must reject Judge McBryde’s facial Constitutional claims”

After holding that in regard to the other punishments awarded by the Judicial Council, the periods of one year and three years respectively, having already expired before the appeal came to be heard the court held that the appeal did not become moot and that it was open to the appellant to canvass of the correctness of the punishment of reprimand.

It said:

“In short, the claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification and is the only sanction in the case that remains unmoot. Thus Judge Mc Bryde’s textual argument fails. Given the benefits to the Judiciary from intra-branch efforts to control the self-indulgence of individual Judges, we see no basis for inferring structural limits on Congress’s enabling such efforts”.

It also went into the merits of the punishment of one year and three years and vacated the same on facts. It however affirmed the reprimand.

We may add that in the Report of the National Commission on Judicial Discipline and Removal (1993), in the U.S. which was a Commission appointed to review the enforcement of the 1980 Act, (a Report which runs into 210 pages), it is stated at page 83 (Ch.V on Judicial Discipline) as follows:

“..... the Act of 1980.....sought to provide ....a formal mechanism within the Judiciary as a supplement to the impeachment process”.

The above judgment in McBryde and the 1993 Report clearly establish that notwithstanding the fact that the US Constitution contained provisions only for impeachment, still the US Courts upheld laws under which ‘minor measures’ could be imposed. It was not necessary that the Constitution should contain provisions for imposing ‘minor measures’. As part of the power to keep its own house in order, the Judiciary could, under ordinary law made by the legislature, impose ‘minor measures’.

Canada (Federal):

(i) In Canada, the Supreme Court in MacKeigan vs. Hickman: 1989 (2)S.C.R 796 (at 811-812), La Forest J clearly observed that s 99(1) of the Constitution Act, 1867 which speaks only of removal by address of the Houses, does not preclude Parliament from making a law providing other mechanisms:

“for dealing with inquiries or complaints relating to the performances of judicial functions that are either not sufficiently serious as to warrant proceedings for removal, or which may preclude or assist the conduct but not constitute an impediment to the proper functioning of such proceedings or effectively amount to a substitute for them.”

(ii) In Justice Paul Cosgrove vs. Attorney General of Ontario 2005 F.C. 1454, Justice Madam Mactavish observed that the Canadian Judicial Council (CJC) acts as ‘institutional filter’. The procedure in its By-laws and the complaint procedure represents a carefully calibrated effort to reconcile the need for judicial accountability, with the preservation of the independence of the judiciary. This process includes an ‘institutional filter’, in the form of the judicial pre-screening process, which maintains an appropriate relationship between the judiciary and outside influences. Complaints are considered internally, and are only referred for an inquiry where the CJC itself determines that the complaint is sufficiently serious and sufficiently meritorious as to potentially warrant the removal of the Judge.” The preliminary screening stage recognized by Justice Strayer in Gratton vs. Canadian Judicial Council: 1994(2)FC 769 offers an important protection against unmeritorious complaints.

A question arises as to the legislative competence of our Parliament to make such a law providing for imposition of minor measures by the Judicial Council. The question would be whether the power could be traced to Art. 124 (5) of the Constitution of India. The point here is whether a law enabling imposition of minor measures can be brought within Art. 124 (5) which reads as follows:

“ (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge under clause (4).”

The second part of Art. 124 (5) refers to the investigation and proof of misbehaviour or incapacity of a judge as referred to in Clause (4). If this second part can be treated as an independent provision and not necessarily connected with the procedure for presentation of an address, there is no difficulty in holding that this part confers sufficient power to legislate a law relating to imposition of minor measures by the Judicial Council. In our view the word `and` after the word `investigation` should be read disjunctively and so read the second part of Art. 124 (5) expressly permits the making of a law authorizing the Judicial Council to impose minor measures. As stated earlier the first part of Art. 124 (4) dealing with a Motion in either House is not part of the Parliamentary procedure and can be regulated by statute and it has been so held by the Supreme Court in the cases of Justice V.Ramaswami. In fact, that is how an inquiry outside Parliament into misbehaviour or incapacity is provided by a law made under Art. 124 (5). The same Judicial Council, by virtue of the later part of Art. 124 (5) can be authorized by law in a complaint procedure to impose minor measures.

The Law Commission is of the view that in the light of the judgments of the US and Canadian Courts, in our view, intra-branch supervision within the Judiciary can be recognized and provided for by the Parliament for the benefit of the Judiciary as long as the intra-branch supervision did not extend

to removal by address, a sanction which is exclusively within the purview of the Parliament. All other 'minor measures' which Parliament may by statute allow to the Judiciary cannot be considered as being ultra vires the Constitution.

The constitutional provision of address by the Parliament to the President which signifies inter-Branch control is distinct from in-house or intra-Branch control. The address procedure is only a limitation on Executive and Parliamentary interference with the conduct of judges. It never purported to prescribe the outer limits of disciplining the Judges by intra-branch or in-house mechanism.

In the present Bill there can validly be a recognition by the Parliament of the inherent power of the judiciary to put its own house in order by and permitting the Judicial Council to administer minor measures for acts or omissions of a judge which do not warrant removal by address. By providing a law enabling the Judicial council to impose minor measures, the Parliament would only be facilitating the intra-branch control by the judiciary over its members.

Assuming that Art. 124 (5) which permits a law to be made for the purpose of Art. 124 (4) is not attracted, even then such a provision for imposing minor measures at the level of the Judicial council can be justified with reference to Article 246 read with Entry 11-A of List III of the Seventh

Schedule of the Constitution which refers to the topic 'Administration of Justice'. The subject of 'Administration of Justice' is wide enough to encompass the in-house disciplinary procedure for judges of the superior courts. In State of Bombay v. Narothamdas Jethabai 1951 SCR 51, the Supreme Court while interpreting the words 'administration of justice' in the State List of the Government of India Act 1935, speaking through Justice Mahajan (as he then was) said: (at pp.83-84) "It seems to me that the legislative powers conferred on the Provincial Legislature by Item of List II has been conferred by use of language which is of the widest amplitude (administration of justice and constitution and organization of all courts). It was not denied that the phrase employed would include within its ambit legislative power in respect to jurisdiction and power of Courts established for the purpose of administration of justice. Moreover, the words appear to be sufficient to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Provincial." The same views were echoed in a recent judgment of the Constitution Bench of the Supreme Court in Jamshed N Guzdar v. State of Maharashtra (2005) 2 SCC 591 where Shivaraj Patil, J., speaking for the Bench observed:

" The general jurisdiction of the High Courts is dealt with in Entry 11-A under the caption 'Administration of Justice', which has a wide meaning and includes administration of civil as well as criminal justice. The expression 'administration of justice' has been used without any qualification or limitation wide enough to include the

`powers' and `jurisdiction' of all the courts except the Supreme Court. The semi colon (;) after the words `administration of justice' in Entry 11-A has significance and meaning. ...It is an accepted principle of construction of a Constitution that everything necessary for the exercise of powers is included in the grant of power."

We have already pointed out that in the 1939 Act in the U.S.A, there was no specific provision for imposition of minor measures and S. 307 and S.332 of Title 28 USC 332 merely referred to `administration of the business of the courts' and the said words were interpreted by Harlan J in Chandler's case 398 US 74 as enabling minor measures such as withdrawal of listing of cases.

From the above discussion it is clear the words `administration of justice' in Entry 11-A can encompass all that is necessary and incidental to speedy, effective and efficient judicial administration and would permit the Parliament to make a law constituting the National Judicial Council and empowering it to impose minor measures.

Even otherwise, in our view, the question is not whether there is any express provision in the Constitution granting power to impose minor measures but the question is whether there is any provision in the Constitution which takes away or restricts the power of the judiciary or prohibits the judiciary from imposing minor measures. The answer is that there is no such prohibition in our Constitution. In fact when Parliament itself

wants to recognize this power which is already with the judiciary, there is no need to question the validity of this grant of power. That was exactly what was observed in McBryde's Case in the U.S, quoting from Christensen v. Harris County (2000) 529 U.S 570 (583) that “ when a statute limits a thing to be done in a particular mode it includes a negative of any other mode”.

**The Law Commission recommends that the Bill of 2005 must be suitably modified to provide for ‘minor measures’ to be imposed by the Judicial Council itself. Such a law can be made under the latter part of Art. 124 (5) and in any event, under Art. 246 read with Entry 11- A of List III of Schedule VII of the Constitution of India which refers to the subject of ‘Administration of Justice’. Introducing a provision permitting ‘minor measures’ to be imposed by the Judicial Council will be valid and will not be unconstitutional.**

(IX) Whether in the case of a `reference` by Speaker/Chairman pursuant to a Motion for removal by address under Art. 124, the Judicial Council is bound to report that the charges warranting removal are proved or are not proved or whether if such charges do not warrant removal it could either impose minor measures itself or whether or it could recommend to Parliament that it is a fit case warranting minor measures?

We have already pointed out above that in the case of complaint procedure it is open to the Judicial Council to impose minor measures itself where in its

opinion the charges do not warrant removal and that a law to that effect can be validly made.

But the question arises whether in a reference procedure initiated pursuant to a reference by the Speaker/Chairman, where the charges do not warrant removal, the Judicial Council could itself impose minor measures or recommend minor measures to Parliament.

Under Art. 124 (4) read with Art. 217, the members of Parliament are permitted to move a Motion only for removal. In fact that is the only provision which permits Parliament to have a say in the matter of disciplining judges. The allegations must be so grave as to warrant removal. Inasmuch as there cannot be a Motion for imposition of minor measures under Art.124 (4), it is impermissible for the Judicial Council to do the same thing indirectly while considering a reference by the Speaker or Chairman, in a Motion for removal by address. The position would however be different if, in addition to the reference, there is a complaint before the Judicial Council on the same facts which constitute the reference. In such event, the Judicial Council will follow the complaint procedure as well.

Further the Supreme Court pointed out in Justice V.Ramaswami's cases that if misbehaviour was not proved Parliament could not take up a Motion inasmuch as such misbehaviour must be proved outside Parliament. The Supreme Court further stated that it is only where the misbehaviour is proved

that the motion could be taken up. In our view unless the Judicial Council comes to the conclusion that the misbehaviour proved warrants removal, Parliament cannot consider the Motion for removal. Since a Motion for removal which is the only situation conferring jurisdiction on Parliament to consider removal of a judge, it is impermissible for the Parliament to consider imposition of minor measures. That, under our Constitutional scheme is not permissible and should be left entirely to the Judicial Council in a complaint procedure.

**The Law Commission is of the view that it is not permissible for the Judicial Council to recommend imposition of minor measures on a reference by the Speaker/Chairman of either House of Parliament. However, if there is, simultaneously, a complaint on the same facts before the Judicial Council, in addition to a reference, the Judicial Council can itself impose such ‘minor measures’ while disposing of the complaint. However, while returning the reference to the House it cannot recommend any minor measure to be passed by the House.**

(X) Tenability of an argument based on California and other State Constitutional Amendments to contend that imposition of ‘minor measure’ requires amendment of the Constitution:

We have already stated that for imposing minor measures, the Constitution need not be amended and in fact the U.S. courts have decided that without amendment of the Constitution minor measures could be imposed.

A question arises whether even though the U.S. Federal Constitution was not amended for imposing ‘minor measures’, why have the States in the U.S. amended their State Constitutions?

(A) It is true that in California and most of the States in U.S., the State Constitutions were amended while bringing in new provisions for “disciplining” State Judges in a manner other than by impeachment or removal by address into the Constitutional provisions.

It must be noted that this was because the new provisions introduced in the State Constitutions deal not with the recommendation for removal but with an additional method of ‘removal’ by a State Judicial Commission or by the State Supreme Courts, which is apart from the provision for ‘removal’ by impeachment or by address as contained in the State Constitutions. Inasmuch as the States wanted to provide an additional method of ‘removal’ other than removal by impeachment or address, the State Constitutions had to be amended. On the other hand, the Federal Constitution did not have to be amended because Federal Judges could be removed only by ‘impeachment’ and the Judicial Council or the Judicial Conference was not enabled to pass any final orders of removal. In the Federal system, according to the 1980 Act

and the Act of 2002, the Judicial Council and Judicial Conference could only make a recommendation for removal. The position in the States as stated above is, however, different. The State Judicial Commissions were empowered to straightaway order removal. This could not be done except by way of amendment of the State Constitutions and that was why the amendments were made permitting the Judicial Commissions or the State Supreme Courts to pass orders of removal.

The State Constitutional amendments, no doubt introduced ‘minor measures’ as well, along with a procedure for removal by the State Judicial Commissions or the State Supreme Court. But, in our view, this was done incidentally while providing an additional constitutional procedure for ‘removal’ by the Judicial Council or State Supreme Court and not because a constitutional amendment was necessary for imposing minor measures. As stated earlier, an in-house procedure within the Judiciary is lawful and can provide for ‘minor measures’ without any amendment of the Constitution. The US Federal Court Judgments from Chandler to McBryde accept such a position.

**The Law Commission is of the view that no amendment of the Constitution is necessary in our country if a law is made by Parliament enabling the Judicial Council to impose ‘minor measures’ as part of an in-house mechanism.**

(XI) Tenability of an argument that ‘complaint’ procedure before the Judicial Council is ultra-vires because the allegations are not by way of a Motion in the House:

It may be argued that instead of a Motion for an Address as contemplated by Article 124 (4), since we are proposing that the Judicial Council can make a recommendation to Parliament for ‘removal’ of the judge where the proved misbehaviour warrants it, Article 124 (4) needs amendment.

In our view, it is not necessary to amend Article 124 (4). The reason is that our Supreme Court in Justice V. Ramaswami’s case held that the initial Motion and reference to the committee by the Speaker/Chairman is not part of the Parliamentary process but it is part of the Judicial process. A law can validly be made by Parliament under Article 124 (5) for the Judicial Council to recommend to Parliament for removal by address. The Supreme has held that making of such a law is a condition precedent to the removal procedure inasmuch as the proof of misbehaviour or incapacity must be by a body outside Parliament. Unless the procedure for such proof by an outside body is prescribed, Art. 124 (4) cannot come into play.

A second reason is that, as pointed out by the U.S. Appeals Court in Hasting’s Case (1987) the recommendation by a committee of Judges (Judicial Council) is “merely informational”.

In the Canadian case Gratton vs. Canadian Council 1994(2) F.C. 769, it was argued before Strayer J that Parliament had unlawfully purported to give to the Canadian Judicial Council and its Committees, an authority which was vested solely in Parliament by sec 99(1) of the Constitution Act, 1867. In other words, this method enables the Judicial Council under sec 63 of the Judges Act 1985 by way of a complaint, to conduct investigation and recommend removal of a Judge in its report to the Minister. Making such a law was permitted by sec 99(1) of the Constitution but it was contended that this amounted to abdication of its powers by Parliament because Parliament could remove a Judge by address of the Houses to the Governor-General. This contention was rejected by Strayer J relying on the decision of the Privy Council in Hodge vs. Reg: (1883-84) 9 A. (117 (PC)). A sovereign Parliament could legitimately delegate such functions, it held. The power of Parliament to remove was not an 'adjudicative' power which could not be delegated. Even if it were judicial, still as stated in Hodge vs. Reg, Parliament could delegate such functions, in exercise of its sovereign functions. The Canadian Parliament was sovereign and not merely a delegate of the British Parliament.

**The Law Commission is of the view that the procedure in the Judges (Inquiry) Act, 1968 and in the proposed Bill of 2005 enabling investigation/inquiry by the Judicial Council by way of a complaint procedure in addition to a reference procedure is not an infringement of**

**the Parliamentary process contained in Art 124(4) and does not amount to impermissible delegation and is valid.**

(XII) Can a Chief Justice of a High Court be part of the Judicial Council in the case of an inquiry against a Judge of the Supreme Court?

The Draft Bill 2005, provides in sec 3(1) that in respect of all inquiries, whether against a Judge of the Supreme Court or the High Court, the Judicial Council will be a permanent body consisting of the Chief Justice of India, two senior most Judges of the Supreme Court and two senior most Chief Justices of the High Court.

It has already been stated that a Judicial Council cannot investigate allegations against the Chief Justice of India if made in a ‘complaint’ to the Judicial Council but that the Council can investigate allegations against the Chief Justice of India upon a reference by the Speaker or Chairman under sec 9(2) of the Bill of 2005.

But, still the question is whether in the investigation of a ‘complaint’ against a Judge of the Supreme Court, it is proper that two senior-most Chief Justices of the High Court should be members of the Judicial Council?

Unlike the Act of 1968, where the Committee was of an ad hoc nature to be constituted whenever a reference was made by the Speaker/Chairman,

the present Bill of 2005 contemplates a permanent body which can receive 'complaints' from time to time or to which reference can be made by the Speaker/Chairman.

In our view, it would be of considerable embarrassment to two Chief Justices of High Courts to sit in judgment over allegations against a Supreme Court Judge. There could be a variety of reasons as to why a Chief Justice of a High Court may not like to inquire against a Judge of the Supreme Court.

**The Law Commission recommends that the Judicial Council when it investigates into allegations against a Supreme Court Judge (in the complaint or reference procedures) or against the Chief Justice of India (in a reference procedure) should not include the two senior most Chief Justices of the High Courts. In such an event, the Judicial Council should comprise the Chief Justice of India and four senior most Judges of the Supreme Court.**

**The provisions of the Bill of 2005 have to be suitably amended to provide for this contingency.**

(XIII) Is there a need for a recusal provision to be incorporated in the Bill of 2005?

Apart from the situations envisaged in sec 3(2) of the Bill of 2005 where the next senior most Judge comes into the Judicial Council, there could be situations where one of the five members of the Judicial Council may have a genuine reason for 'recusing' himself. For example, the Judge against whom complaint is made or a reference made, may be a close relation or a former junior of his when they were at the Bar or a close friend over a period of years, being from the same State from which the Member Judge hails.

**The Law Commission is of the view that, inasmuch as the Judicial Council of five Judges must collectively take decisions, the procedure, where a Supreme Court Judge or Chief Justice of a High Court recuses himself or herself, is that the next person in seniority must fill the vacant slot. It is necessary to make a provision in this behalf by appropriate amendment to the Bill of 2005 itself. In our view, it is not desirable to leave such a 'recusal' provision to the Rules.**

(XIV )Should the process of investigation precede charges and the inquiry commence only after the framing of charges? Should the investigating judges be different from the Judges in the Judicial Council who conduct the inquiry? Should the investigating judge invariably report his findings to the Judicial Council without finally disposing of the complaint at his level?

The Act of 1968 as well as the proposed Bill of 2005 do not keep the well-known distinction between 'allegation', 'preliminary investigation into allegations', 'framing of charges' and 'inquiry into charges' as being the various steps which in that order can lead to removal.

We shall therefore deal with this distinction in some detail.

We find that in several countries there is a separate provision for investigation by the Council or by a separate investigation Committee preceding the framing of the charges by the Council. The 1968 Act does not refer to a prior investigation before the regular inquiry. In fact, in the case of Justice V. Ramaswami, his counsel Sri Kapil Sibal raised a serious objection before the House that the Justice Sawant Committee did not 'investigate' any facts before framing the 'charges', and that the Committee framed charges straightaway on the basis of the allegations and that investigation should precede framing of charges. This is because, in the course of investigation, it might come to light that there is no factual basis for the allegations and they could as well be dropped. But, this was countered by certain members who pointed out that the provision in sec 3(1) of the 1968 Act talks of investigation after framing of charges. The confusion arose on account of the use of the word 'investigation' for the word 'inquiry' in the 1968 Act. This in our opinion requires a clear elucidation of the different stages of the (i) allegations (ii) investigation (iii) framing of charges and (iv) conduct of inquiry into the charges.

The point here is that normally charges are to be framed only if the investigation into the allegations show some prima facie material for charges being framed before the regular inquiry is launched. This aspect gains importance because once the charges are framed against a judge without investigating whether there is a prima facie case on facts, the Judge's reputation gets tarnished and once the damage is done, it will be very difficult for him to retrieve his image.

It will however be noticed that Art 124(5) of the Constitution uses the words 'investigation and proof'. The 1968 Act was entitled Judges (**Inquiry**) Act. Further, inasmuch as the Sawant Committee stated that the proceedings are quasi-criminal, in our view, in the parlance of the Criminal Procedure Code, 1973, the common nomenclature that is used is 'investigation', 'framing of charges' and 'inquiry' to indicate the three separate stages must be taken up in that order.

The marginal note of section 7 of the Bill of 2005 speaks of 'preliminary scrutiny' while the body of subsection(1) speaks of 'consideration and verification' of the allegations in the complaint.

Given the above ambiguously worded provisions in the Bill of 2005, the question is as to how the Bill of 2005 should be rectified to bring about

the necessary distinction between allegations, investigation, charges and inquiry, so far as complaint procedure is concerned.

Section 10 of the Bill of 2005 however indicates that, in the case of reference from the Speaker/Chairman, notwithstanding anything in sec 7 (wrongly printed as sec 6), the charges will be straightaway framed i.e. there is no need for a 'preliminary scrutiny'.

In our view, the word 'investigation' used in Art 124 (5) of the Constitution connotes a 'preliminary investigation' while the word 'proof' indicates proof after a regular inquiry. The Constitution itself visualises a two-stage procedure. But marginal note of sec 7 of the Bill of 2005 uses the words 'preliminary scrutiny' and in subsection (1) of section 7 the words 'considering' and 'verification' are used.

So far as 'frivolous and vexatious' allegations in a complaint are concerned, the words 'preliminary scrutiny' in the marginal note and 'considering' and 'verification' in the main body of the section may be sufficient. Whether the allegations are 'frivolous or vexatious' can be normally determined on a reading of the complaint itself. However, in order to determine whether a complaint is 'not made in good faith' [clause (a) of sec 7(1)] or whether or not sufficient grounds for contemplating a regular inquiry exist, it is necessary to empower the Judicial Council to conduct an 'investigation' preceding the inquiry. Such investigation is something more

than a scrutiny or a verification but, at the same time, it is not a full-fledged inquiry.

Some changes are necessary in ss. 2 to 8 which deal with the complaint procedure; some are necessary in the reference procedure in s. 10; some other changes are also necessary in the general procedure for inquiry (which the Bill of 2005 terms 'investigation') viz., Ss. 12, 16, 17, 19, 22, 24, 25, 26 and 27.

**The Law Commission recommends the following amendments to the Bill of 2005:**

(i) In Sec. 2 the following definitions of 'investigation' and 'inquiry' may be inserted: 'investigation' means 'preliminary investigation'; 'inquiry' means 'inquiry for proof' .

(ii) In sec 3(1), the words 'to investigate' be substituted by the words 'to investigate and inquire'; in sec. 3(2), the word 'investigating' shall be substituted by the words 'investigating or inquiring'; in sec 3(3), the word 'investigation' shall be substituted by the words 'investigation and inquiry'.

(iii) In sec 6 for the word 'investigation', the words 'investigation and inquiry' be substituted in the body as well as in the marginal heading to the section.

(iv) In sec 7, the marginal heading should read “Verification and preliminary investigation of complaints”; in the body of sec 7(1) for the word ‘verification’, the words ‘verification or where necessary, such preliminary investigation as it deems appropriate’ be substituted; in the body of sec 7(1) (b), for the word ‘investigating’ the word ‘inquiry’ be substituted; in the body of sec 7(2), for the word ‘verification’, the words ‘verification or where necessary, preliminary investigation as it deems appropriate’ be substituted.

(v) Marginal heading to sec 8 is correct when it speaks of ‘inquiries’. But, sec 8(1) has to be reframed as follows:

“8(1): If after the verification and preliminary investigation under section 7 in respect of a complaint, the Council proposes to conduct any inquiry, it shall frame definite charges against the Judge on the basis of which the inquiry is proposed to be held”.

(vi) In sec 10 for ‘section 6’ substitute ‘section 7’ and the word ‘investigation’ be substituted by the word ‘inquiry’.

(vii) So far as Chapter V is concerned, the heading should be ‘Procedure for Inquiry’.

(viii) In sec 12(1), 12(2) and 12(2) proviso and in section 13, for the words ‘investigation’ and ‘investigating’, the words ‘inquiry’ and ‘inquiring’ be respectively substituted.

(ix) In Sec. 15(1) and 15 (2), for the word ‘investigation’ the words ‘preliminary investigation or inquiry’ be substituted

(x) Heading of Ch. VI should be ‘Procedure after conclusion of Inquiry’

(xi) In sec 16(1), sec 17(1), the word ‘investigation’ be substituted by the word ‘inquiry’. (In regard to s. 16 there are some more amendments which will be discussed separately hereinafter)

(xii) In sec 19(1), for the words ‘or conducting any investigation’, the words ‘or conducting any preliminary investigation or inquiry’ shall be substituted.

(xiii) In sec. 21, for the word ‘investigation’, the words ‘preliminary investigation and inquiry’ be substituted.

(xiv) We are proposing that the whole of section 22 comprising sub-sections (1) to (3) should be shifted to sec 7 as subsections (3) to (5) and in the body of sub-section (3) of sec. 7 (as now proposed) the words ‘constituting an investigating committee’ can be retained but the words ‘for the purpose of conducting investigation into the matter’ have to be modified as ‘for the purpose of conducting preliminary investigation and for finding whether definite

charges require to be framed for conducting an inquiry into the matter'. In the present proposal for inserting sec 7(4) as stated above for the word 'investigation', the words 'preliminary investigation' be substituted. [As regards the marginal heading of section 7 we have already suggested the change in sub-para (iv) above]

(xv) In sec. 23, for the word 'investigation', the words 'preliminary investigation and inquiry' be substituted.

(xvi) In sec 24, in the marginal heading, the words 'Investigation by the Council' be substituted by the words 'Investigation and Inquiry by the Council'. In the body of sec 24, for the words 'Any investigation' the words 'Any preliminary investigation, or inquiry' be substituted.

(xvii) In sec 25, in marginal heading and body of the section, the word 'investigation' be substituted by the words 'complaint, preliminary investigation and inquiry'.

(xviii) In sec 26, for the word 'investigation', the words 'preliminary investigation or inquiry' be substituted.

(xix) In sec 27, the word 'investigation' in the marginal heading and in the body of section be substituted by the words 'preliminary investigation and inquiry'.

(XV) Whether the National Judicial Council can itself conduct the preliminary investigation, frame charges and then conduct the inquiry?

(a) No doubt, in several countries the procedure to which we have referred, shows that the Judicial Council or Commission delegates investigation to a smaller Committee of Judges. In fact, sec 22 of the Draft Bill of 2005 (which we have suggested should be shifted to sec 7) proposes that such a Committee may be constituted by the Council. This is permissible.

In Hastings vs. Judicial Conference of US (1987) 829 F.2d. 91, this point was raised before the United States Court of Appeals for the District of Columbia Circuit and in its judgment dated 15<sup>th</sup> September, 1987, the Court of Appeals held that “the combination of investigative and adjudicating functions vested in the Judicial Council” is “not inherently impermissible”.

**The Law Commission is of the view that section 22 of the Bill of 2005 which permits the Judicial Council itself to conduct an investigation or appoint a Committee comprising of its Members to conduct the investigation, is constitutionally valid.**

(b) S.22 however requires a change in the language. As it stands now, it can be interpreted as if the members of the Council have to appoint another committee for investigation. Whereas the investigation Committee has to be constituted by the Judicial Council.

The Law Commission therefore recommends that the following words of section 22 “it may designate one or more of its members who shall constitute an investigating committee for the purpose of conducting investigation into the matter” shall be substituted by the words “ it may constitute an investigating committee comprising one or more of its members for the purpose of conducting investigation into the matter”.

(XVI) Should the Judge be given an opportunity at the stage of preliminary ‘investigation’ before the Judicial Council on a complaint to clarify the facts, even if, in the event of the charges being framed, he will have a full-fledged opportunity before the Judicial Council (or in case of a recommendation for removal, he may have yet another opportunity before the Houses)?

The Bill of 2005 indeed provides in s. 7 (2) that at the stage of verification of the complaints under s. 7 (1), the Council “**may**, if it deems it necessary so to do, call for the comments of the judge concerned.”

On this question, the leading authority is the judgment of the Privy Council in Rees vs. Crane 1994(1) All ER 833, where Lord Slynn, speaking for the Privy Council dealt with this aspect exhaustively with reference to fundamental principles of administrative law and judicial independence.

In that case Lord Slynn stated that, generally, a person who is being investigated has no right to be given an opportunity in preliminary or initiating proceedings and that right usually arises at a later stage when he has a right to know about the complaint. It is also true, he said, that natural justice does not normally require that a person must be told of the complaint made against him and given a chance to answer them at the particular stage in question. The reason leading the Courts to this principle was the fact that the investigation was purely preliminary, that there would be a full chance adequately to deal with the complaints later and sometimes it may be a matter of urgency precluding notice. Lord Slynn then stated that there are, however, some cases where an opportunity has to be given to the judge to submit a representation at the stage of investigation. He stated

“But, in their Lordship’s opinion, there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As de Smith’s *Judicial Review of Administrative Action* (4<sup>th</sup> Ed, 1980, p 199) put it: Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person’s interests, the Courts will generally decline to accede to that person’s submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage.”

But, he stated that while considering this general practice, the Court should not be bound by rigid rules. It may have to take into account all the circumstances of the case. He then said:

“Plainly in the present case there would have been an opportunity for the respondent to answer the complaint at a later stage before the tribunal and before the Judicial Committee. That is a pointer in favour of the general practice but it is not conclusive. Sec. 137 which sets up the three-tier process is silent as to the procedure to be followed at each stage and as a matter of interpretation is not to be construed as necessarily excluding a right to be informed and heard at the first stage. On the contrary its silence on procedures in the absence of other factors indicates, or at least leaves open the possibility, that there may well be circumstances in which fairness requires that the party whose case is to be referred should be told and given a chance to comment. It is not a priori sufficient to say, as the appellants in effect do, that it is accepted that the rules of natural justice apply to the procedure as a whole but they do not have to be followed in any individual stage. The question remains whether fairness requires that the audi alteram partem rule be applied at the Commission stage.”

The Privy Council emphasized that, in case a Judge’s case goes straightaway for inquiry – without an opportunity to submit a representation at the stage of

investigation – there will be considerable publicity and the suspicion and damage to the Judge’s reputation must be avoided.

The Privy Council also pointed out that there is provision to allow the Judge or affected party to submit a representation at the stage of investigation before the Canadian Judicial Council (see 1982 Vol. 28, McGill LJ 380), as well as before the U.S. Senate Judiciary Committee (1984) and before the Wisconsin Judicial Commission (see 1976 Wisconsin Law Reports 563, 579).

We have set out the rules of the Wisconsin Judicial Commission, Idaho Judicial Council, Connecticut Judicial Review Council and Texas Tribunal of Seven Judges – where the rules expressly contemplate right to representation or an opportunity at the stage of investigation to the Judge.

**As pointed out hereinabove, section 7(2) of the Bill of 2005 does provide an opportunity to the Judge to submit his ‘comments’ but it gives a discretion to the Council to call for comments ‘if it deems it necessary’. We are of the view that, as in the States in the U.S., this must be obligatory.**

**The Law Commission recommends that for the word ‘may’ in s. 7 (2), the word ‘shall’ should be substituted and the words ‘if it deems it necessary so to do’, should be deleted.**

(XVII) Whether the provisions of sec 21 permitting stoppage of assignment of judicial work to the Judge pending a motion or investigation into a complaint or reference is constitutionally valid? What is the proper interpretation of Art 124(5) read with Art 225 of the Constitution?

Section 21 of the Bill of 2005 talks of ‘stoppage of assigning judicial work in certain cases’. It reads as follows:

“Sec. 21: During the pendency of the investigation or impeachment, the Council may recommend stoppage of assigning judicial work to the judge concerned if it appears to the Council that it is necessary in the interest of fair and impartial investigation.”

The Justice B.C. Ray Committee appointed by the Supreme Court in the case of Justice V. Ramaswami, as noted in Chapter VI, held that it was not permissible to stop allocating work to a Judge during investigation until the charges are prima facie made out by the appropriate authority.

Later on, in so far as ‘suspension’ of a Judge is concerned, B.C. Ray, J. speaking for the Constitution Bench in Sub Committee on Judicial Accountability vs. Union of India: 1991(4) SCC 699 observed:

“The Constitution, while providing for the suspension of a Member of the Public Service Commission in Art 317(2) in a similar situation, has deliberately abstained from making such a provision in case of higher constitutional functionaries, namely, the superior Judges and the President and the Vice-President of India, facing impeachment. It is reasonable to assume that the framers of the constitution had assumed that a desirable convention would be followed by a Judge in that situation which would not require the exercise of a power of suspension.”

Earlier, the learned Judge observed:

“.... The absence of a legal provision like Art 317(2) .... To interdict the Judge .... till the process of removal under Art 124(4) is complete does not necessarily indicate that the Judge shall continue to function during that period. That area is to be covered by the sense of propriety of the learned Judge himself and the judicial tradition symbolized by the views of the Chief Justice of India. It should be expected that the learned Judge would be guided in such a situation by the advice of the Chief Justice of India, as a matter of convention unless he himself decides as an act of propriety to abstain from discharging judicial functions during the interregnum.”

Further as stated by Prof. Simon Shetreet (see Ch. VII above) under the common law prior to the Act of Settlement 1700, the Crown could suspend judges even if they hold office during good behaviour. There were two cases of such suspensions one relating to Judge John Walter and another in case of Judge John Archer. Prof. Shetreet however says that as a matter of practice the judge should take leave of absence pending a criminal trial or proceedings before Parliament for misbehaviour involving moral blame. Otherwise, to grant permission to him “to dispense justice as a judge of the land as usual with grave accusations over his head” is likely to destroy public confidence in the impartiality of judicial proceedings before him in particular and of the judicial process in general.” He also stated that administrative arrangements could be made, in such situations that no cases are assigned to the judge’s list. He refers to a case in England in 1950 when a judge who failed to respond to the pressure put on him was not assigned any work and was finally retired. He also refers to the case in the U.S. of Justice Chandler (1970) 398 U.S 74 where the federal judge unsuccessfully challenged the order of the Judicial Council which directed withdrawal of pending and future cases from him. Prof. Shetreet also pointed out that the judge is not entitled to claim assignment of cases and that when he has not suffered injustice he is not entitled to a judicial remedy. This was on the analogy in the case of a member of the Brighton Council whose name was struck off from all committees (Manton v. Brighton 1951 (2) QB 393).

Now, the point is that sec. 21 of the proposed Bill of 2005 does not use the word ‘suspension’ but uses the words ‘stoppage of assigning judicial work’ in certain circumstances i.e. during the pendency of the investigation or impeachment. The section says that the Council may recommend for such stoppage if it appears to the Council that it is necessary in the interests of fair and impartial investigation.

In other words, sec 21 does not speak of stoppage of assignment of judicial work in every case where there is a complaint or reference. It must be felt necessary in the interests of fair and impartial investigation.

The question still is whether such a power to stop a Judge from performing Judicial work, which belongs to the Chief Justice, can also be given to the Judicial Council? A further question arises whether if ‘suspension’ pending investigation or removal by address is not permissible according to the Supreme Court, the stoppage of assigning judicial work amounts to the same? Another question also arises whether the powers of the Chief Justice of a High Court under Art 225 of the Constitution “to regulate the sittings of the Court and of its members thereof sitting alone or in Division Courts”, (which, of course, is subject to the provisions of the Constitution and to the provisions of any law) can be subjected to a law under Art 124(5) providing for ‘stoppage of assigning judicial work’ to a Judge in certain situations?

No doubt, stoppage of assignment of judicial work pending investigation or impeachment, as pointed by the Privy Council in Rees vs. Crane 1994(1) All ER 833, amounts to purported ‘suspension’ of the Judge. After all, ‘suspension’ is a prohibition against an office-holder exercising functions or powers of his office’. Lord Slynn posed the question:

“The issue in the present case is this whether what the Chief Justice did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.”

The question was answered by stating that on facts, there was an ‘indefinite suspension’ and the Chief Justice acted without jurisdiction because the law in that colonial country required only the President to pass an order of ‘suspension’ after a prescribed procedure was followed. Lord Slynn held that what was done by the Chief Justice “went beyond an administrative arrangement which the Chief Justice was otherwise entitled to make.” He observed:

“the respondent was effectively barred from exercising these functions as a Judge sitting in Court. .... It was in effect an indefinite suspension.”

(A) We shall examine the position with reference to Art 225 under which the Chief Justice has powers to assign work.

First, Art 225 deals only with High Courts and not with Supreme Court. Secondly, the Judicial Council is a separate entity and it cannot exercise the powers of the Chief Justice of India or Chief Justice of a High Court. Thirdly, Art 225 uses the words ‘subject to the provisions of the Constitution and any law of the appropriate legislature’. It also refers to ‘respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts’. This may have reference to the Codes of Civil and Criminal Procedure or the Letters Patent or any special law which prescribes as to the mode of hearing of cases by judges sitting single or in divisions. Art 225 permits a law to be made to achieve the above purposes. In fact the Delhi High Court Act, Kerala High Court Act and the Karnataka High Court Act are examples of such laws.

It could be said that withdrawal of judicial work is part of the ‘administration of justice’ or it relates to ‘regulating the sittings of the Court’. Nevertheless, instead of going by Art 225, we think that, we get a clear answer from Art 124(5) itself. We shall now refer to Art 124(5).

(B) Does Art 124(5) permit a law to be made which provides for withdrawal of judicial work from a Judge, pending preliminary

investigation and inquiry on a complaint or pending inquiry pursuant to a reference?

If we go by Art 124(5) read with Art 217, it is clear that Parliament can make a law which is applicable to both High Court and Supreme Court. Further, Art 124(5) reads:

“Article 124 (5): Parliament may by law regulate the procedure for the presentation of an address **and** for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).”

As we have stated earlier, the word `and` can be construed disjunctively. Parliament can, therefore, make a law for the purpose of `investigation and proof` of misbehaviour or incapacity and, as part of the power, provide not only for `minor measures` at the end of the inquiry, but also for `interim measures` such as withdrawal of judicial work pending conclusion of investigation and inquiry.

Now, it is well settled that if the Constitution vests power in Parliament to make such a law, such law can also prescribe a procedure which facilitates the achievement of the object of an effective procedure for investigation and proof. It is well-known that if a person is under investigation or disciplinary inquiry, his suspension or withdrawal of work from him may, in a large measure, facilitate a more effective and speedy

investigation or inquiry. Those who may give information at the stage of investigation or give evidence in the inquiry may not feel inhibited by the presence of the judge sitting in court deciding cases. There is a possibility of a situation where the cases of the advocate who had given a complaint against the judge may be listed before the same judge.

Thus Parliament which can make a law for a particular purpose, viz., to enable the Judicial Council to conduct investigation and inquiry for proof of misbehaviour of judges, can also in the same law confer incidental power on the Judicial Council to recommend to the Chief justice to withdraw judicial work from the judge for a temporary period, viz., during the pendency of the investigation or inquiry by the Judicial Council or pending proceedings for removal by address or pending criminal proceedings.

This aspect did not fall for consideration in Justice V. Ramaswami's case, (Sub. Committee in Judicial Accountability vs. Union of India: 1991(4) SCC 699) inasmuch as the 1968 Act or the 1969 Rules did not contain a provision like sec 21 of the Bill of 2005. The observations of the Supreme Court in that case that Constitution permits a member of the Public Service Commission to be suspended under Art. 317 (2) pending inquiry while the Constitution does not make any such provision in respect of a judge, have to be understood in the context that the 1968 Act which was made under art.124 (5) did not contain any provision like s.21 contained in the Bill of 2005. That is why the Supreme Court did not have nay occasion to consider whether Art

124 (5) itself is a provision under which a law can be made in respect of investigation and proof of charges of misbehaviour against a judge, providing incidentally for the suspension of such a judge. We are of the view that the observations of the Supreme Court do not amount to a decision that a law made under Art. 124 (5) cannot provide for suspension pending investigation or inquiry.

In the light of the above principles, **the Law Commission is of the opinion that it is permissible for Parliament to make a law to provide that the Judicial Council could as an interim measure recommend withdrawal of judicial work from a judge of the Supreme Court or High Court, for the purpose of an effective investigation and inquiry. The Law Commission is therefore of the opinion that s.21 is constitutionally valid.**

(XVIII)(A) Whether there should be some provision to prevent frivolous and vexatious 'complaints' being filed and provide for some sanctions as in the various Lok Pal Bills or as in the State laws on Lok Ayuktas.

(B) Whether the complaint must be in the form of a petition with a verification of contents giving the source of information and whether it should or should not be supported by an affidavit?

(A) In our view, there must be some provision in the Bill of 2005 which will take care to prevent frivolous or vexatious complaints or complaints not made in good faith falling under proposed sec. 7(1)(a). In the case of such

complaints, it is not sufficient merely to 'dismiss' the same. The office of a Judge and his functions are of utmost importance to society and the reputation of Judges and the Judiciary cannot be allowed to be easily tarnished.

It is not uncommon that whenever a body like the Judicial Council is established, there are a lot of people who would readily start abusing the system. Further, the time of the Judicial Council is very valuable. The Judicial Council consists of the Chief Justice of India, two senior-most Judges of the Supreme Court and two senior-most Chief Justices of High Courts. They also have other regular duties to perform as Judges. There is, therefore, need to provide 'preventive' measures by way of a separate section. We are of the view that filing a complaint which is found to be frivolous or vexatious or not in good faith should be made an offence and punished summarily with imprisonment not exceeding one year.

Such provisions are found in the various drafts of the Lok Pal Bills and were also contained in statutes constituting 'Lok Ayuktas' in several States. For e.g., Sec. 12 (2) of the Lok Pal Bill 2001 apart from prescribing a form states that the complaint may be accompanied by a fee which may be prescribed and a certificate of deposit under sub-section (3) of s. 12. Sec. 12 (3) states that the complainant shall deposit such sum of money in such manner and such authority or agency as may be prescribed and that the certificate of such deposit shall be furnished in prescribed form. S. 12 (2)

states that if the complainant is unable to make a deposit he must apply for exemption. S. 21 deals with the disposal of the deposit under s. 12 and the penalty for malafide complaint. We however do not recommend a similar procedure of making a deposit along with the complaint as the procedure appears to be cumbersome and that making of such complaints an offence is by itself a sufficient deterrent.

**The Law Commission, therefore, recommends appropriate sanctions against such complaints. It recommends that the following provisions be inserted in the Bill of 2005 by way of a separate section:**

- “(1) Any person who makes a complaint which is either frivolous or vexatious or is not in good faith, against a Judge with intent to cause harassment to the Judge against whom the complaint is filed, shall be punishable.**
- (2) When any offence under subsection (1) is committed, the Judicial Council may take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily, so far as may be, in accordance with the procedure specified for summary trials under the Code of Criminal Procedure, 1973 and if such offender is found guilty of committing the offence, sentence him to imprisonment for a term which may extend to one**

**year and also to fine which may extend to rupees twenty five thousand.”**

**The Law Commission recommends an amendment of the Bill of 2005 to provide for an offence on the above lines.**

(B) The question is whether the complaint must be in the form of a petition with a verification of contents giving the source of information and whether it should or should not be supported by an affidavit?

Sec. 5(2) of the Bill of 2005 indeed makes provision in this behalf but it is further necessary to provide in sec. 5(2), that there must be verification as stated below.

**The Law Commission recommends that s. 5 (2) of the Bill of 2005 be amended to provide that the complaint must be in the form prescribed in the rules, must give full particulars of the ‘misbehaviour or incapacity’ which is the subject matter of the allegation and must contain a verification as to which of the allegations are within the personal knowledge of the complainant and which are based on information received and from whom. It must also contain a statement that the complainant is aware that if the allegations in the complaint are found to be frivolous or vexatious or not in good faith, the complainant is liable to be summarily punished for an offence under the Act.**

**The Law Commission is also of the view, there is no need to require an affidavit to accompany the complaint inasmuch as every affidavit has to be sworn before an advocate or notary or other authorized person and if such a procedure is followed, the confidentiality of the allegations cannot be fully assured.** (Hereinbelow, we are providing that the complainant should be prohibited from giving publicity to the complaint before filing the complaint as well as during the course of investigation or inquiry except with the express permission of the Judicial Council in writing)

(XIX) Should the words ‘misbehaviour’ or ‘incapacity’ be defined in the Act? If so, in what manner?

(a) Certain views have been expressed by jurists and Judges that it is not necessary to define the meaning of the word ‘misbehaviour’ or ‘incapacity’ and that it should be left to the Judicial Council to decide whether the particular act or omission constituted ‘misbehaviour’ or the particular state of health of the Judge revealed ‘incapacity’. In fact, it is so observed in C.K. Ravichandran Iyer v. Justice A.M. Bhattacharjee, 1995 (5) SCC 457.

But, even so with a view to make things clear and not to keep it vague and also to make complainants, Members of Parliament and Judges aware of the meaning of the words ‘misbehaviour’ or ‘incapacity’, we are of the view that these words be defined by way of an ‘inclusive definition’.

There are various types of misbehaviour or deviant behaviour. They are categorized by some commentators such as David E Danda as

- (i) improper courtroom behaviour'
- (ii) improper or illegal influence
- (iii) impropriety of the bench
- (iv) other improper activities

Under each of these items, a long list of deviant behaviour are listed out (vide <http://library.findlaw.com/2001/Jan/1/129422.html>) We have earlier referred to the Annual reports of the State courts in California where a long list of misbehaviour or deviant behaviour was given.

The National Commission for Review of the Working of the Constitution (2001) in its Consultation Paper (Vol. 2 Book 1) (para 14.4, 14.5) refers to 'deviant behaviour' which may not warrant 'removal'. The types of 'deviant behaviour' referred to are: not observing the Court hours of work and observing time at one's pleasure; not delivering judgments in time, and postponing the same in some cases for years and even leaving the Court by retirement/transfer without delivering judgments. Sometimes case-lists are manipulated in the sense that heavy matters are pushed to the bottom of the list. Some Judges direct listing of cases without reference to the Chief Justice. Some are too liberal for the sake of populism, admit all cases and

liberally grant interim relief. Some Judges do not keep distance from centers of political power.

(b) Various definitions of misbehaviour or incapacity:

(i) The Justice Sawant Committee which inquired the case of Justice V. Ramaswami stated that 'misbehaviour' as per Art. 124(4)(5) and other provisions of the Constitution means:

- (a) conduct or a course of conduct which brings dishonour or disrepute to the Judiciary as to shake the faith and confidence which the public reposes in the Judiciary. It is not confined to criminal acts or to acts prohibited by law. It is not confined to acts contrary to law. It is not confined to acts connected with the Judicial Office. It extends also to activities of a Judge, public or private.
- (b) The act or omission must be wilful. The wilful element may be supplied by culpable recklessness, negligence or disregard for rules or an established Code of Conduct. Even though a single act may not be wilful, series of acts may lead to inference of wilfulness.
- (c) Monetary recompense would not render an act or omission anytheless 'misbehaviour' if the person intentionally committed

serious and grave wrongs of a clearly unredeeming nature and offered recompense when discovered.

- (d) 'Misbehaviour' is not confined to the conduct since the Judge assumes charge of the present Judicial Office. It may extend to acts or omissions while holding prior judicial office, if such acts or omissions make him unworthy of holding the present judicial office.

(ii) In the UK, the Appellate Courts have at times criticized judges for improper behaviour such as falling asleep, making impatient gestures and for interrupting excessively or for incompetence or for commenting in the Press about a case the Judge is trying (Rodney Brazier, *Constitutional Practice: The Foundations of British Government*, 1999, p.289).

(iii) According to the Protocol in the Lord Chancellor's Department in the Judicial Correspondence Unit, 1998 (vide Ch. VII), the term 'personal conduct' means a Judge whose behaviour towards litigants, defendants or others in Court and a Judge's behaviour or manner of dealing with a case. 'Personal conduct' may include matters such as the making of inappropriate personal or offensive remarks by a Judge during the course of a trial (which do not form part of his or her decision in the case) and behaviour by a Judge outside Court which is inappropriate and would tend to bring the Judiciary into disrepute. Complaints about discourtesy, discrimination or bias in the dealing of a case may be amenable to judicial appeal process, but may also be

treated as complaints about judicial conduct, particularly where the allegation is that of discrimination on racial or sexual grounds which has caused offence to the complainant.

(iv) Art.125 of the Malaysian Constitution states that Judges may be removed on grounds of 'misbehaviour' or if they cannot 'properly discharge the function of their office because of their inability, from infirmity of body or mind or any cause'. But, these words have been interpreted in various ways. 'Misbehaviour' has been construed as extending to conduct outside the Court. Inability to perform judicially for 'any other cause' has been given a liberal constriction. The Judiciary has recently introduced a Code of Ethics for Judges.

(v) In the US State Courts, there are detailed provisions which refer to various kinds of misbehaviour. Art. 6, sec. 18(d) of the California Constitution refers to 'incapacity' as 'disability that seriously interferes with the performance of the Judge'. So far as 'misbehaviour' is concerned it uses the words wilful misconduct in office, persistent failure or inability to perform the Judge's duties, habitual intemperance in the use of intoxicants or drugs or conduct prejudicial to the administration of justice that brings the judicial office into disrepute or improper action or dereliction of duty.

(vi) In Idaho, Rule 28 of the Rules of general procedure refers to 'misconduct in office, wilful or persistent failure to perform the duties of a

Judge, habitual intemperance, or of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or violation of Code of Judicial Conduct. ‘Incapacity’ is described as ‘disability that seriously interferes with the performance of the Judge’s duties which is or is likely to become of a permanent character’.

(vii) The Connecticut Law, Chapter 872(a) sec. 51-51(h)(1) refers to ‘wilful violation of canon of judicial ethics, wilful and persistent failure to perform the duty of a Judge, neglectful or incompetent performance of the duties of a Judge, final conviction of a felony or of a misdemeanor involving moral turpitude, disbarment or suspension as attorney-at-law; wilful failure to file a financial statement or the filing of a fraudulent financial statement, temperament which adversely affects the orderly carriage of justice.

(viii) In addition to the types of ‘misbehaviour’ mentioned above, it may be necessary to add that proof of consistent ‘favouritism’ for or ‘discrimination’ against a litigant or a lawyer of a particular caste, class, community or region would also tantamount to misbehaviour.

(ix) In Chapter II, we have mentioned that there is an article by Giucomo Oberto, Judge Turin, Italy and Dy. Secretary General of International Association of Judges and that article quotes a long list of items of misbehaviour and deviant behaviour. (It is also available on the web).

(x) The judgment in C.K.Ravichandran Iyer v. Justice A.M. Bhattacharjee refers to the meaning of ‘misbehaviour’ given in Krishnaswami v. Union of India: 1992 (4) SCC 605. There, it was stated:

“Every act or conduct or even error of judgment or negligent act by higher judiciary per se does not amount to misbehaviour. Wilful abuse of judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude, would be misbehaviour. Misconduct implies actuation of some degree of mens rea by the doer. Judicial finding of guilty of grave crime is misconduct. Persistent failure to perform the judicial duties of the Judge or wilful abuse of office dolus malus would be misbehaviour. Misbehaviour would extend to conduct of the Judge in or beyond the execution of judicial office.”

(xi) In the States in US, where ‘misbehaviour’ is referred to (see Ch. XVII above), it is stated that ‘incompetence in performing the duties of the office’, also amounts to ‘misbehaviour’. But, as we shall point under the next heading, a complaint cannot be made on the basis of the merits of a judgment but that question is different from ‘incompetence in the performance of the duties of the office’.

(xii) Dato Param Kumaraswamy in his Chennai speech in November 2004 (referred to in Chapter III), after referring to bribery, corruption, abuse of

language, abuse of contempt powers and lenient sentences in grave offences, also refers to “cash, gifts, hospitalities, including womanizing, dining, entertainments, holidays abroad”, and said that golf courses are venues in fast developing countries where payments are made by losing bets taken with Judge. He also refers to favouring particular law-firms, selected lawyers relations.

**The Law Commission recommends that there should be a broad definition of ‘misbehaviour’ as stated above. It should include breach of the Code of Conduct. So far as ‘incapacity’ is concerned it should be further qualified as one which is or is likely to be of a permanent character which does not enable him to perform his judicial functions properly. It recommends that such a definition be introduced in S.2 of the Bill of 2005.**

(XX) Whether a complaint which relates solely to the merits of a judgment or order ought to be entertained?

Several countries have a provision that a complaint dealing with merits of a case will be rejected at the stage of preliminary investigation. This was the reason why the impeachment motion against Justice Chase failed in USA in 1805.

The 1980 U.S Act Title 28 USC Sec. 372 (c) (3) (A) provides that the Chief Judge may dismiss a complaint “if he finds it to be ..... directly related to the merits of a decision or procedural ruling”.

In the US Judicial Improvements Act of 2002, it is stated in sec. 352(b) (1)(A)(ii) that the Chief Judge may dismiss the complaint if it ‘directly related to the merits of a decision or procedural ruling’. Most of the States in US have a like provision.

This is the position in the United Kingdom (see Ch. VII) and several other countries also.

In the calendar year of 2001, there were 1610 Judges within California and 835 complaints were received against 781 different Judges and of these 807 were summarily dismissed as relating to ‘legal errors’ or ‘erroneous discretionary orders’ and not for judicial misconduct. There were 5 private admonitions keeping names confidential; private advisory letters were issued in 19 cases and only 3 Judges were disciplined. In 2002, there were 918 complaints against 836 different Judges and only in four cases the Judicial Commission found material to initiate proceedings.

In New York, there were 3363 Judges and Justices and in 2000, there were on an average 1400 complaints and 1000 were dismissed summarily. In

2001, 1308 complaints were received and 960 were dismissed summarily. In 2001, 11 censures and 15 admonitions were issued.

There are similar statistics in other States. Even in the Federal system, the National Commission on Judicial Discipline and Removal appointed by Congress to review the 1980 Act, in its Report of August 1993, stated that even the House Judiciary Committee which received complaints found that 90% did not merit any consideration at all. Judge Harry T. Edwards, Circuit Judge (Vol. 87 Mich. L.R 765 at 790) stated that frivolous complaints make up to 88% and sometimes 99.5% of the total complaints received in a Circuit.

It cannot be gainsaid that the weeding out of complaints that relate to the merits of a judicial order is necessary since the proposed Judicial Council is to comprise of the senior-most judges who even otherwise would be tied down with pending judicial work. It, however, requires to be provided that in relation to a pending or decided case there are other connected allegations of misbehaviour like bribery etc., the complaint will be maintainable.

**The Law Commission recommends that the Bill of 2005 should make appropriate provisions that enable the screening and weeding out of complaints that relate to the merits of a pending or decided case except where the complaint contains allegations of misbehaviour in relation to that very case such as bribery etc., in which event such complaint will have to be nevertheless examined.**

(XXI) Whether a provision protecting complainant's identity – as in the case of Whistleblowers' laws – is necessary?

The facts on the basis of which allegations of 'misbehaviour' of a Judge of the Supreme Court or High Court are made are generally within the knowledge of individual members of the Bar or individual litigants or in some cases, media persons. Individual lawyers are particularly afraid of coming out openly by way of a 'complaint' because they do not like to jeopardize their careers by making allegations against a sitting Judge of the High Court or Supreme Court. They have other cases before the same Judge and the Judge may not recuse himself in the cases in which the complainant lawyer is appearing.

If we are realistic in the matter of complaints against Judges then some more special provisions appear to be necessary. A litigant or media person or a lawyer may, in certain circumstances, be apprehensive of even contempt proceedings. Even if 'truth' becomes a valid defence in contempt proceedings, as is proposed in a pending Bill for amending the Contempt of Courts Act 1971, several lawyers would be reluctant to make complainants against sitting Judges out of fear of reprisal.

The Law Commission's 179<sup>th</sup> Report on Public Interest Disclosure and Protection of Informers (2001) is relevant in this context.

There are precedents in the laws of other countries. Sec. 757.93(1)(b) of the Wisconsin law of 1976 creating the Judicial Commission is a part of the Wisconsin Statutes (see Ch. XVII above). It clearly states that ‘any person who provides information to the Commission concerning probable misbehaviour or permanent disability, may request that the Commission “not disclose his or her identity to the Judge or Circuit” and he may make such a request prior to the filing of a petition or a formal complaint before the Commission.

In the light of the practical problems mentioned above, **the Law Commission recommends that a ‘whistleblower’ provision must be provided in the Bill of 2005. Further, there should also be a provision that in case any ‘reprisal’ against the complainant is brought to the notice of the Judicial Council, the Judicial Council may take such action as it may deem fit in public interest.**

(XXII) Is there a need for preserving the confidentiality of the Complaint, the investigation and the inquiry process? Should the Bill of 2005 contain a provision that such confidentiality will be maintained notwithstanding the provisions of the Right to Information Act 2005?

An important aspect that requires to be dealt with is the need to require the complainant and others including witnesses participating in the investigation and inquiry to maintain strict confidentiality regarding the documents and

proceedings in relation to the complaint, the investigation and the consequential inquiry, if any. This is because the matters are of a sensitive nature involving a high constitutional functionary and any disclosure of such information at any stage may not only endanger a fair conduct of investigation and inquiry but also irredeemably tarnish the image of a judge even before the conclusion of the statutory and constitutional processes.

The need for the complainant and other participants to maintain confidentiality absolutely necessary because as is experienced in other countries a large percentage of complaints will stand rejected in the Judicial Council either because they are frivolous or vexatious or not in good faith or relate to a grievance of a litigant or a lawyer on the merits of a case before the judge in which he might have been unsuccessful.

Such provisions as to confidentiality are also to be found in sec. 63(5) of the Canadian Judges Act, 1985, and sec. 6(2) of the Canadian bye laws; sec. 30 and 35 of the New Zealand Judicial Conduct Commissioner and Judicial Conduct Panel Act, 2004; sec. 18(i)(1) of Art. 6 of the California Constitution; sec. 757.93 of the Wisconsin statute is also the same effect.

There is no doubt a provision in s.12 (1) of the Bill of 2005 for in camera proceedings before the Judicial Council but in our view the said provision has to be widened in light of the various aspects mentioned above.

This is to prevent the tendency of complainants and others participating, even before the complaint is filed in the Judicial Council or when the Council is investigating or inquiring into the conduct, from giving publicity to the contents of the complaint or documents or proceedings in the media or the Bar Associations. If the Judicial Council comes to a conclusion that the allegations are true the confidentiality should be maintained by the complainant, every person including a witness and a lawyer who participates in the investigation and inquiry.

Needless to mention that this confidentiality ought to be maintained by the members of the Judicial Council.

The Law Commission is conscious of the need for transparency and accountability in the functioning of the Judicial Council as well as the recently enacted Right to Information Act, 2005. However, given the sensitive nature of the function performed by the Judicial Council, it is important to provide for a separate information disclosure regime in relation to the functioning of the National Judicial Council in terms of the Bill of 2005 that is not within the purview of the Right to Information Act, 2005. It must be understood that the Law Commission is not suggesting that there should be no disclosure of any such information concerning the work of the Judicial Council generally or in relation to individual cases before it. Where 'minor measures' are imposed, there can be a publication of such minor measures but if a private censure or admonition is ordered, then the name of

the complainant and the judge shall not be disclosed. In the case of a recommendation for removal, after the Report is submitted to the Speaker/Chairman, it will be for the Speaker/Chairman to decide on publishing the Report. What is in fact being suggested is that the decisions as to how much information should be disclosed and at what stage must be left to the discretion of the Judicial Council itself.

**The Law Commission therefore recommends that there should be a provision in the Bill of 2005 that every complainant and every person including a witness and a lawyer who participates in the investigation and inquiry, whether or not he seeks confidentiality about his name, must undertake to the Judicial Council that he shall not reveal his own name, name of the Judge complained against, the contents of the complaint or any of the documents or proceedings to anybody else including the media without the prior written approval of the Judicial Council and it will be for the Judicial Council to decide when and to what extent the contents of the complaint shall be disclosed to the public. It must be made clear that this is notwithstanding anything contained in the Right to Information Act 2005. Once the enquiry is completed before the Judicial Council, if 'minor measures' are imposed on a complaint procedure, the same can be published by the Judicial Council with the qualification that in the case of 'private censure or admonition', the name of the complainant and of the Judge concerned shall not be published. In the case of recommendation for removal, since the report is**

**to be submitted to the Speaker/Chairman, it will be for the Speaker/Chairman to decide when such report can be published.**

As these provisions affect the independence of the judiciary and any publicity before a final decision is arrived at by the Judicial council imposing minor measures or recommending removal to the Parliament will adversely prejudice the proceedings as well tarnish the image of the judge facing the investigation and inquiry, **the Law Commission further recommends that s.19 of the Bill of 2005 be amended to provide that the violation of the confidentiality provisions abovementioned would be an offence and that procedure for punishing such offence would be as prescribed under s.20 of the Bill of 2005.**

(XXIII) Should an appeal to Supreme Court for Judicial Review against orders awarding minor measures or removal be provided ?

(1) The Bill of 2005 deals with 'removal' by address of the Houses to the President which may be the result of inquiry pursuant to either a reference or a complaint. It is silent on the question of further challenge to the 'removal'.

The Supreme Court has laid down in Mrs.Sarojini Ramaswami v. Union of India: 1992 (4) SCC 506, that even after the Committee of Judges gives a finding of 'guilt', the finding is still 'inchoate' till the Report is considered by the Houses of Parliament and the findings are accepted by the Houses. Parliament may or may not accept the Report. It has also to give a

hearing to the Judge personally or through counsel. Parliament, no doubt, is not required to give reasons. According to the Supreme Court, the Report is not liable to be challenged in a Court of law till the final order of removal is passed. In fact, the Judge is not entitled to a copy thereof till the Report is submitted by the Committee of Judges to the Speaker or the Chairman. The Supreme Court also held that the Inquiry Committee cannot be treated as a 'tribunal' for the purposes of Art. 136.

The Supreme Court rejected the 'political question' doctrine because, unlike in the case of impeachment in US which is purely a 'political question', the position in India is different- because the procedure is partly 'judicial' before the Committee and then 'political' before the Parliament. Hence, the principles laid down by US Supreme Court in Powell's case (1969) (395 US 486) are not applicable here.

The judgment of the US Supreme Court in Nixon v. US (1993) 506 US 224 states that in US, the impeachment process is a purely political process and that it cannot be questioned in the Supreme Court of USA.

However, in the case of final orders passed by the Judicial Councils in US, question has arisen whether that order is a 'judicial order' and could be questioned in the courts. The first such case was Chandler v. Judicial Council (1970) 398 US 74. In that case, the Judicial Council imposed a

punishment of non-listing of fresh cases and removal of cases which were in his list. When the order was challenged in the courts and when it went up finally to the US Supreme Court, the majority did not decide whether the order of the Council was 'judicial' or not. Harlan J however held it was a judicial order. Douglas and Black, JJ. dissented on another point, namely, that no law could be made imposing minor measures.

Presumably, on the basis of Harlan J's opinion, subsequently in every case where minor punishments were awarded by the Judicial Council, the Judge challenged the same in the District court and the appeals have gone to the Circuit appellate courts. No case, other than Chandler, appears to have gone before the US Supreme Court for a decision on whether the order of the Council is judicial. In McBryde's case, the decision of the Court of Appeal was affirmed by the Supreme Court by refusing to grant certiorari.

But, so far as the law in our country is concerned it is not in doubt because in Justice V. Ramaswami's cases, the Supreme Court has held that even the removal order passed by the President can be challenged in the Supreme Court. Afortiorari, the minor measures if ordered by the Judicial Council, can obviously be challenged in judicial review proceedings because the order is final unlike the case of removal where the order of the Judicial Council is only in the nature of a recommendation to Parliament..

The appropriate Court to adjudicate upon such a remedy resorted to by the Judge is obviously the Supreme Court.

No doubt after L.Chandra Kumar v. Union of India: 1997 (3) SCC 261, the orders of the President directing 'removal' or the orders of the Judicial Council imposing minor measures can be subject to judicial review under Art. 226 of the Constitution before the High Court unless another effective alternative remedy is provided before the Supreme Court, so that the High Court may, in its discretion, refuse to interfere and direct the parties to avail of the alternative remedy before the Supreme Court.

It is, therefore, necessary, in our view that the Bill of 2005 must contain a specific provision for an appeal before the Supreme Court.

(2)(i) There is a view that all judicial remedies must be barred so that the matter would come to an end after the President (in case of removal) or the Judicial Council (in case of minor measures) pass orders.

But, we are firmly of the view that the remedy of judicial review cannot be ousted and in fact, 'judicial review' under Arts. 226 and 227 of the Constitution, according to Chandra Kumar, is part of the basic structure of the Constitution and cannot be removed even by a constitutional amendment.

(ii) Apart from that, international traditions and conventions contemplate an appeal to a Court of law.

Art. 20 of the UN Basic Principles of Judicial Independence, 1995 states that disciplinary proceedings, suspension and removal of Judges should be subject to independent review; Art. 15 of the Siracusa Principles of the International Commission of Jurists, 1981, para 2.37 of the Montreal Resolution on the World Conference on Independence of Judges, 1983, Art. 20 of Dr. L.M. Singhvi's Final Report to UN (1985), Art. 45 of the Lusaka Seminar, 1986, all underscore the need to provide for an independent judicial review.

(iii) Several States in US provide a judicial remedy in regard to action against Judges of the State Courts. For example, in California, the Constitution provides in clause (f) of sec. 18 of Art. 6, that a decision of the Judicial Performance Commission to admonish or censure a Judge or to remove or retire a Judge of the Supreme Court shall be reviewed by a tribunal of 7 Court of Appeal Judges. Clause (g) provides that no Court, except the Supreme Court, shall entertain any action.

In Idaho, the Judicial Council's recommendations are to be placed before the Supreme Court for removal, discipline or retirement. Rule 44 of the Idaho Judicial Council Rules provides for a review.

In Connecticut, under sub-clause 51(r) of sec. 51 of Chapter 872(a) of the statutes, the Judge may appeal to the Supreme Court against the decision of the Judicial Council.

In Texas, under Rule 10 of the Rules, there is a Review Tribunal consisting of 7 Judges in which 6 must agree on removal and under Rule 13 an appeal against removal lies to the Supreme Court.

In Germany, the decision to remove has to be taken by two thirds of the Federal Constitutional Court and there is no problem. In Sweden, the removal order is finally passed by the State Supreme Court itself. This is also the position in some States in US. Here too, there is no need for a further appeal. In the colonial countries, the 'removal' order is passed by the Head of State after consulting the Privy Council.

Taking into account the Constitutional position that judicial review under Art. 226, 227 is part of the basic structure of the Constitution according to L. Chandrakumar's case and the fact that several countries permit an appeal, and international traditions require an appeal, we are of the view that it will be unconstitutional not to provide for an appeal against an order of removal or a final order of the Judicial Council. Even ordinary public servants have a right to move the Court against an order of removal. It is not, therefore, permissible to exclude a further appeal on the judicial side in the case of Judges of the High Court or Supreme Court, whether it be an

order of removal passed by the President or an order imposing minor punishments.

The Supreme Court of India in the Justice V.Ramaswami's case (see Chapter VI) was of the view that the Inquiry Committee was not a tribunal for the purposes of Art. 136. An affected Judge could either approach a High Court under Art. 226 or the Supreme Court under Article 32. But, in the light of the composition of the Judicial Council, which includes the Chief Justice of India, two senior Supreme Court Judges and two senior Chief Justices of the High Courts, and given the limited scope of judicial review in a writ jurisdiction the writ remedy may not be the most appropriate one. Further the likely delay that may occur if the matter starts with a writ petition in the High Court needs to be accounted for.

In view of all the above factors, **the Law Commission recommends that the Bill of 2005 be amended to provide an appeal to the Supreme Court by a Judge against:**

- (1) order of removal passed by the President, whether the proceedings started on a complaint or a reference;**
- (2) other final orders passed by the Council in regard to 'minor measures' passed on the basis of a complaint.**

The Law Commission further suggests that such appeal should preferably be heard by a bench of five judges of the Supreme Court next in seniority to

those who were members of the Judicial Council, although this is matter which need not be provided in the Bill of 2005.

**However, it needs to be clarified that this provision of a right of appeal to the Supreme Court is available only to the judge who is aggrieved by an order passed against him either for removal or where it is a final order of the Judicial Council imposing minor measures. As regards the complainant it is not necessary to provide any right of appeal and if he wants to pursue the matter further he may have to resort to the remedy under Article 32 or 226 of the Constitution.**

(XXIV) What is the ‘standard of proof’ before the Judicial Council as well as before the Houses of Parliament? Is it ‘preponderance of probabilities’ or is it ‘proof beyond reasonable doubt’? What are the standards in a ‘quasi-criminal’ inquiry?

The Justice Sawant Committee dealing with the question of ‘standard of proof’ in an inquiry under Art. 124(4) (read with the Judges (Inquiry) Act, 1968) made an in-depth study regarding this question in matters relating to a reference to the Committee by the Speaker/Chairman. It observed that the inquiry before the three-member Committee appointed by the Speaker/Chairman is ‘quasi-criminal’ in nature and that the proof must be ‘beyond reasonable doubt’. It also referred to the Memorandum issued by the Privy Council which provided a like standard of proof. In the US, a higher standard of ‘clear, satisfactory and convincing evidence’ is necessary

which Justice Sawant commented could mean many things. Justice Sawant Committee also referred to an article by Chief Justice Ben F. Overton of the Supreme Court of Florida in *Chicago-Kent Law Review* to the same effect. (This aspect is discussed in Ch. VI).

So far as ‘impeachment’ proceedings are concerned, it is stated by Prof. Shimon Shetreet, quoting Berger, ‘Impeachment for High Crimes and Misdemeanors (1971) 44 S. Calif L Rev. 395 at 400-415) and Berger on Impeachment and Good Behaviour (1970) 79 *Lords Law Journal* 1475 (1518, 1519) that the impeachment proceedings are ‘criminal’ in nature.

In Australia, in the case of Justice Murphy, the 2<sup>nd</sup> Senate Committee was directed to give findings on the basis of two different standards – (i) preponderance of probabilities, (ii) proof beyond reasonable doubt. Justice Murphy was given the rights of an accused in a criminal trial except that he was not to be called but would be ‘invited’ to give evidence. All evidence was to be recorded in his presence or in the presence of his counsel. If Justice Murphy chose to give evidence, he may be cross-examined.

In this context it is necessary to refer to the general standard of proof applicable to all types of quasi-criminal proceedings, inasmuch as the proceedings for an address for removal and other proceedings before the Judicial Council are in the nature of a quasi-criminal process.

So far as 'quasi-criminal' proceedings are concerned, dealing with contempt cases, the Supreme Court in Bijay Kumar Mahanty v. Jadu (2003) 1 SCC 644, relying upon Mrityunjoy Das v. Sayed Hasibur Rahaman 2001 (3) SCC 739, has stated as follows:

“We have no difficulty in accepting the contention that the case against the appellant is required to be proved beyond reasonable doubt. The contempt proceedings under the Act are quasi-criminal. The standard of proof required is that of criminal proceedings. Therefore, the charge has to be established beyond reasonable doubt.”

In Re: Arundhati Roy AIR 2002 SC 1375, the Supreme Court held that in quasi-criminal proceedings, the presumption of innocence operates.

In the matter of election petitions where corrupt practices are alleged, the Supreme Court stated in Borgaram Deuri v. Premodhar Bora (2004) 2 SCC 227 as follows:

“Allegations of corrupt practices are viewed seriously. They are considered to be quasi-criminal in nature. The standard of proof required for proving corrupt practice for all intent and purposes is equated with the standard expected in a criminal trial. However, the difference between an election petition and a criminal trial is, whereas an accused has the liberty to keep silence, during the trial of an

election petition the returned candidate has to place before the Court his version and to satisfy the Court that he had not committed the corrupt practices as alleged in the petition. The burden is on the election petitioner, however, can be discharged only if and when he leads cogent and reliable evidence to prove the charges levelled against the returned candidate. For the said purpose, the charges must be proved beyond reasonable doubt and not merely by preponderance of probabilities as in civil action. (See Gajanan Krishnaji Bapat vs. Dattaji Raghobaji Meghe (1995) 5 SCC 347; Surinder Singh vs. Hardilal Singh: 1985(1) SCC 91; R.P.Moidutty v. P.T. Kunju Mohammad (2001) 1 SCC 481 and Mercykutty Amma vs. Kadavoor Sivadasan (2004) 2 SCC 217)” (emphasis supplied)

From the above judgments, it is clear that in a quasi-criminal proceeding such as the one leading to an address by the Houses to the President, the proof must be ‘proof beyond reasonable doubt’ and not proof by ‘preponderance of probabilities’. But, the Judge does not have a right to silence, and, therefore, the law and the Rules may legitimately require that the Judge file his defence. Such a law will not offend clause (3) of Art 20 of the Constitution. If he chooses to remain silent or remain ex parte, he will be doing so at his own risk. This is so far as complaint/reference proceedings before the Judicial Council where removal is recommended.

The next question is whether, so far as 'minor measures' are concerned, the proof of 'misbehaviour' not warranting 'removal' can be by preponderance of probabilities?

Where there are serious allegations which are likely to lead to a recommendation for removal, there is no difficulty that the standard of proof should be 'proof beyond reasonable doubt'. But there could be a case where there are several allegations, some serious and some not so serious, and in that event, a defence counsel would like to know whether the standard of proof is 'proof beyond reasonable doubt'. If it is proof beyond reasonable doubt, his attempt will be to create a reasonable doubt and that will be his line of cross-examination. Of course, in a quasi-criminal case, the accused Judge has no right to silence but can be required to set out his view of the facts. Still, defence counsel concentrates, in cross-examination, to create a reasonable doubt. Hence, the law cannot be left vague as to what should be the standard of proof.

Again, there may be a number of allegations, some of which are serious and some are not serious. There can be practical difficulties in the presentation of evidence for the cross-examining counsel, if different standards are applicable to different charges. Even for chief-examination, there can be problems.

Even in regular criminal proceedings, there are serious offences and there are smaller offences. But, the standard of proof, namely, of ‘proof beyond reasonable doubt’ is common to all of them.

Further, the Constitution uses the word ‘misbehaviour’. We have explained that there can be various types of misbehaviour, some serious and some not so serious. It can be argued that fixing different standards for different types of misbehaviour is not permissible. Yet, there can be a grey area where it is not possible to decide whether the allegations in a complaint are serious or not so serious. **The Law Commission is of the view that ‘proof’ must be ‘proof beyond reasonable doubt’ as regards all types of charges which come before the Judicial Council.**

Therefore, **the Law Commission recommends that in sec. 16(1)(a) and (b), the words ‘substantiated either wholly or partially’ to be substituted by the word ‘proved wholly or partially’ along with an Explanation that ‘proved’ means ‘proved beyond reasonable doubt.’**

(Further amendments to s. 16 are discussed separately hereinbelow)

(XXV) What should be the procedure in case one of the members of the Judicial Council is elevated as the Chief Justice of India or is elevated to the Supreme Court, or where there is a vacancy on account of natural causes or the Judge’s services are not available due to other causes, so as to make it clear that de-novo proceedings are not contemplated?

In the US federal system, in the Judicial Improvement Act, 2002 there is a specific provision in sec 353(b) in so far as the Investigation Committee is concerned, to cover such contingencies. It reads as follows:

“Section 353(b) Change of status or Death of Judges: A Judge appointed to a special committee under subsection (a) may continue to serve on that committee after becoming a senior Judge or in the case of the Judge of the Circuit, after his or her term as Chief Judge terminates under subsection (a)(3) or (c) of section 45. If a Judge appointed to a committee under subsection (a) dies, or retires from office under sec. 371(a) while serving on the Committee, the Chief Judge of the Circuit may appoint another Circuit or district Judge, as the case may be, to the Committee.”

**The Law Commission is of the view that even though the proceedings before the Judicial Council are quasi-criminal, they need not be started de novo where among the Members of the Judicial Council, one who is a Judge of the Supreme Court is elevated as Chief Justice of India or where a Chief Justice of a High Court who is a Member is elevated as Judge of the Supreme Court of India or where a vacancy arises due to natural causes or retirement or recusal or where any of the Members is not available (say) due to sickness or other causes and that vacancy is otherwise filled. The Chief Justice of India must be**

**entitled to make appropriate arrangements by way of filling up the vacancy and the proceedings must be continued from the stage where it stopped without the need to start them de novo.**

**Accordingly, the Law Commission recommends that a provision on the above lines with a further clarification that proceedings need not be started de novo, in the case of contingencies mentioned above, may have to be incorporated in the Bill of 2005.**

(XXVI) What should happen if the Judge against whom investigation or inquiry is initiated reaches the age of superannuation during the pendency of the proceedings before the Judicial Council?

A situation that can arise in some cases where a Judge against whom investigation and inquiry is on, may reach superannuation and claim that the proceedings can no longer be continued.

In the case of public servants, the law undoubtedly is that disciplinary inquiries abate or have to be abandoned if the public servant retires before the proceedings have reached finality. The principle here is that once the relationship of master and servant ceases, there is no scope for inflicting a punishment thereafter. In order to get over this problem, several service rules provide that the service of the employee may be continued till the completion of the disciplinary proceedings with a view to award punishment. In some

other cases where a public servant is allowed to retire, the rules provide that the disciplinary proceedings already started shall be continued for the purpose of imposing a cut in the pension to a reasonable extent.

So far as Judges of the Supreme Court and High Courts are concerned, they hold constitutional office and there is a view that strict principles applicable to ordinary public servants do not normally apply. (We say this because the Prevention of Corruption Act 1988 has been applied in Justice Veeraswami's case) Leaving technicalities apart, question arises if the 'misbehaviour' was very close to the date of retirement and the proceedings are not likely to be completed before the date of superannuation, the statute must provide that the proceedings will not lapse on that account but that they may be continued for the purpose of imposing certain minor measures.

No doubt, in such situations, though there is no question of 'removal', or request for retirement, or non-listing of cases for judicial work, but it must still be permissible for the Judicial Council to administer censure/admonition (public or private).

**The Law Commission recommends that the Bill of 2005 should include a provision to make it clear that where a Judge of the High Court or Supreme Court who is under investigation or inquiry before the Judicial Council, reaches the age of superannuation during the pendency of the said proceedings, the proceedings can be continued for the purpose**

**of imposing the minor measures such as censure or admonition, public or private.**

(XXVII) Where removal is recommended by the Judicial Council, should it also recommend that in case the recommendation is accepted by the Houses and the removal order is passed by the President, the judge should be barred from holding any public or judicial, quasi-judicial office nor can he have chamber practice or be an arbitrator in arbitration proceedings?

We have seen that in the states in the U.S. (see Ch.XVII above), it is specifically provided in the relevant statutes that where the Judicial Council is either ordering removal or is recommending removal, the Council is further authorized to bar the Judge from holding any public or judicial, quasi-judicial office or to order that he cannot have chamber practice or be an arbitrator in arbitration proceedings.

**The Law Commission recommends that the Bill of 2005 should contain a provision that where the recommendation of the Judicial Council for removal is accepted by the Houses and the removal order is passed by the President, the judge should be barred from holding any public or judicial, quasi-judicial office nor can he have chamber practice or be an arbitrator in arbitration proceedings.**

(XXVIII) Should the Judicial Council frame a statutory Code of Conduct (subject to modification by Council by notification)? Should the breach of such Code should be treated as misbehaviour? Should the extant Code of Conduct approved by the Supreme Court in 1997 be adopted as the statutory Code till such time the Judicial Council frames a Code of Conduct?

Section 28(1) of the draft Bill of 2005 provides that the Judicial Council shall in the interest of administration of justice, issue from time to time the Code of Conduct which consists of guidelines for the conduct and behaviour of Judges. Sub-section (2) thereof provides that such Code of Conduct may provide that every Judge of the Supreme Court and High Court, at the time of appointment and thereafter annually shall give intimation of his assets and liabilities to the Chief Justice of India or the Chief Justice of the High Court, as the case may be.

The Law Commission is of the view that such a Code of Conduct should be published in the Gazette of India so that every Judge shall be aware of the existence of such Code of Conduct.

Most of the judiciaries in several countries have prescribed Codes of Conduct. The international traditions and conventions referred to in Chapter IV advert to the need for a Code of Conduct to be published. In the various statutes and Rules relating to action by Judicial Commission to which we have referred, it is stated that such Code of Conduct will be published. Breach of Code of Conduct is one of the matters which could be treated as 'misbehaviour'.

There can be no controversy that there should be a Code of Conduct for Judges of the High Court and Supreme Court and that breach thereof could be treated as 'misbehaviour'.

Realizing this, the full court of the Supreme Court passed a Resolution on May 7<sup>th</sup>, 1997 evolving a Code and it was given the title, 'Restatement of Values of Judicial Life'.

**The Law Commission recommends that the Code of Conduct issued by the Council under section 28(1) should be published in the Gazette of India. The Commission further recommends that till such time as the Judicial Council comes to be constituted under the proposed Bill of 2005 and such Judicial Council publishes a Code of Conduct, the Bill must provide that the 'Restatement of Values of Judicial Life' adopted by the Supreme Court in its Resolution dated May 7<sup>th</sup>, 1997 shall be treated as the Code of Conduct for the purposes of the proposed law. It should also contain a provision that the Code of Conduct could be modified from time to time by the Judicial Council by amendments that could be notified in the Official Gazette.**

(XXIX) Whether the proposed Bill should apply to complaints relating to misbehaviour which occurred before the commencement of the proposed Act or in some cases to such conduct which occurred while a

person was functioning as a High Court Judge before being elevated as a Chief Justice of the High Court or a Judge of the Supreme Court?

A question arises whether the accusations being quasi-criminal in nature, a Judge could be subjected to an investigation and inquiry under the proposed Act for such past misbehaviour and whether it would offend clause (1) of Art. 20 of the Constitution.

In our view, the provisions of clause (1) of Art. 20 of the Constitution are not attracted because the 'misbehaviour' is not treated as an 'offence' under the criminal law. Even if the procedure applicable for investigation or inquiry is as done in quasi-criminal case, the Act does not create a new offence.

**The Law Commission recommends that the Bill of 2005 should be made applicable to complaints relating to 'misbehaviour' which occurred before the commencement of the proposed Act but it should not go back to a remote past, the details of which would have gone out of the memory of the Judge. It could be restricted to a period of two years before the commencement of the Act provided the Judge has not retired by the date the complaint is filed before the Judicial Council.**

(XXX) What other amendments are required to be carried out to the Bill of 2005?

The Law Commission has examined the Bill of 2005 very carefully and has, on its broad features made extensive recommendations as set out

hereinabove. There are certain other changes which in its view are required to be carried out to the Bill of 2005. These are set out hereinbelow.

(1) Section 2(b) of the Bill defines Code of Conduct as meaning the guidelines issued by the Council under sub section (1) of sec 32. The inverted commas in sec 2(b) are not properly printed. The Law Commission **recommends** that they should read as “Code of Conduct”.

Secondly, there is no sec 32 in the proposed Bill. The Law Commission **recommends** that “section 32” must be substituted by “section 28”.

(2) The Law Commission **recommends** that the heading of Chapter II “MACHINERY FOR INVESTIGATION” should be substituted by the words “MACHINERY FOR PRELIMINARY INVESTIGATION AND INQUIRY”.

(3) Section 10 shall be subdivided into two parts and the section 10 as proposed in the draft Bill should be substituted by following section:

“(1) On receipt of a reference from the Speaker or the Chairman under sub-section (2) of section 9, the Council shall, notwithstanding anything contained in section 7, frame definite charges against the Judge on the basis of which inquiry is proposed to be held.

(2) Charges framed under sub-section (1) together with statement of grounds on which each charges is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified by the Counsel.”

(4) Section 11 subsection (3) deals with the procedure where the Judge refuses to undergo medical examination. But sec 11 does not provide for the procedure where the Judge agrees to undergo the medical examination. The Law Commission **recommends** that there must be a separate sub section after sub section (3) to the following effect:

“(4) If the Judge agrees to undergo medical examination considered necessary by the Medical Board, the said Board may permit him to produce such other medical reports or opinions of experts as the Judge deems it necessary to prove that he does not suffer from any physical or mental incapacity, and thereafter the Medical Board shall submit a report to the Council with its findings based upon the medical examination conducted at the instance of the Board as well as the material produced by the Judge as aforesaid.”

The Law Commission further **recommends** that sub sec (4) of sec 11 should be re-numbered as sub-section (5) and it should contain a provision requiring the Council to also consider the material produced by the Judge before the Medical Board. The Law Commission **recommends** that sub section (5) should be substituted by the following sub section:

“(5) The Council may, after considering the written statement of the Judge, the medical report submitted by the Medical Board and the material submitted by the Judge before the Medical Board, if any, amend the charges framed under subsection (1) of sec 8 or sec 10, as the case may be, and in such a case, the Judge shall be given a reasonable opportunity of presenting a fresh written statement of defence”.

(5) The heading of Chapter V reads as “PROCEDURE FOR INVESTIGATION”. The Law Commission **recommends** that the heading should be substituted by the following heading “PROCEDURE FOR INQUIRY”.

(6) In the proviso to sec 12(2), the word “may” is repeated twice. The Law Commission **recommends** that the word “may” after the word “writing” may be deleted.

(7) The heading of Chapter VI reads as “PROCEDURE AFTER CONCLUSION OF INVESTIGATION”. The Law Commission **recommends** that the above words should be substituted by the words “PROCEDURE AFTER CONCLUSION OF INQUIRY”.

(8) Section 16(1)(b) provides, that in the case of a complaint, the report of the Council, which is in writing shall be communicated along with the findings and recommendations to (i) the complainant; and (ii) the Judge concerned; (iii) the President. According to the judgments of the Supreme Court in Justice V. Ramaswami’s cases referred to elaborately in this Report, the Judge is not entitled to a copy of the Report till the original Report is submitted by the Council to the Speaker/Chairman. (Of course, such a question would arise only if the findings warrant removal).

The Law Commission therefore **recommends** that in sec 16(1)(b) of the two clauses “(i) the complainant” and the words “and (ii) the Judge concerned” be deleted and clause (iii) be designated as clause (i).

(9) Section 16(2), which is again part of the complaint procedure, states that the President on receipt of the recommendation under sub section (2) is satisfied that (a) no allegation made in the complaint have or has been substantiated either wholly or partly, against the concerned Judge, he shall close the case and no further action shall be taken against the Judge.

In our view while it is correct that in a complaint procedure, the Council should submit its Report to the President, inasmuch as this is not a Report prepared pursuant to any reference by the Speaker or Chairman, the President, which means Executive should not be vested with a further power to be “satisfied” as stated in sub section (2) of sec 16. In our view the procedure envisaged that the President must be ‘satisfied’ requires to be modified.

It is universally accepted that the Executive should have no say in the matter of a disciplinary action taken against a Judge. This is also clear from the discussion in the Report of the Joint Committee of Parliament which preceded the 1968 Act, to which we have referred elaborately, where it was unanimously accepted by all the distinguished Members of the Joint Committee, as well as those who gave evidence, that the Executive should be kept out of the procedure relating to disciplinary action against Judges. In fact, even in the reference procedure, if the Judicial Council comes to the conclusion that the allegations are not proved, the matter ends there and the Parliamentary procedure does not start and the Speaker or the Chairman, in such a case, has to simply drop the motion. That was what the Supreme Court decided in the cases of Justice V. Ramaswami.

The Law Commission, therefore, **recommends** that sec 16(2)(a) be substituted by the following provision:

“If the Council, in its Report, has come to the conclusion that no charges have been proved either wholly or partially, against the concerned Judge, the President shall close the case and no further action shall be taken against the Judge and the Judge and the complainant shall be informed accordingly.”

(10) Section 16(2)(b) uses the words “a prima facie case has been made out by the Council against the Judge, then he (President) shall cause the findings of the Council along with the accompanying materials to be laid before the Houses of the Parliament.”

According to the normal scheme of an investigation and an inquiry, the position is that if the Council finds a prima facie case after making preliminary investigation, it will frame charges and then conduct an inquiry. In the inquiry, the Council gives definite and clear findings that the charges have not been made out or that they have been made out. Therefore, there is no question, even in a complaint procedure, of “a prima facie case has been made”.

The Law Commission, therefore, **recommends** sub clause (b) of sec 16(2) to be substituted by the following sub section:

“If the Council, in its Report, has come to the conclusion that the charges are proved and recommends that the charges warrant removal, then the President

shall cause the Report and the recommendation of the Council, along with the accompanying materials, to be laid before both House of Parliament.”

Sub section (3) of sec 16 contemplates that in the case of a Report under sub section (2) of sec 16, Government shall move a motion in either House. Though in the case of a reference procedure, a Motion is moved by the Members of the Houses, the question arises whether in the case of a complaint procedure, where the Council has recommended that the charges are proved and warrant removal, the Government can be empowered to move a motion in Parliament.

We have referred to considerable literature that normally the Executive should not be empowered to bring a motion in the House and that such a prerogative should vest in the legislators. However, in a situation where there is already a Report of a Judicial Council consisting of Judges, finding that charges are proved and they warrant removal, we are of the view that Government moving a motion in either House of Parliament under sec 16(3), would not impinge upon the independence of the judiciary.

The Law Commission, therefore, **recommends** changes in sec 16(1)(b) as stated earlier and also substitution of sections 16(2)(a) and 16(2)(b) by new provisions as stated above.

(11) Section 17 deals with disposal of motion on reference of the Speaker or Chairman. Section 17(1) requires the Council to forward its findings to the Speaker or the Chairman. The sub section does not refer to the recommendation of the Council to be submitted to the Speaker/Chairman.

The Law Commission **recommends** that sec 17(1) be amended appropriately to state that the Judicial Council shall forward its findings and recommendations for removal, if any, to the Speaker or Chairman.

(No doubt, we have earlier stated that in the case of reference procedure, the Council cannot recommend that the charges which have been proved, warrant minor measures. Such a question can arise only in a complaint procedure with the further difference that where minor measures are proposed, the Council will be the final authority and the recommendation need not be submitted to the Speaker or Chairman).

In a reference procedure the question of a recommendation arises only if the charges which are proved warrant removal. We have already pointed out that it is not open to either of the Houses to impose minor measures. They can only say whether they are accepting the recommendation of the Council for removal or not. The Parliament need not give any reasons even if it does not accept the Report of the Council and comes to the conclusion that no removal order need be passed.

However, the Law Commission **recommends** that sec 17(1) must be amended to provide that the Judicial Council shall forward its findings and its recommendations for removal of a Judge, if any, to the Speaker or the Chairman.

(12) The marginal note of sec 18 uses the words “Impeachment”. In our Report, we have pointed out that there is a difference between impeachment and removal by address of the Houses to the Head of the State. Further, we have pointed out that the Constitution uses the word “Impeachment” only in the case of President of India while it uses the words “by a resolution” so far as the Vice-President, Deputy Chairman of the Council of States and Speaker of the House of Representatives are concerned. So far as Judges of the Supreme Court and High Court are concerned, the Constitution uses the words “address of the Houses for removal”.

Hence the Law Commission **recommends** that the marginal note to sec 18 which uses the word “Impeachment” be substituted by the words “Address by the Houses”.

## CHAPTER XXI

### **Summary of Recommendations and Views of the Law Commission on the draft Judges (Inquiry) Bill 2005**

1. Judicial independence is not absolute. Judicial independence and accountability are two sides of the same coin. The present proposals in the Bill of 2005 together with our recommendations for enabling the Judicial Council to impose ‘minor measures’ including stoppage of assignment of judicial work are constitutional. They ought not to be viewed as an encroachment on Judicial Independence by the Executive or by the Legislature. (p.341)
2. S.3(1) of the Bill of 2005 which provides for the establishment of a National Judicial Council consisting only of judges is constitutionally valid and is consistent with the concept of independence of judiciary, judicial accountability and doctrine of separation of powers. (p.363)
3. The Law Commission is of the opinion that the Bill takes the correct stand that the Chief Justice of India, for good reasons, should not be subjected to the ‘complaint procedure’. Further, the provision in this behalf is neither discriminatory nor arbitrary inasmuch as the position of the Chief Justice of India as the administrative head of the Judiciary is special and is not the same as other Judges of the Supreme Court or Chief Justices of the High Courts. (pp.365-366)
4. Section 2(d) be substituted by the following definition:  
“(d) ‘Judge’ means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of a High Court and also the Chief Justice of India for purposes of the reference procedure but shall not include the Chief Justice of India for the purposes of the complaint procedure;

We further recommend that there should be a separate definition of the words ‘complaint procedure’ and ‘reference procedure’ as follows:

“complaint procedure” means a procedure which is initiated by way of a complaint to the Council under section 5;

“reference procedure” means a procedure which is initiated by way of a motion for removal which is referred by the Speaker or Chairman to the Council. (pp.366- 367)

5(a) A second proviso to section 3(2) should be inserted to the following effect:

“Provided further that where under a complaint is made by any person or a reference is made by the Speaker or Chairman against a Judge of the Supreme Court before his elevation as Chief Justice of India, he shall not be a Member of the Council and the President shall nominate the next senior most Judge of the Supreme Court as the Chairperson and also another Judge of the Supreme Court next in the seniority to be a Member of the Council.” (p.368)

(b) The Bill of 2005 should be amended to provide that if a complaint has been filed against a Supreme Court Judge, the same can be continued even after the Supreme Court Judge is elevated as Chief Justice of India. An Explanation has to be added to this effect to Sec. 5 below sub-section (1) of section 5 in the Bill of 2005. A similar Explanation should be added in sub-section (1) of Sec. 5 to provide for the continuance or initiation of the enquiry against a Judge or the Chief Justice of the High Court when he is elevated to the Supreme Court in respect of acts of misbehaviour during the period when he was a Judge of the High Court. (pp.368-369)

6. A special provision be inserted in the Bill of 2005 to enable the Judicial Council to impose ‘minor measures’, in the complaint procedure. The omission in the Bill of 2005, in this behalf, needs to be rectified by providing, in the case of a complaint procedure, for the imposition of following minor measures by the National Judicial Council, viz.,

- (1) Issuing advisories;
- (2) Issuing warnings;

- (3) Withdrawal of judicial work pending and future for a limited time;
- (4) Request that the judge may voluntarily retire;
- (5) Censure or admonition, public or private. (p.379-380)

7. The Bill of 2005 must, as stated in recommendation No. 6 above, be suitably modified to provide for 'minor measures' to be imposed by the Judicial Council itself. Such a law can be made under the latter part of Art. 124 (5) and in any event, under Art. 246 read with Entry 11- A of List III of Schedule VII of the Constitution of India which refers to the subject of 'Administration of Justice'. Introducing a provision permitting 'minor measures' to be imposed by the Judicial Council will be valid and will not be unconstitutional. (pp.400-401)

8. It is not permissible for the Judicial Council to recommend imposition of minor measures on a reference by the Speaker/Chairman of either House of Parliament. However, if there is, simultaneously, a complaint on the same facts before the Judicial Council, in addition to a reference, the Judicial Council can itself impose such 'minor measures' while disposing of the complaint. However, while returning the reference to the House it cannot recommend any minor measure to be passed by the House. (p.403)

9. No amendment of the Constitution is necessary if a law is made by Parliament enabling the Judicial Council to impose 'minor measures' as part of an in-house mechanism. (p.405)

10. The procedure in the Judges (Inquiry) Act, 1968 and in the proposed Bill of 2005 enabling investigation/inquiry by the Judicial Council by way of a complaint procedure, in addition to a reference procedure, is not an infringement of the Parliamentary process contained in Art 124(4) and does not amount to impermissible delegation and is valid. (p.407)

11. The Judicial Council when it investigates into allegations against a Supreme Court Judge (in the complaint or reference procedures) or against the Chief Justice of India (under a reference) should not include the two senior most Chief Justices of the High Courts. In such an event, the Judicial Council should comprise the Chief Justice of India and four senior most

Judges of the Supreme Court. The provisions of the Bill of 2005 have to be suitably amended to provide for this contingency. (p.408-409)

12. Inasmuch as the Judicial Council of five Judges must collectively take decisions, the procedure where a Supreme Court judge or Chief Justice of a High Court recuses himself or herself, is that the next person in seniority must fill the vacant slot. It is necessary to make a provision in this behalf by appropriate amendment to the Bill of 2005 itself. It is not desirable to leave such a 'recusal' provision to the Rules. (pp.409-410)

13. The following further amendments are required to be made to the Bill of 2005. (pp. 413-417).

(i) In Sec. 2 the following definitions of 'investigation' and 'inquiry' may be inserted:

'investigation' means 'preliminary investigation';

'inquiry' means 'inquiry for proof'.

(ii) In sec 3(1), the words 'to investigate' be substituted by the words 'to investigate and inquire'; in sec 3(2), the word 'investigating' shall be substituted by the words 'investigating or inquiring'; in sec 3(3), the word 'investigation' shall be substituted by the words 'investigation and inquiry'.

(iii) In sec 6 for the word 'investigation', the words 'investigation and inquiry' be substituted in the body as well as in the marginal heading to the section.

(iv) In sec 7, the marginal heading should read "Verification and preliminary investigation of complaints"; in the body of sec 7(1) for the word 'verification', the words 'verification or where necessary, such preliminary investigation as it deems appropriate' be substituted; in the body of sec 7(1) (b), for the word 'investigating' the word 'inquiry' be substituted; in the body of sec 7(2), for the word 'verification', the words 'verification or where necessary, preliminary investigation as it deems appropriate' be substituted.

(v) Marginal heading to sec 8 is correct when it speaks of 'inquiries'. But, sec 8(1) has to be reframed as follows:

“8(1): If after the verification and preliminary investigation under section 7 in respect of a complaint, the Council proposes to conduct any inquiry, it shall frame definite charges against the Judge on the basis of which the inquiry is proposed to be held”.

(vi) In section 10 for ‘section 6’ substitute ‘section 7’ and the word ‘investigation’ be substituted by the word ‘inquiry’.

(vii) So far as Chapter V is concerned, the heading should be ‘Procedure for Inquiry’.

(viii) In sec 12(1), 12(2) and 12(2) proviso, and in section 13, for the words ‘investigation’ and ‘investigating’, the words ‘inquiry’ and ‘inquiring’ be respectively substituted.

(ix) In sec. 15(1) and 15 (2), for the word ‘investigation’, the words ‘preliminary investigation or inquiry’ be substituted.

(x) Heading of Ch. VI should be ‘Procedure after conclusion of Inquiry’

(xi) In sec 16(1), sec 17(1), the word ‘investigation’ be substituted by the word ‘inquiry’. (In regard to s. 16 there are some more amendments which will be discussed under para 27 hereinbelow)

(xii) In sec 19(1), for the words ‘or conducting any investigation’, the words ‘or conducting any preliminary investigation or inquiry’ shall be substituted.

(xiii) In sec. 21, for the word ‘investigation’, the words ‘preliminary investigation and inquiry’ be substituted.

(xiv) The whole of s.22 comprising sub-sections (1) to (3) should be shifted to sec 7 as subsections (3) to (5) and in the body of sub-section (3) of sec. 7 (as now proposed) the words ‘constituting an investigating committee’ can be retained but the words ‘for the purpose of conducting investigation into the matter’ have to be modified as ‘for the purpose of conducting preliminary

investigation and for finding whether definite charges require to be framed for conducting an inquiry into the matter'. In the present proposal for inserting sec 7(4) as stated above, for the word 'investigation', the words 'preliminary investigation' be substituted. [As regards the marginal heading of section 7 we have already suggested the change in sub-para (iv) above]

(xv) In sec. 23, for the word 'investigation', the words 'preliminary investigation and inquiry' be substituted.

(xvi) In sec 24, in the marginal heading, the words 'Investigation by the Council' be substituted by the words 'Investigation and Inquiry by the Council'. In the body of sec 24, for the words 'Any investigation' the words 'Any preliminary investigation, or inquiry' be substituted.

(xvii) In sec 25, in the marginal heading and in the body of the section, the word 'investigation' be substituted by the words 'complaint, preliminary investigation and inquiry'.

(xviii) In sec 26, for the word 'investigation', the words 'preliminary investigation or inquiry' be substituted.

(xix) In sec 27, the word 'investigation' in the marginal heading and in the body of the section, be substituted by the words 'preliminary investigation and inquiry'.

14. Section 22 of the Bill of 2005 which permits the Judicial Council itself to conduct an investigation or appoint a Committee consisting of its Members to conduct the investigation is constitutionally valid. (p.418)

15. The following words of sec 22, "it may designate one or more of its members who shall constitute an investigating committee for the purpose of conducting investigation into the matter" shall be substituted by the words "it may constitute an investigating committee comprising one or more of its members for the purpose of conducting investigation into the matter". (p.418)

16. Section 7(2) of the Bill of 2005 does provide an opportunity to the Judge to submit his 'comments' but it gives a discretion to the Council to call for comments 'if it deems it necessary'. This must be made obligatory. For the word 'may' in sec 7 (2), the word 'shall' should be substituted and the words 'if it deems it necessary so to do', should be deleted. (pp. 421-422)

17. It is permissible for Parliament to make a law to provide that the Judicial Council could, as an interim measure, recommend withdrawal of judicial work from a judge of the Supreme Court or High Court, for the purpose of an effective investigation and inquiry. The Commission is of the opinion that S.21 is constitutionally valid. (p. 430)

18. Appropriate sanctions should be provided against frivolous and vexatious complaints. The following provisions be inserted in the Bill of 2005 by way of a separate section:

“(1) Any person who makes a complaint which is either frivolous or vexatious or is not in good faith, against a Judge with intent to cause harassment to the Judge against whom the complaint is filed, shall be punishable.

(2) When any offence under subsection (1) is committed, the Judicial Council may take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily, so far as may be, in accordance with the procedure specified for summary trials under the Code of Criminal Procedure, 1973 and if such offender is found guilty of committing the offence, sentence him to imprisonment for a term which may extend to one year and also to fine which may extend to rupees twenty five thousand.” (pp. 432-433)

19. Section 5 (2) of the Bill of 2005 be amended to provide that the complaint must be in the form prescribed in the rules, must give full particulars of the 'misbehaviour or incapacity' which is the subject matter of the allegation and must contain a verification as to which of the allegations are within the personal knowledge of the complainant and which are based on information received and from whom. It must also contain a statement that the

complainant is aware that if the allegations in the complaint are found to be frivolous or vexatious or not in good faith, the complainant is liable to be summarily punished for an offence under the Act. (p. 433-434)

There is no need to require an affidavit to accompany the complaint inasmuch as every affidavit has to be sworn before an advocate or notary or other authorized person and if such a procedure is followed, the confidentiality of the allegations cannot be fully assured. (p.434)

20. There should be a broad definition of 'misbehaviour' in the Bill of 2005 as stated in Chapter XX (item XIX). It should include breach of the Code of Conduct. So far as 'incapacity' is concerned, it should be further qualified as one which is or is likely to be of a permanent character which does not enable him to perform his judicial functions properly. Such a definition be introduced in S.2 of the Bill of 2005. (p. 441)

21. The Bill of 2005 should make appropriate provisions that enable the screening and weeding out of complaints that relate to the merits of a pending or decided case except where the complaint contains allegations of misbehaviour in relation to that very case such as bribery etc., in which event such complaint will have to be nevertheless examined. (p.443)

22. A 'whistleblower' provision must be provided in the Bill of 2005. Further, there should also be a provision that in case any 'reprisal' against the complainant is brought to the notice of the Judicial Council, the Judicial Council may take such action as it may deem fit in public interest. (p. 445)

23. There should be a provision in the Bill of 2005 that every complainant and every person including a witness and a lawyer who participates in the investigation and inquiry, whether or not he seeks confidentiality about his name, must undertake to the Judicial Council that he shall not reveal his own name, the name of the Judge complained against, the contents of the complaint or any of the documents or proceedings to anybody else including the media without the prior written approval of the Judicial Council and it will be for the Judicial Council to decide when and to what extent the contents of the complaint shall be disclosed to the public. It must be made

clear that this is notwithstanding anything contained in the Right to Information Act 2005. Once the enquiry is completed before the Judicial Council, if 'minor measures' are imposed on a complaint procedure, the same can be published by the Judicial Council with the qualification that in the case of 'private censure or admonition', the name of the complainant and of the Judge concerned shall not be published. In the case of recommendation for removal, since the report is to be submitted to the Speaker/Chairman, it will be for the Speaker/Chairman to decide when such report can be published. (pp. 448-449)

24. S.19 of the Bill of 2005 should be amended to provide that the violation of the confidentiality provisions abovementioned would be an offence and that procedure for punishing such offence would be as prescribed under s.20 of the Bill of 2005. (p. 449)

25. The Bill of 2005 be amended to provide an appeal to the Supreme Court by a Judge against:

(1) orders of removal passed by the President, whether the proceedings started on a complaint or a reference;

(2) other final orders passed by the Council in regard to 'minor measures' passed on the basis of complaint (p.455)

26. However, it needs to be clarified that this provision of a right of appeal to the Supreme Court is available only to the judge who is aggrieved by an order passed against him either for removal or where it is a final order of the Judicial Council imposing minor measures. As regards the complainant it is not necessary to provide any right of appeal and if he wants to pursue the matter further, he may have to resort to the remedy under Article 32 or 226 of the Constitution. (p.456)

27. 'Proof' must be 'proof beyond reasonable doubt' in all cases as regards all types of charges which come before the Judicial Council. In sec. 16(1)(a) and (b), the words 'substantiated either wholly or partially' to be substituted

by the word 'proved wholly or partially' along with an Explanation that 'proved' means 'proved beyond reasonable doubt.' (p.461)

28. Even though the proceedings before the Judicial Council are quasi-criminal, they need not be started de novo where among the Members of the Judicial Council, one who is a Judge of the Supreme Court is elevated as Chief Justice of India or where a Chief Justice of a High Court who is a Member is elevated as Judge of the Supreme Court of India or where a vacancy arises due to natural causes or retirement or recusal or where any of the Members is not available (say) due to sickness or other causes and that vacancy is otherwise filled. The Chief Justice of India must be entitled to make appropriate arrangements by way of filling up the vacancy and the proceedings must be continued from the stage where it stopped without the need to start them de novo. A provision on the above lines with a further clarification that proceedings need not be started de novo, in the case of contingencies mentioned above, may have to be incorporated in the Bill of 2005. (pp.462-463)

29. The Bill of 2005 should include a provision to make it clear that where a Judge of the High Court or Supreme Court who is under investigation or inquiry before the Judicial Council, reaches the age of superannuation during the pendency of the said proceedings, the proceedings can be continued for the purpose of imposing the minor measures such as censure or admonition, public or private. (pp.464-465)

30. The Bill of 2005 should provide that where the recommendation of the Judicial Council is accepted by the Houses and the removal order is passed by the President, the judge should be barred from holding any public or judicial, quasi-judicial office nor can he have chamber practice or be an arbitrator in arbitration proceedings. (p.465)

31. Section 28(1) refers to the Code of Conduct. The provision must say that it should be published in the Gazette of India. Till such time as the Judicial Council comes to be constituted under the proposed Bill of 2005 and such Judicial Council publishes a Code of Conduct, the Bill must provide that the 'Restatement of Values of Judicial Life' adopted by the Supreme Court in its

Resolution dated May 7<sup>th</sup>, 1997 shall be treated as the Code of Conduct for the purposes of the proposed law. It should also contain a provision that the Code of Conduct could be modified from time to time by the Judicial Council by amendments that could be notified in the Official Gazette. (p.467)

32. The Bill of 2005 should be made applicable to complaints relating to 'misbehaviour' which occurred before the commencement of the proposed Act but restricted to a period of two years before the commencement of the Act provided the Judge has not retired by the date the complaint is filed before the Judicial Council. (p.468)

33. The following further amendments be made to the Bill of 2005 (pp.468-477)

(1) In Section 2(b) the inverted commas for the words should clearly be indicated to read as "Code of Conduct". In the same sub-section, "section 32" must be substituted by "section 28".

(2) The heading of Chapter II "MACHINERY FOR INVESTIGATION" should be substituted by the words "MACHINERY FOR PRELIMINARY INVESTIGATION AND INQUIRY".

(3) Section 10 shall be subdivided into two parts and the section 10 as proposed in the draft Bill should be substituted by following section:

"(1) On receipt of a reference from the Speaker or the Chairman under sub-section (2) of section 9, the Council shall, notwithstanding anything contained in section 7, frame definite charges against the Judge on the basis of which inquiry is proposed to be held.

(2) Charges framed under sub-section (1) together with statement of grounds on which each charges is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified by the Counsel."

(4) In Section 11 after subsection (3) there must be a separate sub section to the following effect:

“(4) If the Judge agrees to undergo medical examination considered necessary by the Medical Board, the said Board may permit him to produce such other medical reports or opinions of experts as the Judge deems it necessary to prove that he does not suffer from any physical or mental incapacity, and thereafter the Medical Board shall submit a report to the Council with its findings based upon the medical examination conducted at the instance of the Board as well as the material produced by the Judge as aforesaid.”

Further sub sec (4) of sec 11 should be re-numbered as sub-section (5) and should be substituted by the following sub section:

“(5) The Council may, after considering the written statement of the Judge, the medical report submitted by the Medical Board and the material submitted by the Judge before the Medical Board, if any, amend the charges framed under subsection (1) of sec 8 or sec 10, as the case may be, and in such a case, the Judge shall be given a reasonable opportunity of presenting a fresh written statement of defence”.

(5) The heading of Chapter V which reads as “PROCEDURE FOR INVESTIGATION” should be substituted by the heading “PROCEDURE FOR INQUIRY”.

(6) In the proviso to sec 12(2), the word “may” is repeated twice; the word “may” after the word “writing” may be deleted.

(7) The heading of Chapter VI which reads as “PROCEDURE AFTER CONCLUSION OF INVESTIGATION” be substituted by the heading “PROCEDURE AFTER CONCLUSION OF INQUIRY”.

(8) In sec 16(1)(b) of the two clauses “(i) the complainant” and the words “and (ii) the Judge concerned” be deleted and ‘clause (iii)’ be designated as ‘clause (i)’.

(9) Sec 16(2)(a) be substituted by the following provision:  
“If the Council, in its Report, has come to the conclusion that no charges have been proved either wholly or partially, against the concerned Judge, the President shall close the case and no further action shall be taken against the Judge and the Judge and the complainant shall be informed accordingly.”

(10) Section 16(2)(b) be substituted by the following sub section:  
“If the Council, in its Report, has come to the conclusion that the charges are proved and recommends that the charges warrant removal, then the President shall cause the Report and the recommendation of the Council, along with the accompanying materials, to be laid before both House of Parliament.”

(11) Sec 17(1) be amended appropriately to state that the Judicial Council shall forward its findings and recommendations for removal, if any, to the Speaker or Chairman. Sec 17(1) must be amended to provide that the Judicial Council shall forward its findings and its recommendations for removal of a Judge, if any, to the Speaker or the Chairman.

(12) The marginal note to sec 18 which uses the word “Impeachment” be substituted by the words “address by the Houses”.

We place on record our appreciation for the extensive research and help rendered by Dr. S. Muralidhar, Part-time Member, in the preparation of this Report and in particular in regard to Chapters II, XX and XXI.

We recommend accordingly.

(Justice M. Jagannadha Rao)  
Chairman

(Dr. K.N. Chaturvedi)  
Member-Secretary

Dated: 31<sup>st</sup> January, 2006

**ANNEXURE - I**

**This Annexure is a draft of the Bill which has been referred to the Law Commission by the Government of India for its examination and suggestions. The recommendations of the Law Commission for making necessary changes in this draft Bill are contained in Chapter XXI of this report.**

## ANNEXURE-I

## THE JUDGES (INQUIRY) BILL, 2005

A

## BILL

*to regulate the procedure for the investigation and proof of the misbehavior or incapacity of a judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters connected therewith.*

BE it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:-

## CHAPTER I

## PRELIMINARY

1.(1) This Act may be called the Judges (Inquiry) Act, 2005. Short title and commencement.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In this Act, unless the context otherwise requires,- Definitions.

(a) "Chairman" means the Chairman of the Council of States;

(b) Code of Conduct " means the guidelines issued by the Council under sub-section (1) of section 32;

(c) "Council" means the National Judicial Council established under section 3 ;

(d) "Judge" means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of a High Court ;

(e) "prescribed" means prescribed by rules made under this Act ;

(f) "Speaker" means the Speaker of the House of the People.

## CHAPTER II

### MACHINERY FOR INVESTIGATION

3. (1) As from the commencement of this Act there shall be established to investigate into any matter involved in, or arising from, or connected with, any allegation of misbehavior or incapacity made in a complaint against a Judge of the Supreme Court or a High Court as the case may be, a council to be called the National Judicial Council consisting of the following:-

Establishment of  
National Judicial  
Council.

(a) Chief Justice of India - Chairperson

(b) Two senior most Judges of the Supreme Court, to be nominated by Chief Justice of India - Members;

(c) Two senior most Chief Justices of the High Courts, to be nominated by Chief Justice of India - Members:

(2) Where the complaint is against a Judge who is a Member of the Council, then notwithstanding anything contained in sub-section (1) the Chief

Justice of India shall nominate the next senior most Judge of the Supreme Court or the next senior most Chief Justice of a High Court, as the case may be, as a Member for the purposes of investigating into the complaint against the said Judge:

Provided that where a reference is received from the Speaker or the Chairman and the complaint is against the Chief Justice of India, then the Chief Justice of India shall not take part in the proceedings of the Council and the President shall nominate the next senior-most judge of the Supreme Court as the Chairperson and also another Judge of the Supreme Court next in the seniority to be the Member of the Council.

(3) The Member of the Council so appointed under sub-section (2) shall cease to be a Member thereof on the conclusion of the investigation referred to in that sub-section.

4. (1) The Council shall, for the purpose of assisting it in the discharge of its functions (including verification and inquiries in respect of complaints) under this Act, appoint a Secretary and such other officers and employees as the President may determine, from time to time, in consultation with the Council.

Staff of the  
Council.

(2) Without prejudice to the provisions of sub-section (1), the Council may, for the purpose of dealing with any complaints or any classes of complaints, secure—

- (a) the services of any officer or employee of investigating agency or the Central Government or a State Government with the concurrence of that Government; or
- (b) the services of any other person or agency.

(3) The terms and conditions of service of the officers and employees referred to in sub-section (1) and of the officers, employees, agencies and persons referred to in sub-section (2) (including such special conditions as may be considered necessary for enabling them to act without fear in the discharge of their functions) shall be such as the President may determine,

from time to time, in consultation with the Council.

(4) In the discharge of their functions under this Act, the officers and employees referred to in sub-section (1) and the officers, employees, agencies, and persons referred to in sub-section (2) shall be subject to the exclusive administrative control and direction of the Council.

5. (1) Any person may make a complaint in writing involving allegation of misbehavior or incapacity in respect of a Judge to the Council. Complaints.

(2) The complaint under subsection (1) shall be in the prescribed form and shall set forth particulars of the misbehavior or incapacity which is the subject matter of allegation and shall be accompanied by an affidavit in support of such particulars.

(3) Notwithstanding anything contained in subsection (1) the Council may entertain any complaint from any other source.

6. The Council may also conduct investigation into any act or conduct of any person other than the Judge concerned in so far as it considers necessary so to do for the purpose of its investigation into any such complaint.

Power of Council to conduct investigation into the complaint of any other person in certain cases.

Provided that the Council shall give such person a reasonable opportunity of being heard and to produce evidence in his defence.

7. (1) If the Council is satisfied, after considering the complaint and after making such verification as it deems appropriate,—

Preliminary scrutiny of complaints by Council.

(a) that the complaint is frivolous or vexatious or is not made in good faith; or

(b) that there are not sufficient grounds for investigating into the complaint,

it shall dismiss the complaint after recording its reasons therefor and communicate the same to the complainant.

(2) The procedure for verification in respect of a complaint under sub-section (1) shall be such as the Council deems appropriate in the circumstances of the case and in particular the Council may, if it deems it necessary so to do, call for the comments of the Judge concerned.

8.(1) If after the consideration and verification under section 6 in respect of a complaint, the Council proposes to conduct any investigation, it shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held.

Procedure in respect of inquiries.

(2) Charges framed under sub-section (1) together with statement of grounds on which each such charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified by the Council.

### CHAPTER III

#### PROCEDURE ON RECEIPT OF MOTION FOR REMOVAL FROM THE SPEAKER OR CHAIRMAN

9. (1) If a notice is given of a motion for presenting an address to the President praying for removal of a Judge signed-

Notice of motion for presenting an address to the President for removal of a Judge.

(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;

(b) in the case of a notice given in the Council of States, by not less than fifty members of that House,

then the Speaker or as the case may be the Chairman may after consulting such persons, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

(2) If the motion referred to in sub-section (1) is admitted, the Speaker or the Chairman as the case may be, shall keep the motion pending and refer the allegations on the basis of which the motion is based to

the Council:

Provided that where notices of motion referred to in sub-section (1) are given on the same day on both the Houses of Parliament, no reference shall be made unless the motion shall be admitted in both Houses and where such motion has been admitted in both Houses, a reference shall be made jointly by the Speaker and the Chairman:

Provided further that where notices of the motion as aforesaid are given in the Houses of Parliament on different dates, the notice that has given later shall stand rejected.

10. On receipt of a reference from the Speaker or the Chairman under sub-section (2) of section 9, the Council shall, notwithstanding anything contained in section 6, frame definite charges against the judge on the basis of which investigation is proposed to be held and proceed accordingly.

Council to frame charges against the judge.

#### CHAPTER IV

#### PROCEDURE IN CASE OF PHYSICAL OR MENTAL INCAPACITY OF A JUDGE.

11.(1) Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Council may arrange for the medical examination of the Judge by such Medical Board as may be appointed for the purpose and the Judge shall submit himself to such medical examination within the time specified in this behalf by the Council.

Medical Examination of the Judge

(2) The Medical Board shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the Council stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

(3) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, it shall submit a report to the Council stating therein the examination which the Judge has refused to undergo,

and the Council may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged in the motion referred to in sub-section(1).

(4) The Council may, after considering the written statement of the Judge or the medical report, if any, amend the charges framed under sub-section (1) of section 8 and section 10 and in such a case, the Judge shall be given a reasonable opportunity of presenting a fresh written statement of defence.

## CHAPTER V

### PROCEDURE FOR INVESTIGATION

12. (1) Every such investigation shall be conducted in camera by the Chairperson and the Members sitting jointly.

Investigation to be conducted in camera.

(2) The Council shall hold every such investigation as expeditiously as possible and in any case complete the investigation within a period of six months from the date of receipt of the complaint:

Provided that the Council may for reasons to be recorded in writing may complete the investigation within a further period of six months.

13. Save as aforesaid the Council shall have power to regulate its own procedure in making the investigation and shall give reasonable opportunity to the Judge of cross examining witnesses, adducing evidence and of being heard in his defence.

Council to have power to regulate its own procedure.

14. The Central Government may, if requested by the Council, appoint an advocate to conduct the case against the Judge.

Central Government to appoint an advocate to conduct the cases against the Judge.

15. (1) If the Council has reason to believe that any documents which, in its opinion, will be useful for, or relevant to, any investigation under this Act, are secreted in any place, it may authorise any officer subordinate to it, or any officer of an investigating agency referred to in sub-section (2) of section 4, to

Search and seizure.

search for and to seize such documents.

(2) If the Council is satisfied that any document seized under sub-section (1) would be evidence for the purpose of any investigation under this Act and that it would be necessary to retain the document in its custody, it may so retain the said document till the completion of such investigation.

2 of 1974.

(3) The provisions of the Code of Criminal Procedure, 1973, relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if, for the word "Magistrate", wherever it occurs, the words "Council or any officer authorised by it" were substituted.

## CHAPTER VI

### PROCEDURE AFTER CONCLUSION OF INVESTIGATION

16. (1) If, after investigation in respect of a complaint, the Council is satisfied that—

Disposal of complaint and follow up action.

(a) no allegation made in the complaint have or has been substantiated either wholly or partly, it shall by report in writing communicate its findings and recommendations to the President accordingly.

(b) all or any of the allegations made in the complaint have or has been substantiated either wholly or partly, it shall by report in writing, communicate its findings and recommendations to —

(i) the complainant ; and

(ii) the judge concerned;

(iii) the President .

(2) If the the President on receipt of recommendation under sub-section (2) is satisfied that—

(a) no allegation made in the complaint have or has been substantiated either wholly or partly, against the concerned Judge, he shall close the case and no further action shall be taken against the Judge; or

(b) a prima facie case has been made out by the Council against the Judge, then he shall cause the findings of the Council along with the accompanying materials to be laid before both Houses of Parliament.

(3) On laying of the advice of the Council along with the accompanying material under sub-section (2) the Government shall move a motion in either House of Parliament for presenting an address to the President praying for the removal of the Judge.

17. (1) Notwithstanding anything contained in sub-section (1) of section 16, where the investigation was initiated on a reference from the Speaker or the Chairman, as the case may be, under section 8, then the Council shall forward its findings to the Speaker or the Chairman.

Disposal of motion on reference from the Speaker or Chairman.

(2) If the report of the Council contains a finding that the Judge is not guilty of any misbehavior or does not suffer from any incapacity, then no further steps shall be taken in either House of Parliament in relation to the report and the motion pending in the House or the Houses of Parliament shall not be proceeded with.

(3) If the report of the Council contains a finding that the Judge is guilty of any misbehavior or suffers from any incapacity then the motion referred to in sub-section (1) of section 8, shall together with the report of the Council, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

18. If the motion referred to in sub-section (3) of section 16 or sub-section (3) of section 17, is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 of the Constitution or, as the case may be, in accordance with the that clause read with article 218 of the Constitution, then the misbehavior or incapacity of the Judge shall be deemed to have been proved and an express address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

Impeachment.

## CHAPTER VII

## OFFENCES AND PENALTIES

19. (1) Whoever intentionally offers any insult, or causes any interruption, to the Council while the Council or any of its Members is making any verification or conducting any investigation under this Act, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Intentional insult or interruption to Council.

(2) The provisions of sub-section (2) of section 199 of the Code of Criminal Procedure 1973 shall apply in relation to an offence referred to in sub-section (1) as they apply in relation to an offence referred to in sub-section (2) of the said section, subject to the modification that no complaint in respect of such offence shall be made by the Public Prosecutor except with the previous sanction of the Council.

20. (1) When any such offence as is described in sub-section (1) of section 19 is committed in the view or presence of the Council, the Council may cause the offender to be detained in custody and may at any time on the same day take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section try such offender summarily so far as may be in accordance with the procedure specified for summary trials under the Code of Criminal Procedure 1973 and sentence him to simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees or with both.

Power of Council to try certain cases.

2 of 1974.

(2) In every case tried under this section the Council shall record the facts constituting the offence with the statement if any made by the offender as well as the finding and the sentence.

(3) Any person convicted on a trial held under this section may appeal to the Supreme Court.

2 of 1974.

(4) The provisions of this section shall have effect notwithstanding anything contained the Code of Criminal Procedure 1973.

21. During the pendency of the investigation or impeachment the Council may recommend stoppage of assigning judicial work to the Judge concerned if it appears to the Council that it is necessary in the interest of fair and impartial investigation.

Stoppage of assigning judicial work in certain cases.

#### CHAPTER VIII

#### MISCELLANEOUS

22. (1) If the Council considers it expedient to do so, it may designate one or more of its Members who shall constitute an investigating committee for the purpose of conducting investigation into the matter.

Power of Council to constitute committees.

(2) The Committee shall have all the powers of the Council while conducting investigation.

(3) The Committee shall submit its report to the Council for consideration and taking a final view on the conclusions arrived at by the Committee.

23. After the commencement of investigation under this Act, no action for contempt of court in any court shall lie or shall be proceeded with in respect of the allegations, which are the subject matter of the investigation.

No action for contempt to lie in certain cases.

24. Any investigation pending before the Council will not affect the criminal liability in respect of allegations under investigation.

Investigation by the Council not to affect criminal liability.

25. All papers, documents and records of proceedings related to an investigation shall be confidential and shall not be disclosed by any person in any proceeding except as directed by the Council.

All records, documents, etc. related to investigation to be confidential.

26. No suit, prosecution or other legal proceeding shall lie against the Council or against any official or employee, agency or person engaged by the Council for the purpose of conducting investigation, in respect of any thing which is in good faith done or intended to be done.

Prosecution of action taken in good faith.

27. Investigation before the Council or its Committee shall be deemed to be a judicial proceeding within the meaning of section 193 of the Indian Penal Code.

Investigation to be judicial proceedings for the purposes of section 193 of IPC.

28. (1) The Council shall in the interests of administration of Justice issue from time to time Code of Conduct which consists of guidelines for the conduct and behavior of Judges.

Code of Conduct for Judges.

(2) The Code of Conduct issued under subsection (1) may inter alia provide the every Judge at the time of appointment as a Judge of the Supreme Court or of the High Court and thereafter annually shall give intimation of his assets and liabilities to the Chief Justice of India or the Chief Justice of the High Court as the case may be.

29. (1) There shall be constituted a Joint Committee of both Houses of Parliament in accordance with the provisions hereinafter contained for the purpose of making rules to carry out the purposes of this Act.

Constitution of Joint Committees of both Houses for making rules.

(2) The Joint Committee shall consist of fifteen members of whom ten shall be nominated by the Speaker and five shall be nominated by the Chairman.

(3) The Joint Committee shall elect its own Chairman and shall have power to regulate, its own procedure.

(4) Without prejudice to the generality of the provisions of sub-section (1), the Joint Committee may make rules to provide for the following among other matters, namely:-

(a) the manner of transmission of a motion adopted in one House to the other House of

Parliament;

(b) the manner of presentation of an address to the President for the removal of a Judge;

(c) the facilities which may be accorded to the Judge for defending himself;

(d) any other matter which has to be, or may be, provided for by rules or in respect of which provision is, in the opinion of the Joint Committee, necessary.

(5) Any rules made under this section shall not take effect until they are approved and confirmed both by the Speaker and the Chairman and are published in the Official Gazette, and such publication of the rules shall be conclusive proof that they have been duly made.

30. (1) The Judges (Inquiry) Act, 1968 is hereby repealed. Repeal and saving.

(2) Notwithstanding the repeal of the Judges (Inquiry) Act, 1968 the rules made by the Joint Committee under section 7 of the said Act shall continue to be in force till new rules are made by the Committee under this Act.

## ANNEXURE-II

## THE JUDGES (INQUIRY) ACT, 1968 (51 OF 1968)

An Act to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and for the presentation of an address by Parliament to the President and for matters connected therewith.

Be it enacted by Parliament in the Nineteenth Year of the Republic of India as follow:-

1. *Short title and commencement.* - (1) This Act may be called the Judges (Inquiry) Act, 1968.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. *Definition* - In this Act, unless the context otherwise requires, --

- (a) "Chairman" means the Chairman of the Council of States;
- (b) "Committee" means a Committee constituted under Section 3;
- (c) "Judge" means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of India and the Chief Justice of a High Court;
- (d) "Prescribed" means prescribed by rules made under this Act;
- (e) "Speaker" means the Speaker of the House of the People.

3. *Investigation into misbehaviour or incapacity of Judge by committee.* - (1) If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed, --

- (a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;
  - (b) in the case of a notice given in the Council of States, by not less than fifty members of that Council;
- then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

(2) If the motion referred to in sub-section (1) is admitted, the Speaker, or as the case may be, the Chairman shall keep the motion pending and constitute, as soon as may be, for the purpose of making an investigation, into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom --

- (a) one shall be chosen from among the Chief Justices and other Judges of the Supreme Court;

- (b) one shall be chosen from among the Chief Justices of the High Courts; and
- (c) one shall be a person who is, in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist:

Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman:

Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

(3) The Committee shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held.

(4) Such charges together with a statement of the grounds on which each such charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified in this behalf by the Committee.

(5) Where it is alleged that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Committee may arrange for the medical examination of the Judge by such Medical Board as may be, appointed for the purpose by the Speaker or, as the case may be, the Chairman or, where the Committee is constituted jointly by the Speaker and the Chairman, by both of them, for the purpose and the Judge shall submit himself to such medical examination within the time specified in this behalf by the Committee.

(6) The Medical Board shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the Committee stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

(7) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the Committee stating therein the examination which the Judge has refused to undergo, and the Committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged in the motion referred to in sub-section (1).

(8) The Committee may, after considering the written statement of the Judge and the medical report, if any, amend the charges framed under sub-section (3) and in such a case, the Judge shall be given a reasonable opportunity of presenting a fresh written statement of defence.



