

**PARLIAMENT OF INDIA**  
**RAJYA SABHA**

**DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON PERSONNEL,  
PUBLIC GRIEVANCES, LAW AND JUSTICE  
TWENTY FIRST REPORT**

**ON  
THE JUDGES (INQUIRY) BILL, 2006  
(PRESENTED TO THE RAJYA SABHA ON 17<sup>TH</sup> AUGUST 2007)  
(LAID ON THE TABLE OF THE LOK SABHA ON 17<sup>TH</sup> AUGUST, 2007)**

**RAJYA SABHA SECRETARIAT  
NEW DELHI  
AUGUST, 2007/SRAVANA, 1928 (SAKA)**

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## COMPOSITION OF THE COMMITTEE (2006-07)

(Constituted on 5<sup>th</sup> August, 2006)

1. Dr. E.M. Sudarsana Natchiappan <sup>3/4</sup> *Chairman*

### **RAJYA SABHA**

2. Dr. Radhakant Nayak
3. Dr. Abhishek Manu Singhvi
4. Shri Balavant *alias* Bal Apte
5. Shri Virendra Bhatia
6. Shri Tariq Anwar
7. Shri Ram Jethmalani
8. Dr. P.C. Alexander
9. Shri Tarlochan Singh
10. Shri Suresh Bhardwaj

### **LOK SABHA**

11. Dr. Shafiqur Rahman Barq
12. Shri Chhattar Singh Darbar
13. Shri N.Y. Hanumanthappa
14. Shri Shailendra Kumar
15. Dr. C. Krishnan
16. Shri Harin Pathak
17. Shri Dahyabhai Vallabhbhai Patel
18. Shri Varkala Radhakrishnan
19. Prof. M. Ramadass
20. Shri Vishvendra Singh
21. Shri Bhupendrasinh Solanki
22. Shri Raj Babbar
23. Shri S.K. Kharventhan
24. Shri A. Krishnaswamy
25. Shri Anirudh Prasad *alias* Sadhu Yadav
26. Shri N.S.V. Chitthan
27. Vacant
28. Vacant
29. Vacant
30. Vacant
31. Vacant

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## COMPOSITION OF THE COMMITTEE (2007-08)

(Constituted on 5<sup>th</sup> August, 2007)

1. Dr. E.M. Sudarsana Natchiappan <sup>3/4</sup> *Chairman*

### **RAJYA SABHA**

2. Dr. Radhakant Nayak
3. Dr. Abhishek Manu Singhvi
4. Shri Balavant *alias* Bal Apte
5. Shri Suresh Bhardwaj
6. Shri Virendra Bhatia
7. Shri Tariq Anwar
8. Shri Ram Jethmalani
9. Dr. P.C. Alexander
10. Shri Tarlochan Singh

### **LOK SABHA**

11. Shri Raj Babbar
12. Dr. Shafiqur Rahman Barq
13. Shri N.S.V. Chitthan
14. Shri Chhattar Singh Darbar
15. Shri N.Y. Hanumanthappa
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18. Dr. C. Krishnan
19. Shri Shailendra Kumar
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21. Shri Dahyabhai Vallabhbbhai Patel
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25. Shri Vishvendra Singh
26. Shri Anirudh Prasad *alias* Sadhu Yadav
27. Vacant
28. Vacant
29. Vacant
30. Vacant
31. Vacant

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### **SECRETARIAT**

Shri Sham Sher Singh, Joint Secretary  
Shri K.P. Singh, Joint Director  
Smt. Sasilekha Nair, Deputy Director  
Shri Vinoy Kumar Pathak, Assistant Director

(ii)

## INTRODUCTION

I, the Chairman of the Committee on Personnel, Public Grievances, Law and Justice, having been authorised by the Committee, present its Twenty first Report on the Judges (Inquiry) Bill, 2006\* . The Bill seeks to establish the National Judicial Council to undertake preliminary investigation and inquire into allegations of misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and to regulate the procedure for such investigation, inquiry and proof, and for imposing minor measures and for the presentation of an address by Parliament to the President of India and for matters connected therewith.

2. In pursuance of the rules relating to Department Related Parliamentary Standing Committee, Hon'ble Chairman, Rajya Sabha in consultation with Hon'ble Speaker, Lok Sabha referred\*\* the Bill, as introduced in the Lok Sabha on the 19<sup>th</sup> December, 2006 and pending therein, to the Committee on the 26<sup>th</sup> December, 2006 for examination and report.

3. Keeping in view the importance of the Bill, the Committee decided to issue Press Communiqué to solicit views/suggestions from interested individuals/ organisations/institutions on various provisions of the Bill. Accordingly, a Press Communiqué was issued in response to which memoranda containing suggestions were received by the Committee from the general public, persons from the legal profession, former Judges and eminent Jurists and others.

4. The Committee held preliminary discussion on the Bill in its meeting held on the 18<sup>th</sup> January, 2007. A Press Conference was subsequently addressed by the Committee on that day to elicit public opinion on the various provisions of the Bill. It further considered and heard a presentation on the Bill by the Secretary, Ministry of Law and Justice (Department of Justice) in its meeting held on the 25<sup>th</sup> January and 2<sup>nd</sup> February, 2007.

5. The Committee heard oral evidence of twenty five individuals/organisations/ institutions/ experts during the course of examination of the Bill.

6. While considering the Bill, the Committee took note of the following documents/information placed before it: —

(i) Background note on the Bill, supplied by the Government;

(ii) Memoranda received from various organisations/institutions/ individuals/experts on the provisions of the Bill; and

(iii) The comments of the Ministry of Law and Justice on the views/suggestions contained in the memoranda received from various organisations/institutions/individuals/experts on the provisions of the Bill.

7. The Committee held clause-by-clause consideration of the Bill on the 14<sup>th</sup> and 25<sup>th</sup> June, 2007.

8. The Committee adopted the Report in its two meetings held on the 24<sup>th</sup> July, and 1<sup>st</sup> August, 2007.

9. The Committee in all held fifteen sittings to deliberate upon the various provisions of the Bill *i.e.* 18<sup>th</sup> & 25<sup>th</sup> January, 2<sup>nd</sup>, 13<sup>th</sup> & 20<sup>th</sup>, February, 13<sup>th</sup> March, 11<sup>th</sup> & 12<sup>th</sup> April, 8<sup>th</sup> May, 7<sup>th</sup>, 14<sup>th</sup> & 25<sup>th</sup> June,

17<sup>th</sup> & 24<sup>th</sup> July and 1<sup>st</sup> August, 2007. Besides its above mentioned sittings in Delhi the Committee interacted with various dignitaries/State Governments *etc.* during its study visits outside Delhi in 2007.

10. For the facility of reference and convenience, the observations and recommendations of the Committee have been printed in bold letters in the body of the Report.

**NEW DELHI**

August, 2007.

**E. M. SUDARSANA NATCHIAPPAN**

Chairman

Committee on Personnel

Public Grievances, Law and Justice

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## REPORT

1. The Judges (Inquiry) Bill, 2006 (*Annexure – A*) introduced in Lok Sabha on the 19<sup>th</sup> December, 2006 seeks to establish a National Judicial Council to undertake preliminary investigation and to inquire into allegations of misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court. The Bill also seeks to regulate the procedure for such investigation, inquiry and proof and to impose minor measures and for the presentation of an address by Parliament to the President and for matters connected therewith.

2. In the light of the above, the Judges (Inquiry) Bill, 2006 was introduced\* in the Lok Sabha on the 19<sup>th</sup> December, 2006. It was referred\*\* to the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the 26<sup>th</sup> December, 2006 for examination and report.

3. That the Bill has a definite legislative purpose, is elucidated by the Statement of Objects and Reasons appended to the Bill, which states as under :-

“A suitable legislative framework is the need of the hour for empowering a judicial forum to deal with complaints against Judges of the Supreme Court and High Courts. On the basis of the recommendations made in the 195<sup>th</sup> Report of the Law Commission of India on the Judges (Inquiry) Bill, 2005, the Bill, namely the Judges (Inquiry) Bill, 2006 has been prepared.

It may be recalled that the Judges (Inquiry) Act, 1968 was enacted with a view to lay down a procedure for removal for proved misbehaviour or incapacity of Judges of the High Courts and the Supreme Court by way of address of the Houses of Parliament by the President. The Law Commission of India in its 195<sup>th</sup> Report has examined the issue of judicial accountability in the light of the law laid down by the Supreme Court in its various judgments, which relate to the interpretation of articles 121, 124 and 217 of the Constitution.”

3.1. While considering the Bill, the Committee felt the need to have vast range of discussions with legal luminaries, former Chief Justices of India and former Judges of the Supreme Court/High Courts and other stakeholders from the legal field. Since the subject matter of the Bill was of sensitive nature, the Committee decided to invite views suggestions from individuals/organisations also. It, accordingly, authorised the Secretariat to issue a press release for inviting views/suggestions. The Committee also organised a press conference on the 18<sup>th</sup> January, 2007 so that a wide publicity to the Bill is given by the print and electronic media. In response to the press release published on the 4<sup>th</sup> January, 2007 in the major English and Hindi

dailies and vernacular news papers all over the country and the subsequent press conference held on 18<sup>th</sup> January, 2007 a number of representations/memoranda were received by the Committee Secretariat.

3.2. Since, the Committee endeavoured to hear legal experts, former Chief Justices of India, Judges of the Supreme Court/High Courts and other stakeholders in the legal field for an in depth appraisal of the various provisions of the Bill, it requested the Hon'ble Chairman, Rajya Sabha for extension of time on 20.3.2007. The Chairman Rajya Sabha acceded to the request of the Committee and granted extension of time till the first week of Monsoon Session (2007).

3.3. The major points raised in various memoranda are summarized as follows:-

- (i) The provisions of the Bill for (a) complaints, (b) withdrawal of judicial work, and (c) minor measures are invalid as there is no power under the Constitution to subject a judge to such action at the hands of a statutory body;
- (ii) There is no reason to make impeachment easy much less to bypass it by introducing 'complaint procedure';
- (iii) Article 124(5) empowers Parliament to legislate on the investigation and proof but does not empower Parliament to create an external forum like a Council to entertain complaints from any person whatsoever. The complaint procedure is *ultra-vires* to the Constitution;
- (iv) The accountability of Judges must necessarily be to a body like Parliament and not some Judicial Council activated by a private complaint;
- (v) Article 124(5) of the Constitution provides for the procedure for presentation of the address and for investigation and proof of the misbehaviour or incapacity of a Judge. It is not traceable to Entry 11-A, list III 'Administration of Justice' as erroneously thought by the Law Commission in its 195<sup>th</sup> Report;
- (vi) The Bill directly attacks judge's independence through complaints by any person and decision thereon by other Judges who may now exercise a power not contemplated by the Constitution to impose minor measures against them;
- (vii) Once a complaint procedure is provided, the reference procedure will never be resorted to; the complaint procedure will mark the beginning of the end of the fearlessness and independence of the judiciary as the loosing litigant may file a complaint against the judge who in turn may fear besmirching their reputation; There is no power under the Constitution to put judges at the mercy of any person who deems it fit to complain to the Judicial Commission and set in motion a sort of disciplinary proceeding;
- (viii) There is separation of power within the assigned sphere and the only check and balances are those provided in the Constitution; under the Constitution, the only check on judiciary is through the power of impeachment which cannot be initiated by any person by filing a complaint nor any body can entertain any such complaint;
- (ix) The Bill is unconstitutional as violating Article 124 as well as the independence of the judiciary and

separation of powers which are part of the basic structure of the Constitution;

- (x) The Bill should include (a) misjudgment as a reason for complaint, (b) setting up of State Judicial councils, and (c) the report of the inquiry be subject to RTI Act after the inquiry is completed;
- (xi) The clause relating to imprisonment as mentioned in Clause 26 of the Bill be deleted;
- (xii) The National Judicial Commission should be under the Chairmanship of President of India or the Vice-President;
- (xiii) The composition of the National Judicial Commission should include outsiders including those belonging to SC/ST communities;
- (xiv) Reasons should be recorded by the Council while deciding the complaint which should be subjected to confirmation by the Confirmation Council;
- (xv) The decisions of the Council should be tabled in the Parliament and on confirmation President should execute it;
- (xvi) The definition of misbehaviour should include 'character' also;
- (xvii) Decisions of the Council should be final but the aggrieved judge should be able to represent to the President of India;
- (xviii) CBI should specifically be recognized as one of the agencies for investigation under the Bill for any misbehaviour etc;
- (xix) The Council should have power for surveillance and for taking *suo-motu* action against the errant judges;
- (xx) Giving powers to the council for minor measures is contrary to the provisions of the Constitution; council in its present form will spoil the basis structure of the Constitution; The proposed Bill surrenders the powers vested in the executive and the legislative wings to the judicial wing;
- (xxi) 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 dishonor or disrepute to the judiciary as to shake the faith and confidence which the public reposes in the judiciary. It is not confined to acts which are contrary to law and also not confined to an act connected with the judicial office. It extends to all activities of a Judge, public or private.
- (xxii) The act or omission must be willful. The willful 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 willful.
- (xxiii) Monetary recompense would not render an act or omission any the less misbehaviour if the Judge intentionally committed it;
- (xxiv) Misbehaviour is not confined to conduct since the judge assumes charge of the present judicial office.

- (xxv) The standard of proof is proof beyond reasonable doubt.
- (xxvi) The misbehaviour must be held proved accordingly by the Inquiry Committee.
- (xxvii) The Judge against whom an inquiry is being held is under constitutional obligation to co-operate with the inquiring authority and not to raise petty-fogging objections to abjections to obstruct the inquiry;
- (xxviii) In Section 23 it may be added that a Judge in respect of whom removal order is passed by the President, shall be prohibited from practicing law and appearing as lawyer in any court or Tribunal in the Country.
- (xxix) The Council should have power of appointment and transfer also in addition to disciplinary powers.

3.4. The Committee forwarded the memoranda so received from the individuals and organisations to the Ministry of Law and Justice (Department of Justice) for their comments thereon.

3.5. The Ministry in their written reply/comments (*Annexure B*) on the memoranda mainly focused on the following points:-

- (i) The issue was examined by the Law Commission in its 195<sup>th</sup> Report. The Commission has opined that 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.
- (ii) Impeachment will be invoked only if and when the NJC concludes that charges proved warrant removal of a Judge. It is not being made easy.
- (iii) Law Commission has stated that a law can be made under the later parts 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.
- (iv) Law Commission, in its 195<sup>th</sup> Report, has said that 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. (page 407)
- (v) Adequate safeguards have been provided in the Bill to punish those making vexatious complaints.
- (vi) Impeachment will be invoked only if and when the NJC concludes that charges proved warrant removal of a Judge. It is not being made easy. The complaint procedure is an additional mechanism for ensuring accountability of judges.
- (vii) (a) Comprehensive definition of 'misbehaviour' is already provided in the Bill; (b) Setting up of State Judicial Council is not consistent with the Constitutional scheme for higher judiciary; (c) This will compromise with the confidentiality of the proceedings of the Council.
- (viii) Adequate safeguards have been provided to ensure that the complaint procedure will not be misused. The Bill is aimed at bringing accountability while preserving the independence of judiciary.
- (ix) The proposed law provides a framework for empowering a suitable judicial forum to deal with complaints against judges of the Supreme Court and High Courts.

- (x) The definition of ‘misbehaviour’ in the Bill is comprehensive.
- (xi) There is already a provision for appeal for the aggrieved judge against whom the Council has passed the orders.
- (xii) It is for the NJC to draw up the Code of Conduct and the Clauses to be included in it.
- (xiii) Under Clause 28, it is left to the Council to determine the circumstances under which the identity of the complainant can be kept secret.
- (xiv) Provisions of clause 29 regarding stoppage of work are well founded and not arbitrary.
- (xv) The Bill provides for punishment in case of disclosing the identity of the complainant and the judge without the approval of the Council.
- (xvi) As per the Bill, the Council will devise its own procedure for inquiry and investigation.
- (xvii) Chief Justice of India being the head of the institution has been kept away from other Judges under complaint procedure. However, a reference can be made by the Parliament into his conduct to the Council.
- (xviii) The Bill aims at devising suitable legislative framework for empowering a judicial forum to deal with complaints against judges of the Supreme Court and High Courts. Reference procedure already exists in the Judges (Inquiry) Act, 1968 which substantially remains unchanged in the Bill.
- (xix) Government has no statutory powers for initiating any disciplinary action against the judges, both of Supreme Court and the High Courts. The Council will investigate the complaints for their genuineness.
- (xx) Since NJC will be a permanent body, It would be necessary that any change in the composition of the Council is made with the approval of the President of India.

4.0. Since the sitting judges were the stakeholders in the proposed Bill, the Committee decided to call for the views of the Supreme Court and all the High Courts, Accordingly, the Committee Secretariat *vide* its letter dated 23<sup>rd</sup> January, 2007 requested the Supreme Court and all the High Courts through their Registrar-General to apprise the Committee with their view points on the various provisions of the Bill. In response thereto the Committee received detailed suggestions from the High Courts of Allahabad, Jharkhand, Madhya Pradesh, Gujarat and Punjab & Haryana. While the High Courts of Calcutta, Himachal Pradesh, Sikkim and Chhattisgarh out rightly opposed the Bill, being destructive of the judicial independence, the High Court of Andhra Pradesh stated that “it is not proper for the High Court to express any view”. However, the High Court of Orissa favoured the provisions made in the Bill. A Summary of views received from the above High Courts is placed at (*Annexure-C*).

4.1. The Committee was also enlightened by the opinion/suggestions of former Chief Justices of India and other Judges of the Supreme Court/High Court. Valuable inputs were provided by Justice Ranganath Misra, Justice P.N. Bhagwati, Justice R.S. Pathak, Justice V.S. Malimath and Justice K. Ramaswamy on various issues concerning judicial independence, Judicial accountability and the appointment of Judges. The views/suggestions of these esteemed legal luminaries along with the views of senior Advocates of the Supreme Court are placed at (*Annexure D*).

4.2. The Committee took up the consideration of the Bill in its meeting held on 25<sup>th</sup> January, 2007. The Secretary, Department of Justice made a presentation on the Bill during the meeting. He briefly traced the background of the proposed Bill and narrated the reasons for proposing repeal of the Judges (Inquiry) Act, 1968.

4.3. The Committee took up in-house discussion and clause-by-clause consideration of the Bill in its meeting held on the 14<sup>th</sup> and 25<sup>th</sup> June, 2007. The Committee adopted the draft Report on the Bill in its meeting held on the 1<sup>st</sup> August, 2007.

## CHAPTER -II

### JUDICIARY

5.0. One of the three wings of the polity judiciary has always been a supremely important edifice in a democratic nation. It has always been accorded a place of highest sanctity by the modern day nations irrespective of the form of Government they choose to adopt. The concept of modern day Government envisages co-existence of all the three organs of the Government *viz.* the legislature, the executive and the judiciary. These three organs or estates are expected to function within their Constitutional limits. Judiciary plays an important role in resolving the disputes not only between the parties but also between the Centre and the States, between the States and most importantly between the State and its subjects. In democratic countries like ours, judiciary plays an important institutional role *i.e.*, it has to keep the other wings of the State within their constitutional limits.

5.1. In our country judiciary has always been held at highest pedestal from the beginning. Further, the Constitution has also assigned a distinct role to the judiciary. It not only interprets the provisions of the Constitution finally but also enforces the fundamental rights embodied in part III of the Constitution. Further, in Indian context the judiciary had played a distinct proactive role, as, it has, time and again, given directions to the executive of the day to enforce provisions enlisted in part IV of the Constitution by taking affirmative action for the welfare of the people.

### INDEPENDENCE OF JUDICIARY

6.0. Since the judiciary has been assigned a very distinct role under the Constitution of India, it is but imperative that it may be allowed to remain strong, vibrant and independent, free from the influence of the executive. The founding fathers of the Constitution were very keen to ensure that the judiciary is independent of the executive and the legislature. Hence, they envisaged an independent judiciary. There are several provisions in the Constitution that insulate judiciary from external influences. The following provisions of the Constitution are intended to secure independence of the judiciary:-

- (a) The President appoints the judges on the recommendation of judicial collegium. In the case of appointment of the Chief Justice of India, the President must consult such judges of the Supreme Court and the High Courts as he may deem necessary. For the selection of other judges of the Supreme Court, he must consult the Chief Justice of India. The appointment of the judges of a High Court is made by the President after consultation with the Chief Justice of India and the Governor of the State. In the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court concerned must be consulted.
- (b) Security of tenure is guaranteed to every judge. A judge of the Supreme Court or of a High Court can be removed only on the ground of proved misbehaviour or incapacity. The President can remove a judge only when an address has been presented against him by each House of Parliament.

- (c) Salaries of the judges have been fixed by the Constitution and cannot be varied by the legislature except during the period of financial emergency. Once appointed, their privileges, rights and allowances cannot be altered to their disadvantage.
- (d) The Supreme Court and the High Courts have been given authority to recruit their own staff and frame rules regarding conditions of service.
- (e) Expenditure in respect of the salaries and allowances of the judges is not put to the vote of the Parliament and State Legislatures.
- (f) The administrative expenses of the Supreme Court, including salaries, allowances, and pensions, payable to its officers, are charged on the Consolidated Fund of India. Similarly, administrative expenses of the High Court are charged on the Consolidated Fund of the concerned State.
- (g) The Constitution debars the Supreme Court judges from pleading or appearing before any court of judicial authority in the country even after his retirement. Also after retirement a judge of the High Court can practice only in the Supreme Court or in a High Court in which he has not been a judge.
- (h) No discussion shall take place in the Legislature of a State or 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.

6.1. Thus, our Constitution has done everything possible to make the Supreme Court and the High Courts independent of the influence of the executive. An attempt is made in the Constitution to make even the subordinate judiciary independent of extraneous influences. The Constitution also directs and facilitates separation of the executive from the judiciary and places the magistracy which deals with criminal cases on the same footing as civil courts.

6.2. Thus, there is every conceivable provision in the Constitution of India to make the Supreme Court and the High Courts independent from the influence of the executive and the legislature

## JUDICIAL ACCOUNTABILITY

7.0. Associated with the higher cause of truth and justice, judiciary and the judges have been accorded a distinct position. The Constitutional provisions also make it obvious that the intention was to create an impartial judicial body. It is not out of place to mention here that even though the Constitution of India does not recognize the doctrine of separation of powers in its absolute form, it still rests on the premise that the “functions of the different branches of Government have been sufficiently differentiated.” In this context, what the Constitutional provisions provide for is that “there should be an impartial and independent judicial body to adjudicate upon the matters and to act as the interpreter and guardian of the Constitution.”

7.1. It is also equally important to note that the judicial power was in the hands of the judiciary even

before the Constitution of India came into existence. It is also a well settled principle of modern day governance that an authority deriving its existence from same source cannot claim to be absolute and unaccountable. It must be accountable either to the source of its origin, to the institution and more importantly to the people. All wings of Government belong to the people, when the legislature and the executive both are accountable, the judiciary cannot remain unaccountable and absolute. No person, howsoever high is above the law similarly, no institution howsoever sanctified can claim to be unaccountable. Ultimately, every institution is accountable to the people in every democratic polity like ours.

### CONSTITUTIONAL AND OTHER PROVISIONS EXISTING FOR ACCOUNTABILITY

8.0. The framers of the Constitution provided a mechanism for accountability under Article 124(4) which provides 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 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 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.”

The Article stipulates the following four things specifically:-

- (i) A judge of the Supreme Court shall be removed only by an order of the President;
- (ii) It should be after an address by each House of Parliament;
- (iii) That address should be supported by a special majority; and
- (iv) Removal has to be on the grounds of “proved” misbehaviour or incapacity.

Thus, this Article provides for a “method” and “grounds” on which a Judge of the higher judiciary is to be removed.

8.1. Evidently, the founding father of the Constitution while inserting this clause, had in their mind the vision of such legal luminaries of their time who were of high moral, ethical and legal scholarship. They must have thought that the judiciary shall always be composed of such scholars. This may be the reason that they envisaged an accountability mechanism for serious judicial misconduct which could be remedied only by way of “removal”. The provisions of Article 124(4) read with Article 218 provide for removal of a Judge of the Supreme Court or the High Court for “proved misbehaviour” or “proved incapacity” by a Parliamentary procedure known as “impeachment”.

8.2. However, the Parliamentary procedure of impeachment can be resorted to only after the allegations against a Judge have been “proved” meaning thereby that these allegations have been investigated and established by some authority which is impartial and independent. That is, before having recourse to the parliamentary procedure of “removal”, charges or allegations of misbehaviour and incapacity must have been investigated and proved. This procedure and constitution of such a machinery which is supposed to

investigate is again to be prescribed by the Parliament. Article 124(5) which provides for regulation of such procedure and for presentation of an address to Parliament vests this power exclusively in the Parliament. Article 124(5) stipulates 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).” Article 124(5) empowers Parliament to make laws for the following:-

- (i) for regulating the procedure for the presentation of an address; and
- (ii) for investigation and proof of the misbehaviour or incapacity of a Judge.

8.3. The above mentioned two Articles cover the existing mechanism under the Constitution for enforcing judicial accountability, known as “impeachment procedure”. A plain reading of the Articles make it clear that the Constitutional provisions only provide for “removal” and that the power of removal lies with Parliament. How and by whom the procedure of investigation is to be initiated is found in the Judges (Inquiry) Act, 1968, though the Constitution is silent as to who would be the complainant *e.g.* any individual or the representative of the people.

#### THE JUDGES (INQUIRY) ACT, 1968

9.0. In pursuance of the provisions of Article 124(5) of the Constitution the Judges (Inquiry) Act, 1968 was enacted to regulate the procedure for 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. Clause 3 of the Act stipulates investigation into misbehaviour or incapacity of a Judge by a Committee on a notice of a motion for presenting an address to the President praying for the removal of a Judge. However, that notice is to be signed by one hundred Members of Lok Sabha, if such a notice is given in Lok Sabha and by fifty Members of Rajya Sabha if such a notice is given in Rajya Sabha. The Committee that is envisaged under Section 3 is to be constituted by the Speaker or the Chairman as the case may be. Sub Section(2) of Section 3 of the act reads as under:-

“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 Justice 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.”

9.1. The above provisions spell the power of the Speaker or the Chairman to constitute a Committee to investigate on the charges of misbehaviour or incapacity against a Judge. The composition of the Committee is supposed to have the representation of the Supreme Court, High Courts and the presence of a legal Scholar. The Act further provides for submission and subsequent laying of the report of the Committee

to the Speaker or Chairman and thereafter before both Houses of Parliament.

9.2. The above provisions clearly specify a procedure that whatever the outcome of the investigation of the Committee that has to be communicated to the Speaker or the Chairman and subsequently laid before each House of Parliament for further proceedings.

#### THE IN-HOUSE PROCEDURE BEING FOLLOWED IN THE HIGHER JUDICIARY.

10.0. In 1997 the Supreme Court of India passed two resolutions dealing with Judicial Accountability viz Restatement of values of Judicial life and in-house procedure within the Judiciary. The Restatement of Values of Judicial Life Resolution was adopted in the full court meeting of the Supreme Court on May 7, 1997 which included the following:-

“That an in house procedure should be devised by the Hon’ble Chief Justice of India to take suitable remedial action against the 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.”

10.1. The in-house procedure is essentially meant for disciplining the Judges, against whom complaints of judicial misconduct and misbehaviour were received. The in-house procedure rests on the premise that there may be complaints casting reflection on the independence and integrity of a Judge which is bound to have a prejudicial effect on the image of the higher judiciary. In the in-house procedure, a complaint against a judge is dealt with at an appropriate level within the institution. It is examined by his peers and no outside agency is involved, thus the independence of judiciary is maintained.

#### THE EFFICACY OF THE CONSTITUTIONAL AND OTHER PROVISIONS AND JUDICIAL ACCOUNTABILITY

11. Through experience it has generally been accepted that the existing Parliamentary procedure of removal of a Judge is cumbersome, time consuming and tends to get politicized. There has been one instance of impeachment proceedings being resorted to which resulted in a failure due to considerations other than procedural difficulties. Though only one instance of proceedings being initiated against a judge of higher judiciary does not mean that judiciary by and large is the way it was in the not-so-distant past when the integrity of the higher judiciary was never doubted. As stated by the Supreme Court itself “Judicial office is essentially public trust. Society is, therefore, entitled to expect that a judge must be a man of high integrity, honesty and required to have moral vigor, ethical firmness and impervious to corrupt or venal influences”. Seen in this context, the judiciary today is losing that reverence. There have been sweeping references by former judges/legal luminaries such as that “the integrity of about 20 percent of the higher judiciary was in doubt”. Now, the instances of corruption, non-judicial activities, aberrations in judicial conduct, incompetencies are coming to fore. The Constitution only provides for “removal” and there are no provisions dealing with judicial misconduct and misdemeanor inviting measures less than “removal”. Furthermore, as per 1968 Act it is only the Members of Parliament who can bring about any proceedings against a judge of the higher judiciary. There is no provision Constitutional or otherwise which enables the citizens or authorities other than member of Parliament to register complaints of judicial misconduct or other grievances. All these factors coupled with delays and judicial impropriety have by and large lowered the image of the judiciary in

public eye considerably. There has been perceptible deterioration in the conduct of many of the judges within and outside the court, thus raising the issue of evolving a mechanism to scrutinize the conduct and behaviour of such judges.

### BACKGROUND LEADING TO THE INTRODUCTION OF THE JUDGES (INQUIRY) BILL, 2006

12.0. Since there were instances of grave judicial aberrations thus shaking the faith of the people in the judiciary, it was, but thought proper to introduce some measures of accountability in addition to the existing Parliamentary procedure. The Ministry of Law and Justice in their background note on the issue stated that :-

“Allegations of deviant behaviour involving acts of corruption and moral turpitude, against some Judges of the High Courts have come to the notice of the Government in the past but the Government has no constitutional competence to set up any committee to look into allegations levelled against Judges of the High Courts. At best, the complaint, in case a copy is not endorsed to the Chief Justice of India, is referred to the Chief Justice of India for such action as he may deem fit.”

12.1. The Ministry further stated that under the Judges (Inquiry) Act, 1968 only the Speaker, Lok Sabha or the Chairman, Rajya Sabha can admit a complaint relating to the misbehaviour or incapacity of a Judge for being inquired into by a Committee to be constituted by them. The Ministry further opined that the scope of the 1968 Act is limited as it does not create any institutional framework for dealing with complaints against the Judges of the Supreme Court/High Courts. It will, therefore, be advisable if on the pattern of USA, Canada and other developed countries, a permanent body which could be called as the ‘National Judicial Council, could be constituted under the Act.

12.2. The Ministry further apprised the Committee that in order to provide a legislative framework, a Bill namely the Judges (Inquiry) Bill, 2005 was drafted and forwarded to the then Chief Justice of India for comments of the Supreme Court. The then Chief Justice desired that the Bill be referred to the Law Commission of India for detailed examination and Report. The Law Commission in its 195<sup>th</sup> Report dealt with the subject in detail and made comprehensive recommendations. Some of the recommendations of the Law Commission on the Bill of 2005 are listed below :-

- Ø 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;
- Ø Clause 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;

- Ø 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;
- Ø 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; and
- Ø 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.

12.3. It was in pursuance of the recommendations of the Law Commission as contained in its 195<sup>th</sup> Report, that the proposed Bill was introduced in the Lok Sabha. The Bill, namely, the Judges (Inquiry) Bill, 2006 is based on the premise that judicial independence is one of the basic fundamentals of the Constitution. Judicial independence and judicial accountability are inseparable. Thus, there is an urgent need of a legislation for establishing a National Judicial Council to look into the allegations of misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court, as the case may be, and to regulate the procedure for such investigation, inquiry and proof in a complaint procedure in addition to the earlier “reference procedure” as contained in the Judges (Inquiry) Act, 1968. In a complaint procedure, a complaint can be made by any person to the Judicial Council against Judges of the Supreme Court (except the Chief Justice of India), Chief Justices and Judges of High Courts. The Judges (Inquiry) Bill, 2006, *inter alia*, seeks to empower the National Judicial Council for imposing minor measures also. The Bill also seeks to repeal the Judges (Inquiry) Act, 1968.”

12.4. In the background note of the Bill, the Department of Justice, Ministry of Law and Justice informed the Committee as under :-

“The transparency and accountability in the higher judiciary are ‘at present’ being enforced and maintained through ‘In-House’ system by the peer group.

The issue of Judicial Accountability was discussed at the Conference of Chief Justices held in 1990 and on the basis of the broad consensus emerging out of the deliberations, the Chief Justice of India summed up the position as follows:

The Chief Justice of the High Court has the competence to receive complaints against the conduct of the Judges of his court and when he receives any he could look into it for finding out if it deserves to be closely looked into. Where he is satisfied that the matter requires to be examined, he

shall have facts ascertained in such manner as he considers appropriate keeping the nature of allegations in view and if he is of the opinion that the matter is such that it should be reported to the Chief Justice of India, he shall do so.

The Chief Justice of India shall act in a similar manner in regard to complaints relating to conduct of Judges of the Supreme Court and in regard to conduct of Chief Justices of the High Courts. On the basis of the facts ascertained, the Chief Justice of the High Court or the Supreme Court, as the case may be, shall take such appropriate action as may be considered proper, keeping the interests of the judiciary as the paramount consideration.”

12.5. In order to provide a legislative framework to enable people to make complaints against the erring Judges of the higher judiciary, the Judges (Inquiry) Bill, 2006 has been introduced. The Bill seeks to create an additional institutional framework apart from the existing constitutional provision to hear cases of misconduct and incapacity by establishing a permanent Body *viz.* the National Judicial Council.

### CHAPTER –III

#### DELIBERATIONS AND RECOMMENDATIONS OF THE COMMITTEE ON CERTAIN ISSUES

13.0. The initial deliberations on the Bill aroused the concern of the Committee, on the various provisions of the Bill, including on three specific issues pertaining to the (i) infringement of the exclusive right of Parliament under article 124; (ii) the composition of the proposed National Judicial Council; and (iii) allowing any person to make a complaint against a Member of the higher judiciary. These three concerns were voiced by the Chairman of the Committee, while hearing a presentation of the Secretary, Department of Justice, stating that “we feel that the mandate in Article 124, that is, the exclusive right of Parliament is now being delegated to a Council. Secondly, we feel that you are opening up the Pandora’s box by allowing not only the citizens but also any person to lodge a complaint against the Constitutional authority. Thirdly, We feel that this Bill is taking away the powers of the Parliament by constituting a Council and, thereby, the powers are being handed over to the Judiciary, through the President”. The Committee in its subsequent meetings extensively deliberated upon these three specific issues along with other provisions of the Bill as under.

#### PARLIAMENT’S POWER TO IMPEACH A JUDGE

13.1. As per the existing provisions a Judge of the higher Judiciary is to be removed on certain specified grounds as provided under Article 124. Thus, it is the prerogative of the Parliament to remove a Judge after following a certain procedure. An apprehension was raised by the Members of the Committee that the provisions of the proposed Bill seek to take away the powers of Parliament and vest the same in the proposed National Judicial Council. The Committee observed that the Constitution has authorized Parliament to deal with the cases of judicial misconduct. Now, that right of Parliament is sought to be vested in the proposed National Judicial Council, a nominated body. The members raised serious concern that it amounts to dilution of the powers of Parliament. The Members further debated whether such a provision could be made through legislative method. In the opinion of the Members this required Constitutional amendment rather than a direct legislative method. The members pointed out that under the existing provisions *viz.* the Constitution and the Judges (Inquiry) Act, 1968, the Speaker or the Chairman are empowered to constitute a committee to investigate and inquire into allegations of misbehaviour or incapacity of the Judge. Now under the proposed Bill, that power of the Speaker or the Chairman has been proposed to be vested in the Chief Justice of India. By implication it would mean that the role assigned to the Parliament and its functionaries shall now devolve on the

Chief Justice of India. This in fact is a cause for concern as succinctly put by one of the legal luminary that “ it would tilt the balance in favour of the judiciary thus undermining the delicate balance of separation of powers between the three wings of the polity” which is the basic structure of the Constitution. The Department of Justice, Ministry of Law and Justice, in their deposition before the Committee, on the issue stated that in the present Bill, the Committee which is named as the National Judicial Council comprising Judges of the Supreme Court and the Chief Justices of the High Courts to be nominated by the Chief Justice of India shall be constituted by the President. And, this Committee will be a permanent body. Whereas under the present provisions of law, the Committee to inquire into allegations against the Judges is constituted by the Speaker of Lok Sabha or Chairman of Rajya Sabha, as the case may be, on case to case basis. This Council can directly advise the President for laying the Report on the Tables of both the Houses of Parliament with a view to initiate proceedings for impeachment of the concerned Judge. Under the existing Constitutional scheme, only the Speaker or Chairman were competent to receive the reports and initiate further action in the matter. Though there is no provision for minor measures or for that purpose any penalty other than removal of the Judges, in the existing Constitutional scheme, however, in practice these measures are being resorted to. There are instances where the Chief Justice of a High Court withdraws the judicial work from a Judge; issues advisories to brother judges and also asks them to go on leave, pending in-house inquiry into allegations against them. There have been a few cases where the Judge against whom very serious allegations were made, had to resign on persuasion or on the informal advice rendered to them by the Chief Justice of India. Therefore, the proposed Bill, in fact, is only documenting these practices, as a legislative measure.”

- 13.2. The representative of the Department of Justice further stated that in the proposed Bill, the three major differences are: the National Judicial Council or its officers will make inquiries into the allegations, instead of the Committee constituted for the purpose. The Committee constituted by the National Judicial Council enjoys more powers for search *etc.* which is not available to the committee under the existing Act of 1968. In the present system, the Judge concerned can give a written statement or be heard on his behalf through a person whom he thinks fit for presenting the case.
- 13.3. The representative of the Department of Legal Affairs sought to allay the apprehensions of the Committee regarding the constitutional validity of the proposed legislation by stating that “the Law Commission is of the opinion that in spite of absence of express constitutional provision permitting imposition of minor measures, conferring of such power through ordinary law and imposition of such measures by the Judicial Council would be constitutionally valid.” The representative further stated that this Bill seeks to provide a statutory basis to already existing in –house peer review. In the

absence of such a thing, it is not possible to issue these minor penalties, like issue of advisories, issue warnings, withdrawal of pending judicial work, request that the Judge may voluntarily retire, and censor or admonition, public or private. It was further stated that article 124 only provides procedure for removal. It does not exhaust the entire field. It does not mean that the removal is only remedy and no other action short of removal could be taken. The representative sought to make it clear that the impeachment process still is within the purview of Parliament and the proposed Bill only seeks to create a procedure other than or in addition to parliamentary procedure of impeachment. He further substantiated his argument by stating that the existing provisions only provide for removal by way of impeachment and there is no provision for imposing minor measures short of removal.

13.4. However, the Committee was of the opinion that the provisions of the proposed Bill will nonetheless reduce the role of Parliament to that of a post office. Taking strong exception to this fact one of the Hon'ble Member observed that "the procedure which has been indicated to be followed by the Council practically excludes even the Chairman of the Rajya Sabha or the Speaker of the Lok Sabha who made the reference to the judicial body for the initial inquiry. To explain the matter further, if it is a complaint, you can dispose it of without informing the complainant if you come to the conclusion that the evidence is not adequate to proceed further. But, when the reference is made by the Chairman of the Rajya Sabha, who also happens to be the vice-President of the country, and the Speaker of the Lok Sabha and if this Council comes to the conclusion that there is no case to proceed further, then they can drop it without informing the Chairman or Speaker as to why they are doing it or why have they done it. It is totally keeping them aside and their role is reduced to that of a post office".

13.5. The Committee is of the considered opinion that the constitution of India specifically entrusts a duty to Parliament with regard to impeachment of a Judge. That constitutional obligation, in any case, cannot be delegated or shifted to any body or institution by way of a statute. The Committee takes strong exception to the fact that the provisions of the proposed Bill have the effect of curtailing Parliament's right to discuss about the conduct of a Judge. The Committee categorically observes that the powers of Parliament with regard to impeachment of a Judge in no case be diluted or shifted to any other institution or body.

#### COMPOSITION OF THE PROPOSED NATIONAL JUDICIAL COUNCIL

14.0. The composition of the proposed National Judicial Council invited considerable debate during the Committee's deliberations on the Bill. It was felt that with the passage of time the Judiciary has already acquired the image of a closed institution, which is not in consonance with the democratic set up of the nation. In this context, the composition of the proposed National Judicial Council specifically conveyed that the Council shall be an exclusive one consisting only of persons from the judiciary alone. On this the Ministry

of Law and Justice, Department of Justice stated that “for composition of the council, the deviation is guided by the premise that the investigation into the allegations against Judges could be left to the peer group only”. The Committee opined that the proposed NJC is supposed to be a nominated body with five Members, with the Chief Justice of India being its Chairman and the rest four members nominated by the Chief Justice of India according to their seniority. This led one of the Member to state “we talk about accountability instead of Judges appointing Judges, which is bad enough in itself; Judges judging judges, even when there are complaints against them, I think, is worse”. The Committee was for widening the composition of the Committee to include persons other than the judges. Various suggestions were put forwarded for composition of the Committee such as eminent persons or jurists, to be appointed by the President of India on the recommendations of the Government of India, representatives of the Bar Council, social scientists, academicians, leader of opposition *etc.* There was general consensus among the Committee Members that the proposed judicially exclusive composition of the National Judicial Council is not in consonance with the principle of accountability.

14.1. While deposing before the Committee, Justice R.S. Pathak suggested changes in the composition of the Committee. He suggested that the NJC should consist of the Chief Justice of India as chairperson; three senior most judges of the Supreme Court selected according to their strict numerical seniority in the list of the Supreme Court Judges. He also included an eminent member of the Supreme Court Bar, highly reputed for his professional integrity and professional experience and dedicated to the best interests of the administration of justice in the council. He justified inclusion of a member of the Bar in the council by stating that “he is a direct participant in the administration of justice, in the development and growth of its ethical standards, and shares in its reputation as the fount of justice. He shall be appointed to the Council by the President of India, who shall have absolute discretion in selecting such person and not be bound by the advice of the Council of Ministers”. Justice R.S. Pathak further suggested that in the case of an investigation and inquiry against the Chief Justice or a Judge of a High Court, the Council should co-opt two Chief Justices of the High Courts selected on the basis of strict numerical seniority in a notional list of High Court Chief Justices. However, Justice Pathak was not in favour of “inclusion of High Court Chief Justices as members of the Council in the case of an investigation and inquiry against the Chief Justice of India or a Supreme Court Judge. He stated that “there is considerable merit in the age-old principle that a man should be judged only by his peers. His inclusion could be embarrassing to the Chief Justice of India or Supreme Court Judge who is under investigation and inquiry”.

14.2. The Committee notes that the proposed composition of the NJC rests on the premise that inquiry and investigation against an errant judge is best left to the peer group and this bill seeks to provide a statutory basis to already existing in-house peer review. The Committee suggests that either the NJC should be made a broad based Committee having representation from the Executive, Parliament, Bar or an Empowered Committee consisting of representatives from the NJC, Executive, Parliament and Bar should be there to be a preliminary part of the investigative machinery. The Committee’s recommendation rests on a fundamental premise of administrative law which stipulates that an authority who is taking a disciplinary action against a particular person should not be the inquiry officer. Some other officer should be the inquiry officer, who has to investigate and submit a report to the disciplinary authority. It is very anomalous that here the NJC is both the inquiry as well as disciplinary authority.

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## ALLOWING ANY PERSON TO MAKE A COMPLAINT AGAINST A MEMBER OF HIGHER JUDICIARY

15.0. While deliberating upon the issue of allowing any person to make a complaint against a member of the higher judiciary, the Committee observed that such an open system may lead to a situation where losing advocates and litigants might prefer lodging complaints against the judges, or this route may be utilised for intimidating the Judge trying a particular case thus eroding the independence of judiciary. Even though the Bill has provisions for penalty and punishment for false and frivolous complaints, still the Committee felt that there should not be an easy channel of filing complaints directly to the National Judicial Council. The Committee is for a cautious approach on this issue as certain intrinsic factors are associated with allowing such a system to come into existence viz the independence of judiciary which is a basic structure of the Constitution, its credibility in public eye and the image of the judges. Another very fundamental issue is that the judges are held in high esteem by the people because they are associated with the cause of truth and justice, therefore, they should not be made susceptible to unlimited public criticism by opening up an easy channel of complaints as the same shall undermine their integrity in particular and judicial integrity in general. At the same time due recognition to accountability should be given. In fact independence and accountability have to go together. There is a certain need to tackle the cases of judicial misconduct warranting measures other than removal. Similarly, there is an urgent need to have some institutional mechanism in place other than the Parliamentary procedure for allowing people in addition to the Members of Parliament to have recourse to this mechanism. However, there cannot be an open system of complaints by “any person” thus subjecting each and every judge to complaints whether genuine or frivolous. The Committee observed that the power of even initiating any step against a sitting judge is vested in Parliament. Now, that power is being given to any person. Though, as per the provisions of the Bill a complaint from any person may result in dismissal as false or frivolous but none-the-less it will set the investigating machinery into motion and might even result in “impeachment”. In this context, the Chairman of the Committee observed that “the powers were given to the Members of Parliament. Now, you are giving powers to any person. That does not mean that he has to be a citizen of India. It means any person who is traveling to India can also complain against a sitting judge”.

15.1. The Committee felt that an individual is being equated with 100 MPs of Lok Sabha and 50 MPs of Rajya Sabha for making a complaint against a Judge. This was summed up by the Chairman of the Committee as “A Member of Lok Sabha is elected by an average of 20 lakh people. If 100 Members have to sign a document for the initiation of impeachment, that means, that document is representation of about 20 crores people. If you take 50 Members of Rajya Sabha, it represents entire State of a particular federal set up. But now, you are taking away these powerful issues from them and giving the same to an ordinary man”. The Committee further observed that if an individual can also make a complaint on the ground of misbehaviour which could lead to impeachment, then why the Members of Parliament be subjected to the condition of mustering the strength of 100 MPs of Lok Sabha and 50 MPs of Rajya Sabha, for giving complaint for removal. The Committee further observed that the only difference between an individual making a complaint and 100/50 MPs making a complaint is that an individual's complaint would be tested for its veracity while the MPs complaint would be taken up for investigation. The Committee observes that the Bill seeks to create

a separate complaint procedure for anybody to make complaint. Another procedure is for the MPs to complain. The Committee feels that there is a need to reconcile the two procedures and create a mechanism which would scrutinize the complaints received from both the sources in the first instance and decide whether they are frivolous or vexatious before they go to the NJC for further investigation and inquiry. The Committee is for bringing into existence an Empowered Committee in between the complainants and the NJC.

15.2. The Committee is suggesting for this body as it feels that while creating any mechanism of accountability, the cardinal principle of Judicial independence and people's faith in the judiciary should be kept in mind. It should be such a mechanism that has an inbuilt system of checks and balances and which does not bring the Judges to any disrepute while paving the way for much desirable accountability. There is a pressing need that the instances of corruption, misdemeanor or misconduct should be addressed to in an appropriate and reasonable manner without lowering the repute and image of the Judges and the judiciary.

#### IMPOSITION OF MINOR MEASURES

16.0. In the existing constitutional scheme there is no provision for minor measures or any penalty other than removal of a Judge. The proposed Bill of 2006 seeks to introduce imposition of minor measures such as issuing advisory, censure, warnings or withdrawal of judicial work *etc.* This issue also attracted the attention of the Committee during its deliberations on the Bill, the cause for concern for the Committee was that the constitution only recognizes "removal" as a resort against an errant judge and since the members of higher judiciary are constitutional authorities resort to administrative measures akin to Government Servants cannot be applied to them. The Committee felt that such measures may lead to public distrust and disrespect and the judgment of such judges against whom such measures are resorted to will be viewed with disrespect. In addition to that, the Committee felt that such measures by implication would lower the image of honest and upright judges. Even though, through in-house procedure some of these measures are being resorted to. Still, the Committee was for a cautious approach on this issue as this pertains to action against a constitutional authority. The representative of the Ministry stated on the issue that there are instances where the Chief Justice of High Court withdraws the judicial work from the Judge; issues advisories to brother judges and also asks them to go on leave, pending in-house inquiry into allegations against them. There have been a few cases where the Judge against whom very serious allegations were made, had to resign on persuasion or on the informal advice rendered to them by the Chief Justice of India. Therefore, the proposed Bill, in fact, is only documenting these practices, as a legislative measure.

16.1. It may not be out of place to mention here the views of Justice R.S. Pathak on the imposition of "minor measures". He stated "it may be pointed out that the power of the National Judicial Council is confined to the imposition of "minor measures", and those minor measures are detailed in Clause 20(1)(b). The Council is not empowered to deal conclusively with charges warranting removal of the Judge. The matter lies within the domain of Parliament and the President".

16.2. Still the Committee felt that imposition of minor measures will lower the prestige of the judiciary. A judge facing inquiry under the provisions of the proposed Bill will have his integrity in doubt. The litigants

will be looking at him in doubt and even if he is exonerated or even if there is admonition against him and this fact comes out in open, his reputation will be undermined and the judgment delivered by him will lose its sanctity. In this context, the Committee desires that before proceeding against a judge it should have been clearly established through some body other than NJC that there is sufficient evidence against the Judge. The Committee is of the considered opinion that before setting the investigating machinery in motion it should have been ensured that there is ground to move against the Judge. In the opinion of the Committee it could be accomplished through the Empowered Committee which it is proposing to bring into existence.

#### APPEAL TO SUPREME COURT

17.0. The proposed Bill contains the provisions for appeal to Supreme Court against (i) an order of removal passed by the President and (ii) a final order passed by the council imposing one or other minor measures on the basis of a complaint. The Committee was against any provision for appeal as it felt that a provision for appeal against the President's order is totally uncalled for. The Committee further observed that the Presidential order of "removal" is a result of Parliament's decision after due process and resolution of 2/3<sup>rd</sup> majority by each house therefore allowing its decision to be challenged by Junior Judges is unwarranted. The Committee opined that it is an action against a constitutional authority and it should not remain unending. There is a finality attached to a Presidential order which should not be challenged.

17.1. As for the appeal against an order passed by the Council imposing one or other minor measures, the Committee observed that the Judges should not be treated as ordinary Government servants or ordinary citizens. Moreover the power of judicial review is with the judiciary to address the event of apparent injustice caused to an individual. While it is there, the provision for statutory appeal is not necessary. On this premise, the Committee is against any provision for appeal.

## CHAPTER –IV

### A COMPARISON OF THE EXISTING AND PROPOSED PROCEDURES OF THE JUDGES' INQUIRY AND THE RECOMMENDATION OF THE COMMITTEE

18.0. The existing procedure for making a complaint against a Judge under the Constitution and the Judges (Inquiry) Act, 1968 is that the Member of Parliament initiate the procedure in either House. To initiate the process an MP must necessarily receive a complaint from some source. It could be an individual, a group of individuals, a litigant or anyone. Once a complaint is received and if the MP finds that it carries grave charges against a judge that need consideration, he would muster requisite numbers in either House and give a notice for a motion praying for the removal of the judge. Once this is done it is for the Speaker, Lok Sabha or the Chairman Rajya Sabha to either admit or refuse to admit the motion, after considering all the material on record. In case the motion is admitted, a Committee of three members under the Judges' Inquiry Act, 1968 is constituted. The Committee conducts inquiry and investigation as prescribed under the 1968 Act and presents its report to the Speaker or Chairman as the case may be. If the Committee's investigation lead to the conclusion that the Judge is not guilty of misbehaviour or incapacity, no further action is taken in either House. However, if the report indicts the judge of misbehaviour or incapacity then it is taken up for consideration in the house and if it is adopted by each house in accordance with the provisions of clause (4) of article 124, then the request praying for removal of the Judge is presented to the President.

18.1. The proposed Judges (Inquiry) Bill, 2006 envisages two procedures for registering complaints against the members of the higher judiciary viz. the complaint procedure and the reference procedure. The complaint procedure is for the individual complainants and the reference procedure is actually the impeachment procedure, with certain deviations, as prescribed under Article 124(4) read with the Judges (Inquiry) Act, 1968. The complaint procedure is for enabling any person to make "any allegation of misbehaviour or incapacity" in respect of a judge of the higher judiciary to the National Judicial Council which is to be constituted under clause 3 of the proposed Bill. The N.J.C. has been vested with the discretion to dispose off the complaints accordingly viz (i) if the complaint is frivolous, dismiss it; (ii) if it is not frivolous, then to constitute an investigating Committee for conducting preliminary investigation and if the Committee's finding is for definite charges, then the N.J.C. shall propose to conduct an inquiry and frame charges (iii) if the charges are not proved in an inquiry, then dismiss the complaint; (iv) If charges are proved and the N.J.C. is of the opinion that the charges proved do not warrant removal, then it would impose minor measures against the judge; and (v) If the Council is satisfied that the charges of misbehaviour or incapacity are of serious nature warranting removal, it shall advise the President accordingly i.e. through the President, it will go to Parliament

18.2. The reference procedure as envisaged in the Judges (Inquiry) Bill, 2006 is actually, the impeachment procedure as existing under Article 124(4) and Clause 3 of the Judges (Inquiry) Act, 1968 but with certain deviations. Under this provision, the proceedings against a Judge shall be initiated in the either House of

Parliament by way of a notice. This provision also requires notice by one hundred Members, if given in the House of the People and by fifty Members if the notice is given in the Council of States for a motion for presenting an address to the president praying for removal of a judge on the same grounds *i.e.* misbehaviour or incapacity. If the motion is admitted, then the Speaker or the Chairman, as the case may be, shall refer the allegations to the proposed N.J.C. The deviation here is that under the existing provisions the Speaker or the Chairman are vested with the power to constitute a Committee for investigation of the charges but in the proposed Bill they have to refer the matter to the National Judicial Council. The N.J.C. shall then frame definite charges against the judge and hold an inquiry and accordingly forward its report to the Speaker or the Chairman. The inquiry so conducted by the N.J.C. if it contains a finding that all or any of the charges are not proved, or that any of the charges proved do not warrant removal then no further steps shall be taken in Parliament. However, if the report of the N.J.C. contains a finding that all or any of the charges are proved and the N.J.C. has recommended removal, then the Parliamentary process shall be invoked. Evidently, in both the procedures *viz* the complaint procedure or the reference procedure, it is the N.J.C. which shall finally decide the matter and the Parliamentary process will be invoked only if the N.J.C. recommends “removal” of the indicted judge.

#### AN ANALYSIS OF THE COMPLAINT AND REFERENCE PROCEDURE.

18.3. It may not be out of place to mention here the provisions of the proposed Judges (Inquiry) Bill, 2006 which have far reaching consequences and may also lead to anomalous situation. These provision are enumerated in clause 8, 9, 10, 11, 12, 20 and 21 of the Bill. Clause 8, 9, 10 and 20 deal with the complaint procedure and clause 11, 12 and 21 with the reference procedure.

#### COMPLAINT PROCEDURE

18.4. Clause 8 enables any person to make a complaint against a Judge to the National Judicial Council. The Clause further provides the particulars and format to be followed while making a complaint. Clause 9 provides for the procedure for dealing with such a complaint. Sub-clause (3) enables the NJC to constitute a Committee comprising of one or more of its members for conducting preliminary investigation. Clause 10 envisages inquiry by the Council and clause 20 deal with the imposition of minor measures or advise to the President for removal.

18.5. These clauses constitute what hitherto is known as the In-house procedure. In this procedure, complaints received against the Judges are disposed off by the judiciary itself. Since the proposed NJC is composed of the Judges only, they will receive the complaints, investigate and inquire by themselves and dispose them off accordingly. This entire procedure is internal to the judiciary. whereas as per the provisions of the Constitution and the Judges (Inquiry) Act, 1968 proceeding with regard to inquiry against a judge is to be initiated through MPs and is decided by Parliament after

discussion and debate. Sub-clause (3) of clause 20 envisages a situation where a complaint by any individual may lead to removal of a Judge through impeachment on the recommendation of the NJC.

## REFERENCE PROCEDURE

18.6. Clause 11 stipulates what is known as the Parliamentary process for removal of a Judge. The procedure initiates with notice by the MPs after mustering requisite numbers in either House. It is for the speaker or the Chairman to admit or refuse to admit the motion. Sub-clause (2) makes it obligatory for the Speaker or the Chairman to refer the allegations to the Council once the motion is admitted. Clause 12(1) stipulates that once the matter has been referred to the Council, it will frame charges for holding inquiry against the Judge. Clause 21 speaks about the disposal of reference from the speaker or the Chairman by the Council. Sub-clause (2) of Clause 21 contains a situation where if the Council comes to the conclusion that charges are not proved, then no further proceeding shall be taken in either House. It means that something originating in Parliament may end in the council. Sub-clause (3) contains a situation where if the Council recommends that the charges are proved, then the Parliamentary procedure for “removal” may be invoked.

18.7. The above provisions only highlight that it will be the NJC which shall be conducting inquiry and investigation against the Judge whether it be a complaint procedure or a reference procedure. Secondly, provisions under clause 20(3) and 21(2) are anomalous and may lead to a peculiar situation where a complaint from one single individual may result in impeachment whereas a complaint from 100 MPs Lok Sabha and 50 MPs Rajya Sabha forwarded by the Speaker or Chairman to the NJC may be dropped altogether. Thirdly, clause 20(1)(b)(iv) lists “request that the Judge may voluntarily retire” as one of the minor measures. The pertinent question here is whether requesting for voluntary retirement could be on account of minor misbehaviour or incapacity. If it is a case for retirement it must be on account of major misbehaviour or incapacity which should not have been included in the minor measures.

19.0. The Committee feels that the proposed Bill by including the complaint procedure seeks to include the in house complaint procedure in addition to the reference procedure. The Chairman of the Committee observed on the issue as “Actually the thing is, they want to synchronize the two procedures which are already in existence. One is by an in-house procedure which is followed by all the Judges. This is not by way of any law, but they have a procedure that if there is any minor misbehaviour, they will sit as five members; they will deal with the complaint and action will be taken by them within themselves. There is another procedure which has been made by an Act of Parliament, and that is, where the Members can move a motion of impeachment. Now they want to synchronize both the things. One is in practice, not in law another is in law. They want to synchronize both in one Act, and hence this Bill has been brought in”.

19.1. The difference between the two procedures being that in case of complaint procedure, the complaint

of an individual shall be tested for its veracity and if found vexatious or frivolous that individual will incur penalty including punishment. No such consequences shall entail in case of complaints received through reference procedure. It may not be out of place to mention here that it is the right of the Parliament to go into the complaint right from its initiation till its disposal which now is being sought to be vested in the NJC.

19.2. The provisions of the proposed Bill effectively extinguishes the right of Parliament and the representatives of the people to initiate, discuss and participate in the proceedings for the removal of a Judge. Further, there is no distinction when an individual is making a complaint or when 100/50 MPs put a notice of complaints. In addition to that, the Parliament's authority to constitute an enquiry Committee shall devolve upon the NJC and still further that enquiry Committee shall be composed of Judges only.

19.3. The Committee is of the considered opinion that in no case the existing right of Parliament could be extinguished. It was observed by the Chairman of the Committee that "this Bill is a long departure from the earlier Judges Inquiry Act of 1968, according to which the Parliament has the authority to constitute the enquiry Committee. But, that authority is also now taken away and it is given to the sitting Judges in the name of the National Judicial Council. That means you are usurping the powers of the Parliament which are already in existence".

19.4. The Committee feels that the proposed procedures *viz* complaints and reference procedure should be synthesized to provide a mechanism which has inbuilt checks and balances including scrutiny of complaints whether coming through complaint procedure or reference procedure before they go to the proposed National Judicial Council.

19.5. In this context the Committee recommends that there should be another authority in between. The Committee is for evolving a bicameral system. The National Judicial Council can sit as suggested in the proposed Bill and carry out its functions as enumerated. The Committee being suggested here will be in addition to the NJC which shall be performing the work of a screening committee. This Committee could be named as "Empowered Committee". It could have one member as a representative of the Chief Justice of India. Two Members from both the Houses of Parliament one each as a representative of the speaker, Lok Sabha and Chairman, Rajya Sabha. There could be one nominated representative of the Prime Minister and one representative of the Bar Council of India. The Committee is suggesting for inclusion of the representative of the Bar as it feels that it is this institution which knows about the character and integrity of a judge. The Committee is also guided by the observation of the Supreme Court about the role of Bar in regulating the judiciary in the famous case of Ravichandran Iyer Vs. Justice A.M. Bhattacharjee. The Supreme Court had observed that "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". The composition suggested here for this "Empowered Committee" makes it an independent, high powered,

impartial, screening body. It can work in co-ordination with the NJC. This body could be entrusted with the task of initially receiving the complaints from both the individuals and reference from Parliament and closely examine them to see whether there is *prima facie* a case for sending it to the NJC for detailed enquiry and investigation.

19.6. Such an Empowered Committee, if brought into existence will satisfy certain requirements relating to the role of Parliament, the executive and the judiciary and shall ensure elimination of frivolous complaints at the initial stage itself after proper verification and facilitate the consideration of genuine complaints. It will further satisfy the requirement of impartiality and transparency and consequently save the judges from public disrespect while providing for a complaint mechanism and initiation of disciplinary process.

19.7. The Committee is recommending for an Empowered Committee as it feels that while providing for any system of accountability, it should be kept in mind that the Supreme Court and the High Courts are highly secretive or closed institutions on the administrative side even though very open and transparent in respect of the proceedings they conduct i.e. the judicial proceedings. Every proceeding with regard to administration of Justice is conducted transparently in the courts from the very beginning, so much so, that the statements of the engaged parties, adducing of evidence, cross-examination, arguments, *etc.*, are conducted in the presence of the engaged parties. Further, everything is challengeable till the evidence adduced leads to a final conclusion. This is a characteristic of this institution, very innate to it, that at every stage till the final disposal of a case everything is open and transparent in the judicial proceedings. It is only in very rare cases that the proceedings are kept secret. This is perhaps the reason that the judiciary is respected and revered by the people more than any other institution of the state. There is a consensus that the Judiciary, as an institution, cannot be subjected to an open mechanism of complaints. There is a need to guard against such a system and create a mechanism which is in consonance with the repute and reverence of the judiciary.

20.0. The constitution of this Empowered Committee consisting of non-judicial members representing the legislature Judiciary and Executive would create an additional powerful safeguard to filter and eliminate frivolous complaint petitions. This will also create a reasonable via media providing for both internal as well as external checks on judicial disciplining process with out endangering the judicial independence. Further since the “Empowered Committee” is having the presence of the executive, legislature, judiciary and the civil society, it would satisfy the constitutional parameters and would create a system of checks and balances.

20.1. While recommending for creation of an “Empowered Committee” as an additional body the Committee also takes into account the full court view of the Jharkhand High Court on the need for a regulatory check on complaints. The Jharkhand High Court on Clause 8 of the Bill has opined that “there is no regulatory check for receiving the complaint. Any person/party against whom an order is

passed or any person with jealousy, enmity can lodge a complaint even without examining himself or without producing evidences in support thereof. For entertaining a complaint even in a minor criminal offence, the complainant is required to be examined himself and produce supporting oral and documentary evidence before the summons is issued to the accused. But under the provisions of this section, a complaint lodged only in writing with simple verification by any person as also any complaint from any other sources can be entertained.” The court has further opined that “entertaining the complaint at one stage (which may ultimately be found frivolous) in some cases would cause immense injury and damage to the prestige and dignity of the person bearing high moral character and maintaining high tradition. There is absolutely no safeguard against the said situation. History is the witness that great men who are now worshiped as God and even the names taken as God *e.g.* Lord Ram, Jesus Christ, Satyawadi Harishchandra and father of the Nation-Mahatma Gandhi became victims of jealousy, conspiracy and misconception. In such a world, nobody is safe from mudslinging and malicious attempt, which may, in some cases, would cause more agony and injury than the punishment spelt in the proposed bill.”

20.2. The Committee is suggesting the constitution of the “Empowered Committee ” on another premise also. The Committee feels that it is very unlikely that the members of the higher judiciary will take tough action against their brother judges. It was observed by one of the Hon’ble Members that “there is a conscious or unconscious trade unionism practised by the Judges and there is a natural reluctance on their part to take unpleasant action against their brother judges”. In this scenario the Committee feels that it would be reasonable to have an independent impartial body in between.

Apart from the above reasons the constitution of the “Empowered Committee” may also be considered for the following reasons.

#### AN IMPARTIAL WIDER REPRESENTATIVE BODY

20.3. When any authority or body is created for investigation purposes, it should be an impartial representative body so that the interest of all involved are protected. There are certain offices/designations which are constitutionally supposed to be impartial. These offices/designations are supposed to conduct or do work as mandated by the Constitution. The offices of Chairman, Rajya Sabha and Speaker, Lok Sabha are such offices. The representatives of these offices should be there in the proposed Empowered Committee as the same shall satisfy the requirement of Parliamentary presence which is a constitutional mandate as prescribed under article 124(4) of the constitution. Further, since the endeavour is to provide a machinery dealing with judicial misconduct, a representative of the judiciary should also be there in the body. Therefore the body must necessarily

have the nominee of the Chief Justice of India. Such a representative body could act very impartially and instill faith among all the interested parties that the matter rests in impartial hands. Further, since, the body has wider representation, its scrutiny of the complaints would not be viewed with suspicion from any quarter.

## SCRUTINY OF COMPLAINTS

20.4. Since, the Judiciary is a highly respected institution, there should not be any attempt to lower its image in the name of accountability. In fact, it is the only institution which has survived the faith and trust of the people. Therefore, when providing for a system of complaints from any quarter, reputation of the judiciary must be guarded. This calls for a close scrutiny of the complaints received against a judge. The cardinal principle here is that the proceeding of inquiry or investigation should not be initiated against a Judge unless there is clear evidence against him. Mere allegations of misconduct and consequent initiation of inquiry will not only undermine the credibility of the concerned Judge but also of the judiciary as a whole. It needs to be ensured that an honest and upright Judge is saved from the ignominy of false complaints. The pertinent question is who should conduct such an initial inquiry in an impartial manner. The proposed Bill is vesting this responsibility to the National Judicial Council whose Members are all Judges and which is the final authority also. This proposition may lead to a conclusion in the minds of the people that the Members of the Judiciary shall sit to receive complaints against the Members of the Judiciary and dispose them off accordingly. In such a scenario what complaints were received and scrutinized will not come out in public. Whereas, the purpose of the proposed Bill is to ensure that genuine complaint cases should get final redressal. This requires consideration of both the issues together *viz* elimination of frivolous complaints and close scrutiny of genuine complaints for further action. This could appropriately be done by an independent representative body.

## MAINTAINING CREDIBILITY AND TRANSPARENCY

20.5. Judiciary has been a very closed institution till now. There have been certain In-house practices followed in it. Charges of corruption and misconduct *etc.* have been dealt with through this in-house procedure. There is no data available to apprise the people or other institution about the manner and numbers of such cases received and disposed off and the measures of accountability taken thereof. In fact even an allied institution of judiciary *i.e.* the Bar may not be aware of such a measure. Clearly this system is lacking both in credibility and transparency. This again calls for having a body which is credible and which follows the principle of reasonable transparency. The National Judicial Council, with no outside members, may not command that credibility in public eye and may not be that transparent as the same may be regarded as an internal body of the judiciary. This state of things also makes a case for the Empowered Committee.

NEED FOR BRINGING THE COMPLAINT AND REFERENCE PROCEDURE TOGETHER AND PROVIDING FOR A SINGLE SCRUTINISING BODY.

20.6. The proposed reference procedure, even though a modified version of the 1968 Act, involves devolution of the powers of the Constitutional functionaries i.e. the Speaker and the Chairman and has the effect of curtailing the role of the Parliament. This is not within the Constitutional framework in, as much as, that there could be a case when a process initiated in Parliament could end in the National Judicial Council. Further more, the proposed National Judicial Council is supposed to be a judicially exclusive council with no outside presence, not even from the Bar Council of India. It is very unlikely that the decisions of the National Judicial Council would not be seen with suspicion by the public. They shall receive the complaints from the individuals and the reference from Parliament and thereafter dispose them off accordingly. This would be something similar to the in-house procedure in both the cases *viz* complaint and reference cases. If the Empowered Committee is created, this could provide an integrated, two tier system of eliminating frivolous complaints first at the initial stage, after proper scrutiny and verification by an independent body and later by the National Judicial Council also on its own investigation and inquiry, thus minimizing the chances of injustice being meted out to either party.

20.7. In addition to the above factors, such a system would entail the following advantages also:-

- (i) Since, there is scrutiny at two fora, it is only the genuine cases which will be investigated.
- (ii) Penal provisions proposed in the Bill against frivolous complaints may discourage the people and ultimately defeat the purpose of the Bill. Since there are two fora of investigation, penal provisions could be taken off completely.
- (iii) Right to information act could be applied to both the fora.
- (iv) There would not be any need for right to appeal provisions as an independent and in-house forum, both are conducting the investigation.

## CHAPTER –V

### Appointment of Judges

- 21.0. While deliberating upon various provisions of the Judges (Inquiry) Bill, 2006, the Committee Members repeatedly raised the question of appointment of the Judges and the need for bringing about a comprehensive legislation for judicial appointments and accountability. Interestingly, the legal luminaries who deposed before the Committee including the former Chief Justices of India and other Judges of the Supreme Court also raised the issue of appointment of the Judges. One of the Hon'ble Member observed on the issue as "the present Bill will not take us anywhere near judicial accountability. It is only a complaint mechanism. Judicial accountability can be achieved only by an exhaustive legislation or a comprehensive legislation giving powers to an independent National Judicial Commission for recruitment of Judges, disciplinary action, promotion, *etc.* All these matters will have to be dealt with by an independent agency".
- 21.1. This led the Committee to consider the issue of appointment of Judges also. The relevant provision of the Constitution which deal with the method of appointment of the Supreme Court Judge is Clause (2) of Article 124 which states that every judge of the Supreme Court is appointed by the President by warrant under his hand and seal. However, the President's power of appointment of judges is not unfettered. The Constitution requires him to consult such of the judges of the Supreme Court, and of the High Court, as he may deem necessary. It also requires him to always consult the Chief Justice of India in the appointment of a judge other than the Chief Justice of India. According to the Court's interpretation of these provisions the process of appointment of the judges is initiated by the Chief justice through a collegium consisting of himself and four of the senior most judges of the Court. The recommendation of the collegium is binding on the President. He may, however, not appoint a person whom for specific reasons he does not consider suitable for appointment. In such case, the collegium must reconsider his recommendation. On reconsideration, it may either drop the name of the person not found suitable by the President or reiterate its recommendation. In the later case, the President is bound to accept the recommendation. This interpretation of the Constitutional provision by the court in 1993 has led to a situation wherein the executive's discretion in the appointment of the Judges has totally been negated. This in effect means that the President or executive is bound to accept the recommendation of the collegium. The pre 1993 situation involved the discretion of the President i.e. the executive in the appointment of Judges. This was reinforced in a 1982 judgment of the court wherein it was expressly stated that in the matter of appointment of the judges, the President has primacy. By 1993 judgment, the court overruled its earlier interpretation. On this, one of the Hon'ble

Member observed that “In 1993, the Judges took upon themselves the solemn powers which the executive always enjoyed in our Constitution and which the executives in all democratic constitutions everywhere in the world enjoy even today, that is, to make appointments to the higher judiciary. By a very curious procedure of a judicial examination of this case, they appropriated to themselves the power to appoint themselves”. Another Member observed that “.....the 1993 Judgment of the Supreme Court actually interpreted consultation into command. Consulting Supreme Court means you take command from the Supreme Court. The executive has a role in this and that role must be given its play. In fact, as is done by the 1993 Judgment, to mean it as a command is unconstitutional. Therefore, that has to be corrected”.

21.2. Evidently, after, the 1993 judgment, the role of the executive on the appointment of Judges has virtually been obliterated, it is the judiciary which has arrogated to it all the powers with regard to appointment of the Judges It is the collegium which selects and recommends the names of the Judges for appointment which have to be accepted by the executive. It was observed by one of the members on the issue that “the way the appointments are being made today, every member of the collegium has somebody to promote; they fight for his promotion and bringing him to the High court bench for the Supreme Court bench. When allegations are made against such a person, do you expect that this council, consisting of only judges, is going to shed all its trade unionism, favouritism? If we are dissatisfied with the method of appointment, this power cannot reside only in a group of judges. It has to be in a wider body”. The constitutional provision expressly states as under: -

“....Article 124 : Establishment and Constitution of Supreme Court:

(1) xx xx xx xx

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a Judge other than the Chief Justice, the chief Justice of India shall always be consulted”.

This phrasing itself is indicative of the executive’s primacy in the appointment of the Judges. Now, the collegium has taken this consultative process to itself and it recommends names which are to be accepted by the executive. This has resulted in situation which is characterized as Judges appointing Judges. This is in contrast to the Constitutional provision. It was suggested by a Member that “the proposed National Judicial Council should also be the authority competent to recommend all names for appointments as judges and Chief Justice of the High Courts and the Supreme Court. It might be only fair and natural that the body which dealt with complaints/references against the Judges and recommended the punishments to be awarded to them, should also be the one to recommend the names of persons to the president for appointment as

Judges/Chief Justices of the High Courts and the Supreme Court”. Another Hon’ble Member referring to Justice Malimath’s deposition before the Committee stated that “Mr. Malimath, the eminent Ex-Judge and author of the March 2003 Report on Reforms of Criminal Justice System regrettably but candidly told the Committee that the new method of selection of Judges, introduced not by constitutional amendment but by a fresh constitutional interpretation by Judges themselves, holding that the decision of the Judges will prevail over that of the Executive in making these high appointments had not improved matters.”

21.3. Justice Malimath, during his deposition before the Committee had stated as under:-

“.....all that which I have always maintained is against the express tenor of the Constitution. It is a wrong decision. It is an aberration. Sooner it is corrected, the better it is. The earlier one was better. Actually, the quality of appointment of judges in my opinion has suffered after the 1993 judgment of the Supreme Court which has abrogated the exclusive power of virtually recommending the judges, virtually neutralizing the judges. The quality of judges appointed earlier, in my opinion, is much better than the quality of judges appointed after this collegium. It is against the express tenor of the Constitution. It says the President can make an appointment in consultation with such judges of the Supreme Court or of the high court. He can say that he can seek advice of any of the judges. This is what the Constitution says. But you now say that only these four judges. How can you do that? The Government seems to have abdicated its power which was there. Virtually the Government has no say in the matter of appointment.....”.

21.4. While taking stock of the impact of the post 1993 situation, former Chief Justice of India Justice P.N. Bhagwati stated as under:-

“.....but ask any lawyer, standard has gone down. Why it is because of the mode of appointment. When the Supreme Court gave its judgment that the appointment should be in the hands of the judiciary and the government should be bound by it and it should be the end of judiciary, namely, Chief Justice and first four judges. Everyone thought, perhaps, at least, some people thought but I never thought that myself that this would improve the appointment of or quality of appointment of judges. I know what happens there in the Committee of five. I don’t want to discuss that or disclose that but we see what appointments have been made. I don’t know and I don’t have any idea. But I hear from people, therefore, we have actually got to have a comprehensive law wherein with the appointment of judges we have to look into the manner in which you are going to deal with them and then how to deal with them and how to deal with any misconduct and what should be the procedure for impeachment. I don’t think it is possible to dissect all these things into different laws but there may be some conflict between what you have provided in one situation in one legislation and in another legislation. The situation may arise where it may be very difficult to decide which particular law should be applied.....”.

21.5. While deposing before the Committee former Chief Justice of India Justice R.S. Pathak stated on the issue of appointment of judges as under:-

“.....so far as the collegium is concerned, I must frankly confess that I have serious reservations about it. In regard to the old practice that we used to follow in the appointment of judges, although this is not a matter really for today’s deliberations, in my judgment in S.P. Gupta case you will find that I thought we were quite happy with the old system provided it worked out *bona fide*.”

21.6. Former Chief Justice of India Justice Ranganath Misra summed up on the issue of appointment of judges as under:-

“I had made a reference, as a Judge or as a chief Justice, to a larger Bench of the court to find out how this process will be worked out. It sent to a Nine-Judge Bench. It was a larger Bench. We wanted a decision from the Supreme Court on the question. It was not a matter which was to go beyond a point and decide how the vacancies of the Judges would be filled up. There was a wrong thing, probably, in my own way, I consider, that the referring Bench had said that all other questions were closed and that was the only issue to be discussed by the larger Bench. But was referred to should have been looked into, not how Benches would be created, how Judges will be allowed to come in and whether the entire thing is to be reopened. It is a pity that the entire thing was reopened. Ultimately, a principle was evolved by which appointment of Judges were made by the Judges themselves and not by any other agency. The status of the Judges, taken as for the Supreme Court collegium was of one type and for the other collegium were of different type. The foundation on which the appointments were to be made and as were being made that was given up and appointments in the Supreme Court were done on the recommendation of a collegium, consisting of the Chief Justice and two Judges. Then, in the High Courts were made in a particular way. I just indicate it for your consideration that it is on the basis of the recommendation, out of them it was being done. Between that came the authorised Bench of three, to be called a collegium, and a Bench of five for a collegium of the Judges who were retiring or may not be retiring may be already working, the system got disturbed. The power given to the President was taken. The Constitution clearly reads that the Judges shall be appointed by the President on the recommendation of the Government. If that is so, it was not open to exclude the President, make it obligatory for the Judges of the High Court to work in a particular mechanism for the selection, and this has brought in problem.”

21.7. It may not be out of place to mention here the views of the Secretary, Department of Legal Affairs, on the issue of appointment of Judges. The Secretary stated that “this is something we are facing ever since 1993, when the judges took over the power of appointment. Nowhere in the world is this the case; judges don’t appoint themselves. But we have walked into a trap where judges appoint themselves and the executive has no role to play”. Stating further, the Secretary, added that “there is a

larger issue involved and this has to be taken up for review by the court where the Parliament can assert its primacy in appointments”.

- 21.8. The Committee also feels that when the question of complaints is being addressed to, the question of appointments should also be addressed to appropriately. There was a consensus among Committee members that pre 1993 position was a better option as it was in consonance with the provision of the Constitution wherein the executive and the judiciary both were involved in the consultative process and the executive had the primacy. The Committee favours for the restoration of pre 1993 position.
- 21.9. The Committee further suggests that the appointments could also be entrusted to wider a body other than the collegium with representation both from the judiciary and the executive. The Committee is of the considered opinion that it could be entrusted to the proposed “Empowered Committee” which could initially screen the names and thereafter, refer the same to the National Judicial Council for final recommendations.

## CHAPTER –VI

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22.0. During, the Committee's deliberations certain other issues aroused the attention of the Committee. These issues included the following:-

### Decisions of the National Judicial Council (NJC)

22.1. It is not clear from the relevant provisions of the Bill by what method the National Judicial Council will take its decisions? What will happen if there is a difference of opinion among the Members of the National Judicial Council? The Committee feels that this vacuum will be addressed when rules are framed and decision by simple majority is provided therein.

### Non compliance with the decisions of the NJC

22.2. Clause 20 of the Bill authorizes the NJC to impose minor measures. What will happen if a judge refuses to comply with the orders of the NJC? On this particular issue it was observed by the Chairman of the Committee that "suppose, this punishment is not complied with, where is the power, or to whom is the power given to enforce this punishment? Is the power given to the Chief Justice of India, or National Judicial Council's order is executable order? If yes, who will execute it? If there is a violation, how it has to be monitored? The Committee thinks that non compliance with the orders of the NJC should be treated as non ethical on the part of the Judge who is refusing to comply with the orders of NJC and the NJC should recommend such a case for impeachment proceedings.

### Annual Report of the NJC

22.3. Since, the NJC is going to be the authority deciding each complaint finally involving its own internal process, it would be reasonable if an annual report is laid to Parliament in respect of the work done by it in furtherance to its accountability to the people through Parliament.

### Constitutional Validity of the Judges (Inquiry) Bill, 2006

22.4. This issue came in for discussion as some members felt that the constitutional provision under article 124 only provide for 'removal' and since this bill seeks to provide for an additional mode of removal and subjects a judge to additional penalties viz. minor measures which are not provided for in the Constitution, the Bill is *ultra vires* the constitution. In the opinion of the members providing for additional mode of removal and additional penalties requires constitutional amendment than a direct legislative method. It was pointed out by an Hon'ble member that "Chapter IV of the Constitution deals with the Union Judiciary. The Judges of the Supreme Court are to be appointed by the President after consultation with senior Judges of the Supreme

Court and the High court as the President may deem necessary. A judge may be removed from office only by an order of the President after each House of Parliament has addressed him for such removal and the address is supported by a prescribed majority in both Houses of Parliament. Apart from this he retains his office till he attains the age of 65 years or earlier tenders his resignation. Similar provision is made for appointment of High court Judges except that they retire when they complete 62 years of age. Neither the Chief Justice of India nor any senior judges of the Supreme Court individually or collectively can exercise any disciplinary powers over a brother judge. Article 124 ensures his independence not only from executive but substantially from the legislature also. The present Bill cannot be described a Bill for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge. Moreover, as the Bill seeks to provide an additional mode of removal and subjects a judge to additional penalties not provided for in the Constitution, the Bill is *ultra vires*.”

22.5. The Chief Justice of the Jharkhand High Court also opined that “the provisions of the Judges (Inquiry) Bill, 2006, providing a procedure for filing complaint by any person with an allegation of misbehaviour or incapacity of a Judge to the Council is contrary to the Constitutional Provisions and Scheme. The constitution does not contemplate the complaint of any kind against a Judge.” He further opined that “Article 121 prohibits any discussion in the Parliament with respect to the conduct of the Judge of the Supreme Court or of the High court in discharge of his duties except upon a motion for removal of a Judge. What cannot be discussed in the Parliament cannot also be the subject-matter of the Parliamentary legislation. The conduct of a Judge and imposing minor measures for such conduct, a fortiori cannot therefore, be a subject-matter of Parliamentary legislation”. The Chief Justice further opined that “it is true that the object is to bring some legislation for empowering a Special Forum to deal with the complaints regarding the Judicial accountability to be shown by the Judges of High Courts and the Judges of Supreme Court is laudable. But the said legislation should not cause an adverse effect on the independence of the higher judiciary. Therefore, the Bill should be suitably modified”.

22.6. Some of the legal luminaries who had deposed before the Committee on the Bill were also of the opinion that the proposed legislative enactment requires constitutional amendment as the constitution only provides for “removal” and measures short of removal are not expressly provided for in the constitution as it stands. Leading legal luminary Shri Fali S. Nariman, suggested amendment in the end of Article 124 in the following words “such law may also make provision as to measures short of removal.” Another legal luminary was of the view that the provisions of the proposed Bill are against the basic structure of the Constitution as they will undermine the independence of the judiciary. Elaborating further the witness stated that the independence, in the context of the judiciary, does not mean independence from the legislature and executive alone, it also means independence from other judges acting singly or collectively against a judge. The provisions of the proposed Bill seeks to create a mechanism where brother judges will judge the conduct of a judge which in the opinion of the witness was unconstitutional.

22.7. However, in spite of the intense debate about the Constitutional validity of the Bill, the Committee took note of another view point which emerged during the course of the same discussion. There were some Members and Witness who were of the opinion that the Constitution does not prohibit measures other than “removal” altogether. These Members and Witnesses referred to the in-house procedure being followed and adhered to in the judiciary. It was observed by one of the Member that “The Bill is a first significant step toward providing a balanced regulatory statutory mechanism for the higher judiciary. Jettisoning the Bill either on the ground of perceived unconstitutionality or on the ground of “under-inclusion” of several other topics like appointment of Judges or on the ground of imperfection may well amount to throwing the baby out with the bathwater”. The Committee also took note of the Judicial pronouncements in this regard. The Committee was guided by the interpretation of the Constitution by the Supreme Court in the case of C.

Ravichandnan Iyer Vs. Justice A.M. Bhattacharjee which ultimately laid the foundation for the in-house procedure in the higher judiciary to deal with the cases of misconduct warranting measures other than "removal". In the above quoted case it was observed by the Supreme court that "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". The Apex Court had further observed that "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 question involves delicate but pragmatic approach to the questions of constitutional law".

22.8. It was after this pronouncement the Supreme Court in its full court meeting on 7<sup>th</sup> May, 1997 had 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".

22.9. The Committee also noted the view of the Allahabad High Court on this issue which stated that "the Apex court itself has laid down that the chief Justice of a High Court has ample power to deal with any Judge who misconduct himself. Self regulation by Judiciary is the method which has been emphasized by the Apex Court. The Chief Justice of India, as head of the Judicial fraternity has ample power to look into any complaint against any Judge. The in-house remedy for restoring the confidence of people against errant behaviour or misconduct by any Judge has functioned quite effectively". It was further stated by the Allahabad Court that "In recent past fruitful results of in-house procedure were seen by everyone. The Chief Justice of India being head of the Judicial fraternity does not lack means and power to discipline the Judges. On the advice of the Chief Justice of India two Judges have tendered resignation from their office in recent past, one of Delhi High court and one of Rajasthan High Court. There are various other examples where the Judges and even the Chief Justice of the High Court had resigned on the advise given by the Chief Justice of India. The gap between proved misbehaviour and bad behaviour consistent with high office can only be disciplined by self regulation through an in-house procedure".

22.10. The Committee further notes that the judiciary itself is not averse to self regulating methods. It was observed by the Supreme Court itself in Ravichandran Iyer Vs. Justice A.M. Bhattacharjee case that "this in-house procedure would fill in the constitutional gap and would yield salutary effect. Unfortunately, recourse to this procedure was not taken in the case at hand, may be, because of absence of legal sanction to such a procedure." The above observation of the Supreme court make it evident that even the judiciary feels that there should be some mechanism to fill in the gap between proved misbehaviour and bad conduct.

22.11. The Committee takes this opportunity to disagree with the Law Commissions interpretation of entry 11A in list III of the Constitution on which the Law Commission of India has based its argument in favour of the constitutional validity of the proposed Bill. Entry 11A in list III deals with the Administration of Justice; constitution and organisation of all courts, except the Supreme Court and High Courts. It is evident that the particular entry expressly excludes High courts and the Supreme court from its purview. Therefore, the Committee does not agree with the interpretation of the Law Commission in favour of the Constitutional validity of the proposed Bill.

22.12. Taking all the above discussion into account the Committee feels that the in-house procedure devised by the judiciary had its foundation in the interpretation of the constitution viz. article 124. The procedure has been in practice for a decade and has been accepted by the entire administration and the Courts as it is. There has not been a single instance where it has been challenged till date. The Committee also takes note of the fact that the proposed Bill seeks to incorporate the provisions of the Judges (Inquiry) Act, 1968, which again has been in place for about four decades without being challenged even once. Therefore, the Committee feels that the proposed Bill is not seeking to give a new interpretation to article 124 of the constitution. In fact it is seeking to provide a statutory basis to a procedure viz. in-house procedure sanctified by practice and fully accepted by the judiciary. Therefore, despite the opinions of Law Commission and other witnesses the Committee feels that though there is no need for a Constitutional amendment the issue of Constitutional validity of this Bill be thoroughly examined once again before proceeding further with the Bill because many witnesses including jurists were of the opinion that this Bill will not withstand constitutional validity in its present form without amending the Constitution and the Committee can not and should not ignore the views of legal fraternity.

#### Reservations in Judiciary

22.13. Several Members of the Committee raised the issue of reservations in judiciary for SCs/STs/OBCs and other minority groups. The Committee has raised the issue of social justice in judiciary in its other reports also viz, the 2<sup>nd</sup> report of the Committee pertaining to the Demands for Grants of Ministry of Law and Justice wherein the Committee had observed “that during the course of Committee’s deliberations with the representatives of the Ministry, a point was made for adequate representation of SCs, STs and OBCs in the higher judiciary to meet the ends of social justice and equity.” The opinion of an Hon’ble Member on the issue is listed below:-

22.14. Judiciary widens the ambit of social, economic and political justice to the people. It has the prerogative of undertaking judicial review of the Constitution, which is not extended to the Executive. The legislations formulated and passed by the Indian Parliament are also subjected to the appraisal of the Judiciary.

22.15. Such a coveted institution should also exhibit the reality of the social milieu in which the judiciary has been created. It cannot live in isolation in ivory tower and remain outside the ambit of constitutional provisions. The Constitution of India provides for reservation to socially and educationally backward citizens in all institutions of state such as legislature and executive through Articles 15(4), 16, 38, 46, 340 and 93<sup>rd</sup> Constitutional Amendment.

22.16. Accordingly, a percentage of seats are reserved for socially and educationally backward sections in the parliament of India, State Legislative Assemblies, Local Bodies, Central and State Civil Services including IAS and IPS, Public Sector Units, Central and State Governmental Departments and in all public and private educational institutions, except in the minority and religious educational institutions.

22.17. Judiciary is manned and operated by learned judges and other judicial officers. When Executive and Legislature are brought under the ambit of constitutional reservation, it is but natural that Judiciary, the third pillar of Democracy, should also be covered by the principle of reservation. Otherwise, it creates a dubious distinction among the three pillars of democracy. This is the major rationale regarding Reservation in Judiciary.

22.18. Equality of status and of opportunity guaranteed by the Constitution is precisely negated when the Judiciary closes the doors for the appointment of all classes of society. India is a pluralistic society. There are several distinct and differing interests of people with multiplicity of religion, race, caste and community.

22.19. They need to be given equal opportunity in all walks of life for participation in every sphere. Judiciary cannot be an exception. Reservation principle should be inclusive of Judiciary. This alone can bring constitutional balance between the Legislature, Executive and Judiciary. Then only the real cause of Social Justice can be served.

22.20. Denial of this opportunity to all classes of people, be they Backward Classes or SCs or STs or Minority or Women goes contrary to the concept of participatory democracy. This implies that the judicial administration of the country should also be participated by all the outstanding and meritorious candidates and not by any selective or insular group. This can be ensured only when there is an explicit affirmative action in the form of Reservation in Judiciary.

22.21. Today thanks to Reservation Policy, a large number of candidates from BCs, MBs, SCs and STs have been well educated. They have become highly competent to occupy the positions of judges in the High courts and Supreme court. AS the National Commission to Review the working of the Constitution (NCRWC) observes “over 50 years of the progress of education, however tardy, has certainly produced adequate number of persons of the SC, ST and OBC in every State who possess the required qualification having necessary integrity, character and acumen required for judges of Supreme court and High Court for appointment as Judge of the superior judiciary.”

22.22. It is true that judges are appointed in accordance with the provisions of Articles 124 and 217 of the Constitution. These Articles do not make any specific provision for reservation for any caste or class of persons. But why those who appoint judges have not taken a broader view of the Indian society and selected advocates from the neglected communities? Through a shrewd process of manipulation, the Indian Judiciary has been keeping the competent persons of the downtrodden communities from the purview of appointment of judges.

22.23. This has been vindicated by the Supreme Court Judgment delivered in 1993 which states, “even today there are complaints that generations of men from the same family or caste, community or religion, are being sponsored and initiated and appointed as judges, thereby creating a new “theory of judicial relationship”.

22.24. This nexus and manipulative judicial appointments have to be broken. Reservation in Judiciary is the only answer.

22.25. Besides, reservation alone can provide justice to majority sections of the society which have competent

persons but under represented. If we look at the statistics of judges in higher courts, we notice a dismal picture. The national Commission to Review the Working of the Constitution helps us to substantiate this point. It observed that “in higher judiciary, the representation of Scheduled Castes, Scheduled Tribes and Other backward Classes is inadequate. Out of 610 judges in the various high courts, there are hardly about 20 judges belonging to the Scheduled Castes and Scheduled Tribes”.

22.26. The appointment of judges from all strata of the society will have a tremendous impact on the social fabric of the judiciary itself. After all, judiciary has to reflect the aspirations of the people. These are articulated by the Indian Parliament and State Legislatures which are accountable to the people. Only when candidates drawn from different sections of society are appointed as judges, they would understand the social flavour of the legislation passed by the Parliament and Legislatures.

22.27. They would properly interpret them from social angle. This would pave the way for social progress of India. Judges, who have no linking of the social milieu or the living conditions of the neglected sections of society sit as judges in Full Bench or Division or Single Bench very often set aside the legislations passed by the Parliament and Legislatures.

22.28. Adequate representation of the backward citizens especially Scheduled Castes and Scheduled Tribes in all the organs of the State, including the Higher Judiciary (Supreme Court and High Courts) is a mandate of the Indian Constitution. It necessarily and naturally flows from the basic features of democracy, equality and secularism.

22.29. Such representation in the legislature is taken care of by Article 330 and 332 with the hope that such provision for reservation can cease after a particular period once such representation becomes certain even without reservation as hoped in Article 334. The adequate representation in the executive wing of the state is ensured by the command of Article 335 read with Articles 14 and 16 (especially clauses 4, 4A and 48).

22.30. Such adequate representation in all other areas was implied in the Constitution and assured by the mandate under Article 14 and 15, which require such reservation as a necessary ingredient of the principle of equality and which has found its resonance in the clauses 4 and 5 of Article 15. In addition, our Constitution secures equality of status and opportunity as reflected in the Preamble. And, Article 14 not only permits, but also requires classification on the basis of a rational nexus with a reasonable objective.

22.31. Moreover, the mandates of secularism (which includes pluralism, diversity and adequate representation of different classes and groups) and democracy (which requires representative, participative and dialogical character of all the organs and institutions of the State) necessarily require a representative judiciary having adequate participation of un-represented backward classes especially SCs and STs. Since this adequate representation could not be attained even after 60 years of our independence, it is necessary to explicitly provide for such reservation and representation of the backward classes among the judges of the Supreme Court and High Courts. Such provisions should be made and implemented without brooking any further delay. Such provision is also mandated by the Directive Principles of State Policy (Part IV) especially Articles 38, 39, 39A and 46. The same also is in tune with Part-IV A (Fundamental Duties) of the Constitution. [The duty to cherish and follow the noble ideals and other such duties especially Article 51 A (a) (b) (e) (f) (j)].

22.32. Without needing any further Constitutional amendment, the provision for reservation in the higher judiciary has been already included in the Article 14 and 15 of the Constitution. Most specifically Article 15(4) provides for special provisions for Backward Classes, SCs and STs, which special provision necessarily includes representation of these groups in higher judiciary. Since the procedure for selection of and appointment of judges has not been laid down explicitly unlike in the case of legislature and executive, the application of Articles 14 and 15(4) could not be provided explicitly, the fact that the implied procedure did not bring about the 'adequate representation' of these classes only shows the failure of the present implied procedure. Since the Constitution has to be read and interpreted harmoniously and holistically, an interpretation of Article 124, 216 and 217 should have to take into consideration the provision under Article 14 and 15(4) and the basic features of democracy, equality and secularism, which necessarily includes provision for adequate representation in the higher judiciary.

22.33. To conclude, it offends one's common sense as to why there should not be any reservation in a Constitutional body of law interpreters, while such reservation is available in the law-makers' (Parliament and State Legislatures) and law-implementers' body (Executive), where all the three wings of our democracy are equal and important in the Constitutional architecture and flowing from it the national policy of the country.

22.34. The Committee would like the Government to consider this issue earnestly.

CHAPTER –VII  
CLAUSE BY CLAUSE CONSIDERATION

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23.0. In the background of Committee recommendation to re-examine the issue of constitutional validity of the Bill in details the Committee took up clause by clause consideration of the Bill in its meetings held on the 14<sup>th</sup> & 25<sup>th</sup> June, 2007.

Clause-2

23.1. Clause 2 is the definition clause defining various terms used in the Bill.

23.2. Sub-clause (i) defines the term ‘Judge’ as follows:-

“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 purposes of the complaint procedure”.

23.3. The Committee notes that the exclusion of the Chief Justice of India from the definition for the purposes of the complaint procedure was without any reasonable justification. The Committee is for bringing the Chief Justice of India within the purview of the complaint procedure since as discussed in the earlier part of the report, the Committee is not in favour of keeping the reference procedure.

23.4. The Committee suggests to amend the definition as follows:-

“Judge means a Judge of the Supreme Court or the High Court and includes the Chief Justice of a High Court and also the Chief Justice of India for purposes of complaint procedure”.

23.5. Since the Committee is not in favour of keeping the reference procedure clause 2(i) defining the reference procedure may be deleted.

23.6. Subject to the above amendment the Committee adopted the clause.

Clause - 3

23.7. Clause 3 provides for establishment of National Judicial Council and its composition.

23.8. The clause invited considerable discussions on two main issues (i) establishment of the Council and (ii) its composition. The Committee notes that the Council, though appointed by the President totally excludes the presence of the executive and Parliament. This in the opinion of the Committee is violation of the mandate given to the Parliament under article 124(4).

23.9. The Committee further notes that the Chief Justice of India is the Chairperson of the Council and other members of the council are two senior most Judges of the Supreme Court and two Chief Justices of the High Courts to be nominated by the Chief Justice of India. The Committee is of the considered opinion that either the National Judicial Council should be made broad based by including non-judicial Members representing Parliament, and Executive or another additional body be created with representation from Judiciary, Executive, Parliament and Bar to work in co-ordination with the NJC. The Committee suggests for

constitution of an “Empowered Committee” for the purpose as part and parcel of NJC. Hence clause 3(1) should have provisions for “Empowered Committee”.

23.10. The Committee, further notes that the words “to be nominated by Chief Justice of India” in sub clauses (b) and (c) of clause 3(2) may be deleted as by virtue of seniority the Judges will automatically become the Members of the National Judicial Council. The Committee further suggests that other members should be appointed by the President and not by the Chief Justice of India.

23.11. Sub-clause 3 may be added in Clause 3 providing for the composition of “Empowered Committee” as referred to in para 23.9 above. The Committee suggests that the consequent changes in subsequent clauses may accordingly be made.

23.12. Subject to above amendments the Committee adopted the clause.

#### Clause –4

23.13. Clause 4 provides for change in the composition of the Council under certain circumstances.

23.14. The Committee adopted the clause without suggesting any change therein.

#### Clause –5

23.15. Clause 5 prescribes functions of the National Judicial Council.

23.16. The Committee takes serious note of the fact that under sub –clause (2) of clause 5, the council has been authorised to deal with the complaint cases coming under complaint procedure (clause 8) and reference procedure (clause 11) in a similar manner. No distinction has been made in the procedures even though the complaints are coming through two different sources viz. from individuals and 100/50 MPs Lok Sabha/Rajya Sabha respectively. The Committee observed that this in effect amounts to one individual being treated at par with 100 MPs.

23.17. The Committee also notes that it is a statutory provision that provides for 100/50 MPs making a reference to Parliament and it is the Parliament’s prerogative to decide on such a reference. Now the provision of clause 5 vests that power of Parliament to the National Judicial Council. Further, the similarity of procedure could lead to similar fate of the complaints. There will not be any distinction when an individual is making a complaint and when 100 and 50 MPs are making a complaint under constitutional provisions. The Committee opines that the procedure under clause 5 may be confined to complaint cases only.

23.18. Subject to above suggestion the Committee adopted the clause.

#### Clause 6

23.19. Provides for the Council to conduct the investigation and inquiry into any act or conduct of any person other than a Judge in so far as the Council considers it necessary.

23.20. The Committee adopted the clause without suggesting any change therein.

#### Clause 7

23.21. Provides for appointment of officers and employees of the Council for the purposes of discharge of its functions and to fix their terms and conditions of service. It also provides for the utilisation of the services of any officer or employee of the Government or any other agency.

23.22. Since the clause carried provisions for staff of the council it was adopted by the Committee without suggesting any change therein.

#### Clause 8

23.23. Provides the procedure for making a complaint involving allegations of misbehaviour or incapacity in respect of a Judge. It also provides for the particulars to be given in such complaint.

23.24. The Committee notes that the complaint procedure incorporated in clause 8 of the Bill is in fact an in-house procedure which is being followed by the judges since 1997 whereby complaints against the judges are decided by the Judges themselves. This clause authorizes the proposed NJC to receive and deal with the complaints.

23.25. The Committee suggests setting up of a Screening Committee before the NJC to scrutinize those complaints. That Screening Committee hereinafter referred to as "Empowered Committee" will have representation not only from the NJC but also from the executive, Parliament and Bar to imbibe impartiality and transparency in the scrutiny of complaints. In this clause the "Empowered Committee" should do the verification, screening and selecting the complaints for investigation and inquiry by the NJC under clause 5.

23.26. Proviso 3 to Clause 8(1) should be deleted as it will create an exemption in favour of a Judge who has committed misbehaviour during the last years of his tenure.

23.27. Subject to above suggestion, the Committee adopted the clause.

#### Clause 9

23.28. Provides the procedure for verification and preliminary investigation of the complaints. It also provides for the dismissal of frivolous and vexatious complaints.

23.29. Sub-clause (3) of clause 9 stipulates constitution of an investigating Committee by the NJC for conducting preliminary investigation with one or more of its members. The Committee is of the opinion that it is violative of natural principles and even administrative laws which stipulate that the disciplinary authority should not be the inquiry authority also. The Committee recommends that this investigation should be done by some other independent impartial authority. Since the Committee has suggested for an "Empowered Committee" accordingly the complaints would be referred to the "Empowered Committee" for verification, screening and selecting complaints that will go for investigation to NJC under Clause 9. Hence, Clause 9(1) should be modified by splitting verification screening to the "Empowered Committee" and the work of investigation to NJC.

23.30. Subject to above suggestion the Committee adopted the clause.

#### Clause 10

23.31. Lays down the procedure in respect of inquiry and framing of charges and written statement of defence in a complaint case.

23.32. After some discussion, the Committee adopted the clause without suggesting any change therein.

#### Clause 11

23.33. Deals with procedure of reference by the Speaker or Chairman as the case may be to the Council and provides the method of notice of motion for presenting an address to the President for removal of a Judge.

23.34. The Committee notes that the clause takes away the powers of the Speaker, Lok Sabha and Chairman, Rajya Sabha to constitute a Committee for investigation into the charges of misbehaviour or incapacity of a Judge and vest the same to the NJC. Since the Committee has recommended for an “Empowered Committee” the Speaker or Chairman can refer the matter to this Committee and not to the NJC. The “Empowered Committee” shall sit as a screening Committee to consider the complaints received through the complaint procedure and send the same for investigation.

23.35. In view of the above proposition, clause 11 may be deleted.

#### Clause 12

23.36. Requires the Council on receipt of a reference from the Speaker or Chairman to frame definite charges against the Judge for holding inquiry.

23.37. Since, the Committee has suggested for constitution of an “Empowered Committee” for initial verification and screening of the complaints this clause may be deleted.

23.38. In view of the Committee recommendation for constitution of “Empowered Committee” the provision of chapter-IV Clauses 11 and 12 are obsolete hence may be deleted.

#### Clause 13

23.39. Provides for the procedure for inquiry in case of physical or mental incapacity of a Judge and it lays down the method for medical examination of the Judge in such cases.

23.40. The clause is adopted by the Committee without suggesting any change therein.

#### Clause 14

23.41. Provides for the procedure for inquiry and requires such inquiry to be conducted in camera.

23.42. The Committee observes that there should be no media report about a judge and adopted the clause.

#### Clause 15

23.43. Empowers the Council to regulate its own procedures in making the inquiry in accordance with the principle of natural justice to give reasonable opportunity to the Judge of cross-examining the witnesses adducing the evidence and of being heard in his defence.

23.44. Since the clause pertained to normal procedural matter, the Committee adopted it without suggesting any change therein.

#### Clause 16

23.45. Provides for the Central Government to appoint an advocate to conduct the cases against the Judge.

23.46. The Committee notes that the clause allows the Central Government to appoint an advocate to conduct case against the Judge. However, the clause does not have provision enabling the judge to engage an advocate for his defence. The Committee desires for an equal opportunity to be accorded to the judge including the legal aid in deserving cases.

23.47. The Committee suggested to include the words “if a Judge is not able to arrange an advocate, the Government may provide it” in the clause, with the suggested amendment the Committee adopted the clause.

#### Clause 17

23.48. Provides that the Council shall, while conducting any preliminary investigation or inquiry, has all the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908.

23.49. Since the clause contained procedural matter, the Committee adopted it without suggesting any change therein.

#### Clause 18

23.50. Provides for search and seizure of any documents that, in the opinion of the Council, would be useful for, or relevant to any preliminary investigation or inquiry.

23.51. Since, the clause contained normal procedural matter, the Committee adopted it without suggesting any change therein.

#### Clause 19

23.52. Provides for change in the composition of the Council due to elevation of any member as Chief Justice of India or due to elevation of any Chief Justice of the High Court as a Judge of the Supreme Court or in case any vacancy in the Council arises due to retirement or resignation of a member of the Council.

23.53. The Committee adopted the clause without suggesting any change therein.

#### Clause 20

23.54. Provides for the disposal of complaint and follow up action in complaint procedure after conclusion of inquiry including imposition of minor measures.

23.55. The Committee recommends that the word “Minor” may be substituted with the word “appropriate”. Sub-Clause (iv) of clause 20(1)(b) which lists “request that the Judge may voluntarily retire” may be deleted

as requesting the judge to retire voluntarily may amount to enabling a judge to bypass the accountability process.

23.56. In Sub-clause (3) and (4) the word President may be substituted with the word “Parliament i.e. Speaker or Chairman” as report of NJC under Clause 20 should be sent to the Chairman/Speaker in consonance with article 124(4) and (5) of the Constitution.

Clause 21

23.57. Provides for disposal of reference from the Speaker or the Chairman under the reference procedure.

23.58. Since, the Committee has recommended for constitution of an “Empowered Committee” and deletion of Chapter-IV containing clauses 11 and 12 pertaining to reference procedure, the provisions of Clause 21 may also be deleted as they pertain to procedure for Clause 11.

Clause 22

23.59. Provides for the address to the President for the removal of the Judge by Parliament.

23.60. The Committee adopted the clause without suggesting any change therein.

Clause 23

23.61. Provides for disqualification of the removed Judge for any diplomatic assignment, employment under the Government of India or the Government of a State, or to act as an arbitrator in any arbitration proceeding and also in respect of chamber practice.

23.62. The Committee adopted the clause without suggesting any change therein.

Clause 24

23.63. Provides that intentional insult or interruption to the Council shall be an offence punishable with imprisonment for a term that may extend to six months, or with fine, or with both.

23.64. The Committee adopted the clause without suggesting any change therein.

Clause 25

23.65. Provides for powers to Council to try certain cases and for taking cognizance of the offence showing cause.

23.66. The Committee adopted the clause without suggesting any change therein.

Clause 26

23.67. Provides for the punishment for false and vexatious complaint. It also provides that any person, who

makes a complaint that is found by the Council to be false or vexatious or with an intention to harass the Judge, shall be punished with imprisonment for a term that may extend to one year and also to fine that may extend to 25,000 rupees.

23.68. This clause came in for much discussions. Some of the Committee Members were of the opinion that the clause itself is unnecessary as it will only discourage people from making complaints against the Judges. The Committee suggests for insertion of the words “after due process of enquiry” after the words “which is found by the council” so that a complainant is protected.

23.69. Subject to above amendment, the Committee adopted the clause.

#### Clause 27

23.70. Provides for the confidentiality in complaint procedure and says that the complainant and every person, who participate in the preliminary investigation and inquiry as a witness or as a lawyer, must undertake 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, including the media without prior written approval of the Council.

23.71. The Committee adopted the clause without suggesting any change therein.

#### Clause 28

23.72. Provides for keeping identity of complainant confidential.

23.73. The Committee is for deletion of the words “and also the Judge against whom the complaint is made” because it feels that the Judge against whom a complaint is made should have the opportunity to know about the motive of the complainant.

23.74. Subject to above amendment, the Committee recommends for deletion of the clause.

#### Clause 29

23.75. Provides for stoppage of assigned judicial work during the pendency of the preliminary investigation or inquiry or address by both Houses of Parliament to the President.

23.76. The Committee adopted the clause without suggesting any change therein.

#### Clause 30

23.77. Provides for appeal to the Supreme Court in the matter of an order of removal passed by the President, or an order passed by the Council imposing one or other ‘minor measure’ on the basis of a complaint.

23.78. The Committee notes that the Judicial service is not service in the sense of employment. Therefore, the Judges should not be treated as ordinary Government servants. The Committee further notes that a presidential order for removal is the Parliament’s prerogative after due process/resolution of 2/3<sup>rd</sup> majority. It should not be allowed to be challenged. On these grounds, the Committee opines for not keeping the

provision for appeal both in case of removal or “minor measures”. It feels that the very purpose for which the Bill was introduced would be defeated if provision for appeal is given.

23.79. Accordingly, the Committee recommends deletion of the clause.

Clause 31

23.80. Provides for no action for contempt of court in respect of the allegations which are the subject-matter of investigation or inquiry by the Council.

23.81. The Committee adopted the clause without suggesting any change therein.

Clause 32

23.82. Provides that any preliminary investigation or inquiry pending before the Council will not affect the criminal liability in respect of such allegations.

23.83. The Committee adopted the clause without suggesting any change therein.

Clause 33

23.84. Provides that all records and documents related to complaint, preliminary investigation and inquiry, shall be confidential, irrespective of anything contained in any other law, for the time being in force, including the Right to Information Act, 2005.

23.85. The Committee is for creating an exception for making the final order under Clause 20 of the NJC known to people.

23.86. Subject to above amendment, the Committee adopted the clause.

Clause 34

23.87. Provides that no suit, prosecution or other legal proceedings shall lie against the Council or any official or person engaged by the Council for conducting preliminary investigation or inquiry, in respect of anything that is done in good faith.

23.88. The Committee adopted the clause without suggesting any change therein.

Clause 35

23.89. Provides that proceedings before the Council and the Committee shall be the judicial proceedings for the purposes of section 195 of the Code of Criminal Procedure, 1973 and sections 193, 196 and 228 of the Indian Penal Code.

23.90. The Committee adopted the clause without suggesting any change therein.

Clause 36

23.91. Provides for the Council to lay down a code of conduct for the Judges of the Supreme Court or of the High Courts.

23.92. Justice R.S. Pathak, during his deposition before the Committee had suggested as under:-

“Clause 36(3) provides that the Code of conduct contemplated by Clause 36(1) should require a Judge to give intimation of his assets and liabilities to the Chief Justice of India or the Chief Justice of the High Court. I would suggest that intimation of the assets and liabilities of his wife and unmarried children should also be included.”

23.93. The Committee is for making the code of conduct a public document so that it is known to people.

23.94. Subject to above suggestion, the Committee adopted the clause.

#### Clause 37

23.95. Provides for the constitution of Joint Committees of both Houses of Parliament for making rules.

23.96. The Committee adopted the clause without suggesting any change therein.

#### Clause 38

23.97. Provides for the repeal for the Judges (Inquiry) Act, 1968.

23.98. The Committee adopted the clause without suggesting any change therein.

#### Clause – 1

23.99. Clause 1 states the title of the Bill and its commencement

23.100. Sub clause (1) of clause I which states the title of the Bill came in for some discussion. It was observed that the existing title of the Bill does not convey the true intent of the legislation. The Committee feels that if the title of the Bill is changed to “National Judicial Council Act” it will convey the exact meaning of the new enactment. In Clause (1) for the figure “2006” the figure “2007” be substituted. In the Preamble for the word “fifty seventh” the word “fifty eight” be substituted.

#### LONG TITLE OF THE BILL

23.101. The Committee notes that the matter relating to the conduct of an inquiry against a Judge is by its very nature a sensitive matter as it is a matter against a constitutional authority. It observes that an upright and honest judge may not like to remain in his seat even if a warning is administered to him. The words minor measures do not find favour with the Committee Members. Accordingly, the Committee suggests the substitution of the words “minor measures” with the words “appropriate measures”.

23.102. Subject to the above suggested amendment; the long title was adopted as it is.

24. The Committee recommends that the above Bill, as reported by it, may be passed along with the suggestions incorporated therein.

MINUTES OF DISSENT SUBMITTED BY  
SHRI RAM JETHMALANI, M.P.

This Committee has been examining The Judges (Inquiry) Bill, 2006, which was originally drafted by the Ministry for Law & Justice in 2005 and was then examined by the Law Commission of India. The Commission by its 105<sup>th</sup> Report has produced the present draft.

2. This Committee has had the benefit of long hearings at which eminent witnesses with expert knowledge in the field expressed their views and answered queries from Members of this Committee. Some of the witnesses sent valuable notes thereafter crystallizing their thoughts and responses on matters arising out of the discussions at the hearings.

3. The preamble of the Bill declares that the Bill is for 'establishing a National Judicial Council to undertake preliminary investigation and inquire into allegations of misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and to regulate the procedure for such investigation, inquiry and proof, and for imposing minor measures; and for the presentation of an address by Parliament to the President and for matters connected therewith'.

4. The objectives in the above Preamble are carried out in the 38 Clauses of the Bill. The Bill is accompanied by the usual statement of 'Objects and Reasons'. It rightly proclaims judicial independence as one of the basic fundamentals of the Constitution and that independence and accountability are inseparable. It follows from this assertion that provisions for accountability do not curtail judicial independence; in fact they fortify it. The Report of this Committee has taken note of this very wholesome principle.

5. The statement further proceeds to declare 'an urgent need of legislation for establishing a mechanism to deal with allegations of misbehaviour or incapacity of Judges of the Supreme Court and the High Courts'. This urgency has been accepted virtually by every witness who appeared before the Committee. It is no pleasure for the Committee to recount the reasons for this urgency.

6. Mr. Malimath, the eminent Ex-Judge and author of the March 2003 Report on Reforms of Criminal Justice System regretfully but candidly told the Committee that the new method of selection of Judges, introduced not by constitutional amendment but by a fresh constitutional interpretation by Judges themselves, holding that that decision of the Judges will prevail over that of the Executive in making these high appointments had not improved matters. This is what the witness said "Actually, the quality of appointment of judges in my opinion has suffered after the 1993 judgment of the Supreme Court..... The quality of judges appointed earlier, in my opinion, was much better than the quality of judges appointed after their collegiums..... Our Founding Fathers and the Constitution-makers never thought that judiciary would reach to this point. We have betrayed their trust."

7. Many other witnesses have testified to this tragic phenomenon. Some of the members of this Committee, who are busy practicing lawyers, have also confirmed this sad development. The Committee accepts this testimony fully.

8. At the very outset the Committee has been presented with the problem of the constitutional validity of this Bill Chapter IV of the Constitution deals with the Union Judiciary. The Judges of the Supreme Court are to be appointed by the President after consultation with senior Judges of the Supreme Court and the High Courts as the President may deem necessary. A judge may be removed from office only by an order of the President after each House of Parliament has addressed him for such removal and the address is supported by a prescribed majority in both Houses of Parliament. Apart from this he retains his office till he attains the age of 65 years or earlier tenders his resignation. Similar provision is made for appointment of High Court Judges except that they retire when they complete 62 years of age.

9. Neither the Chief Justice of India nor any senior judges of the Supreme Court individually or collectively can exercise any disciplinary powers over a brother judge. Article 124 ensures his independence not only from the executive but substantially from the legislature also. Even though the Parliament can present an address for removal for proved misconduct or incapacity, the Parliament is debarred by Article 121 from holding any discussion on the conduct of a Judge except upon a motion for presenting an address. The clear inference from this provision is that the misconduct or incapacity on which the motion for removal is based must have been already judicially determined by a Judicial Tribunal which does not suffer from any such prohibition. That Judicial Tribunal has been created by the Judges Inquiry Act of 1968. This legislation has been enacted in exercise of the powers conferred by Clause 5 of Article 124 which provides "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)".

10. The Bill seeks to repeal the 1968 Act. The present Bill cannot be described as a Bill for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge. Moreover, as the Bill seeks to provide an additional mode of removal and subjects a judge to additional penalties not provided for in the Constitution, the Bill is in the opinion of this Committee wholly *ultra virus*. Many expert witnesses have shared this view. If the Government wishes to go ahead with the Bill in its present form it will be well advised to secure the opinion of the Hon'ble Supreme Court of India under Article 143 of the Constitution and to avoid the embarrassment of the Supreme Court holding the Act to be invalid.

11. The Committee has seriously considered whether the problem of judicial corruption, misconduct and incapacity, physical or intellectual can be solved by providing a National Judicial Council contemplated by Clause 3 to investigate and inquire into any matter involved, arisen from or connected with any allegation of misbehaviour or incapacity and empowering any person to make a complaint in writing of such misbehaviour or incapacity.

12. Witness after witness has deposed before the Committee that the remedy lies not in creating these additional measures and penalties and the Judicial Council to adjudge and inflict them but in changing the method of initial recruitment. The experience of the Members of this Committee supported by the convincing testimony of large number of witnesses compel the conclusion that the methods of initial appointment which have been tried before and after 1993 have miserably failed. Far from there being an improvement, there has been a steady decline of moral as well as technical equipment of the appointees. A third method has to be devised in the hope that it will serve the desired objective.

13. A weighty and conclusive reason is to be found in the nature of the judicial office itself. When a Judge

has been advised to retire voluntarily or censured or admonished it deprives the Judge of all his dignity and stature, makes him an object of contempt and enables every litigant boldly to tell him that he has no confidence in him and that he should recuse himself from the case in hand. The Judge will be in a pathetic position and any decision rendered by him will fail to conform to the principle that justice must not only be done but seem to be done. This entire system of minor punishments will expose the entire judicial system to ridicule and be totally counter productive. It will be destructive of the declared objectives of the proposed Bill.

14. Clause 21(2) of the Bill is repugnant to Article 124 of the Constitution inasmuch as it deprives the Parliament of its constitutional rights to decide whether a proved misconduct does or does not deserve removal. The Bill transfers this function to the Judicial Council.

15. Some of the witnesses who initially came to make their comments on the Bill on being questioned by the Committee conceded that the proper remedy is the creation of the National Judicial Commission and that the Bill must be rejected in toto. The Committee fully shares this opinion. It is said that after 1993 the Judges of the Supreme Court have evolved an In House procedure under which all allegations made against any Judge are inquired by a Collegium and suitable action taken. The Committee regrets that there is no evidence before it of any such effective functioning of the alleged In House procedure. No judge seems to have incurred either the penalty of removal or any of the minor penalties mentioned in Clause 20 of the Bill.

16. The Committee appreciates the argument which has been made by respectable and credible witnesses that there is a conscious or unconscious trade unionism practiced by the Judges and there is a natural reluctance on their part to take unpleasant action against their brother judges. When a case comes before a Judge of the Supreme Court or the Judge of the High Court for hearing in open Court and the Judge discovers that one of the litigating parties is known to him either as a friend or as an enemy, he voluntarily recuses himself from the case. This is a very proper course of judicial conduct. How can senior judges make judgments imposing punishments on their colleagues with whom they sit in Court day in and day out and when they and their families habitually meet interact and socialize. They are bound to have prejudices for and against their colleagues and any judgment by them in the matters of their colleagues will not evoke public confidence. Complainants will feel unfairly treated even if their complaints are rightly rejected. The Committee has, therefore, come to the conclusion that the Judicial Council contemplated by the Bill should be treated as a non starter.

17. The Committee recommends the creation of a body whether called Council or Commission in which the judiciary, the executive, the political opposition, the Bar, the academic world and world of social sciences are adequately represented. Even the Judges (Inquiry) Act, 1968 contemplated one of the Members to be a Jurist to be selected by the Presiding Officer of the relevant House of Parliament. The presence of a Jurist would ensure the academic excellence and professional expertise of the persons appointed or promoted to Judicial Office.

18. The Committee feels fortified in its opinion by the fact that earlier Government had introduced in Parliament a Judicial Commission Bill which unfortunately lapsed because of the dissolution of the Lok

Sabha. The Commission had all the powers of appointment and removal. It is also right to point out that the primary object of the present Bill namely Judicial Accountability itself assumes that the judiciary is accountable to some body else and not to itself. The Bill is thus a caricature hardly designed to achieve any significant measure of accountability of our higher Judiciary.

19. The Committee feels as indeed most of the witnesses have conceded before the Committee that the Organized Bar should also be represented on this body. The lawyers know much more about the integrity and character of an aspiring Judge as well as sitting Judges than any one else. Witnesses have deposed before the Committee that the present system of appointment only ensures the selection of children, relatives and friends of sitting Judges being preferred to better qualified candidates. This grievance is not imaginary and the Committee cannot ignore it.

20. Without prejudice to this Committee's complete rejection of this entire Bill, the Committee wishes to draw attention to the following factors which should be taken care of if the Government is determined to go ahead with the Bill.

- (i) There is no justification for excluding the Chief Justice of India from being proceeded against under the complaint procedure of Chapter III of the Bill.
- (ii) The Judicial Council will be so much flooded with work that the Judges working on it will have to abandon their normal judicial work and devote full time to the disposal of complaints made by citizens. At least in the beginning there is going to be a flood of them.
- (iii) Clause 30 of the Bill provides for appeal to the Supreme Court. This is absurd and unworkable. Junior Judges will be sitting in Appeal over the decision of the senior judges and for every appeal atleast a five judge bench will have to be constituted. This will open administration of justice in the Supreme Court to adverse criticism if not ridicule.
- (iv) All orders of the Council must by constitutional amendment be excluded from the ambit of Articles 32, 136 and 226 of the Constitution of India. This is also a further reason as to why the Bill should be rejected in toto.
- (v) Without these constitutional amendments the Bill will create another prolific source of litigation. On one hand the judges are thinking of creating night shifts for the working of courts on the other hand they wish to create a further unbearable burden.
- (vi) The drafting of the Bill leaves much to be desired. For example in Clause 3(2) senior most judges are senior most and they do not have to be nominated by the Chief Justice.

In Clause 9 (1) of the Bill the simple text should be as under:-

“If the Council is satisfied after such preliminary investigation and inquiry as it considers necessary

that the complaint is either false or not supported by credible evidence or does not disclose a case of misbehaviour or incapacity it should dismiss the same and record its reasons for the dismissal”.

These are only illustrations of bad drafting which is a prominent feature of the whole Bill.

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MINUTES OF DISSENT SUBMITTED

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BY : VIRENDRA BHATIA, MEMBER OF COMMITTEE

I have gone through the proposed 21<sup>st</sup> report, Judges (inquiry) Bill 2006, in my view this Judges (inquiry) bill may be returned for reconsideration on account of following reasons :

1. This bill is in conflict with the Constitutional provisions (Article 124(4) and is likely to be declared ultra-virus to the Constitution of India.
2. That if there is any necessity to bring the bill, the Constitution amendment is required.
3. That it encroaches upon the right of the Parliament.
4. That even if no Constitutional amendment is required, then it is in conflict with the recommendation made by the committee contained in Chapter (i) to (iv) and (vi) of report.
5. That it will not be able to serve the purpose, for which the bill is being brought, it will lead to more serious repercussions.
6. That this bill affects the independence of judiciary and if this bill is passed, the Judges will be under tremendous pressure and will not be able to discharge their duties, independently & fearlessly.
7. That this bill will help nuisance creators, they may be litigants or lawyers. It will also divide the Judges among themselves and the Judges may form there own power group.
8. That in future, in India the situation like Pakistan may, also, be created. By making false complaints for the inquiry to be instituted, some pressure group may demand that the Chief Justice of India or other Judges facing inquiry may be suspended. This may lead to the same situation, that had taken place in Pakistan, where the Chief Justice of Pakistan was suspended and next man was sworn in as Chief Justice.
9. That this bill does not cure the root cause of the complaint against Judges. Cure lies at appointment stage of the Judges. If honest, competent lawyers of proven integrity are not appointed the Judges, then this bill will not likely to serve any purpose.

My view is that this bill may be returned with the recommendation that a comprehensive reform bill may be introduced, keeping in view the recommendations contained in Chapter (i) to (iv) and (vi) of the report.

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— To be appended at printing stage

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— Published in Gazette of India (Extraordinary) Part II Section 2 dated the 19<sup>th</sup> December, 2006.

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Rajya Sabha Parliamentary Bulletin Part-II (No. 43744) dated the 27<sup>th</sup> December, 2006.

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