Pre-Legislative Briefing Service (PLBS)

The Judicial Standards and Accountability Bill, 2010: A Briefing Document

Submitted to the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

TABLE OF CONTENTS

Executive Summary

The Judicial Standards and Accountability Bill 2010 (hereinafter "the Bill") is a legislation which aims to increase accountability of the higher judiciary in India, comprising the Supreme Court and the High Courts. As stated in the Preamble and reiterated in the Statement of Objects and Reasons, it seeks to achieve this aim by establishing statutory judicial standards, instituting a system of public complaints against judges for misbehaviour and incapacity and setting up a revised administrative mechanism to enforce these standards and hear these complaints. Like the Judges (Inquiry) Act, 1968, the legislation which this Bill repeals, the ultimate mechanism for enforcing judicial accountability in this Bill is impeachment of the judge pursuant to the constitutional scheme envisaged in Art. 124(4) read with Art. 124(5) [read with Art. 218 for impeachment of High Court judges].

No one can argue with a rationale as laudable as seeking to increase judicial accountability. Especially in contemporary India, where the reputation of the higher judiciary has recently been tarnished by allegations of corruption and two impeachment motions in different stages of progression, an increase in judicial accountability is vital for maintaining public confidence in the judiciary. This report however is premised on the foundational belief that any attempt to increase judicial accountability must be harmonised with the concomitant need to preserve judicial independence, a part of the basic structure of the Constitution and a foundation of our democratic government. It is through the lens of this belief that this report undertakes a comprehensive legal analysis of the Bill, which is hoped, will be of significant use to the Honourable Committee in recommending appropriate reforms.

Chapter I of the report critiques the definition of 'misbehaviour' in clause 2(j) of the Bill. It argues that the term should not be defined statutorily but instead the power to define it should be vested in the Oversight Committee, the nodal institution set up by the Bill for its enforcement. Chapter II undertakes both an internal and external critique of the judicial standards listed in Clause 3 of the Bill. It argues that the statutory laying down of standards poses a threat to judicial independence and such standards should instead be reformulated as guidelines which may be used by the Oversight Committee in carrying out its functions under the Bill. At the same time it analyses these standards threadbare to make them conform to international best practices and remove logical inconsistencies.

Chapter III deals with the processes of making a complaint and initial scrutiny. It recommends a simplification of the process in the interests of time and administrative convenience. Chapter IV concerns the Oversight Committee and recommends changes to its composition and points out certain key institutional features relating to the Oversight Committee which the Bill omits to mention. Chapter V deals with investigations for complaints alleging incapacity of a judge. It points out certain drafting oversights in the Bill and recommends suitable amendments to ensure that investigation, not only for misbehaviour, but also for incapacity, takes place under uniform and efficacious processes. Chapters VI and VII deal with offences and penalties prescribed in the Bill. They seek to complement the provisions, in the Bill by suggesting additional penalties and undertake a detailed analysis of the punishments provided for offences under the Bill to judge their commensurability. Chapter VIII focuses on the issue of time limits for investigation and recommends reform such that the investigation under the Bill happens expeditiously.

Chapter IX deals with a key issue which had been recommended by the Law Commission of India in its 195th Report on the Judges (Inquiry) Bill, 2005— the imposition of minor measures. This chapter comprehensively deals with the provisions for minor measures in this Bill, in foreign jurisdictions and looks at the rationale for their imposition in order to recommend certain amendments which will make them workable in an Indian context. Finally, Chapter X suggests a novel mechanism for furthering judicial accountability— the setting up a Judicial Development Scheme by appropriate rules under this Bill, which will be a regulated evaluation system with the sole purpose of improving the quality of the higher judiciary, a practice which has yielded positive results in other jurisdictions.

The report omits to analyse several provisions of the Bill, most notably provisions in relation to declaration of assets in Chapter III of the Bill. This is deliberately so, since we are in complete agreement with Parliament as far these provisions are concerned. Insofar as the other substantive provisions which we do analyse are concerned, it is hoped that our recommendations can assist the Honourable Committee in suggesting appropriate reform to the Bill, such that the quest for judicial accountability in India is both sound in principle and effective in practice.

I. Definition of Misbehaviour: Clause 2(j)

A. Introduction

1. Clause 2(j) of the Bill defines the term misbehaviour as,

"(j) "misbehaviour" means,

(i) Conduct which brings dishonour or disrepute to the judiciary; or
(ii) Wilful or persistent failure to perform the duties of a Judge; or
(iii) Wilful abuse of judicial office; or
(iv) Corruption or lack of integrity which includes delivering judgments for collateral or extraneous reasons, making demands for consideration in cash or kind for giving judgments or any other action on the part of the Judge which has the effect of subverting the administration of justice; or
(v) Committing an offence involving moral turpitude; or
(vi) Failure to furnish the declaration of assets and liabilities in accordance with the provisions of this Act; or
(vii) Wilfully giving false information in the declaration of assets and liabilities under this Act; or
(viii) Wilful suppression of any material fact, whether such fact relates to the period before assumption of office, which would have a bearing on his integrity; or
(ix) Wilful breach of judicial standards.

2. The rationale for defining 'misbehaviour' in the Bill is evidenced by the use of the word 'means' as well as the long list of nine grounds which constitutes misbehaviour. These two facts taken together represent a clear legislative attempt to make the definition of misbehaviour exhaustive. The use of the word 'means' has, in a long line of cases, been held by the Supreme Court to impart to the definition an exhaustive character. For example, in *Bharat Cooperative Bank v. Employees Union,*[1] a three-judge Bench of the Court held that any definition that is preceded by the word

[1] *Bharat Cooperative Bank v. Employees Union*, (2007) 4 SCC 685.

'means' is normally exhaustive. In addition the widely enumerated list of nine grounds complements this understanding and seeks to ensure that all possible aspects which may be considered judicial misbehaviour are covered.

3. Both the idea of defining 'misbehaviour' statutorily as well as making this definition exhaustive and, by implication, binding on both the Oversight Committee which is the nodal body to carry out the purposes of the Act as well as the courts which have the power of judicial review, require closer scrutiny in light of the Constituent Assembly Debates, existing law, earlier reform efforts and Supreme Court precedent.

B. Misbehaviour: A History of the Term

4. The relevance of the term 'misbehaviour' in the context of removal of judges arises owing to its usage in Art. 124(4) of the Constitution, which deals with the grounds and procedure for impeachment of Supreme Court judges.[2] Article 124(4) in turn owes its genesis to Clause 18 of the Union Constitution Committee Report. While discussing this provision, members of the Constituent Assembly, though in agreement regarding the fact that impeachment would only be on the grounds of misbehaviour or incapacity, differed regarding the method of establishing such proof. Whereas one school of thought represented by Alladi Krishnaswami Ayyar suggested that the constitutional provision, given best practice worldwide, should merely lay down the grounds and allow proof of these grounds to be determined by federal law and subsequent processes,[3] another viewpoint espoused by M. Ananthasayanam Ayyangar, was that the constitutional provision itself should require that a special tribunal comprising judges or ex-judges of the Supreme Court or the High Courts recommends impeachment if the grounds were proved.[4] Though the former view prevailed, it is instructive to note that neither of these views sought to define the term misbehaviour, either in the Constitution (the latter view) or as a matter of federal law (the former view), let alone define it exhaustively. Even in the discussion of Draft Art. 103(4), the immediate precursor to Art. 124(4) of the Constitution, there was no

[2] Article 217(1)(b) makes the same grounds and procedure applicable for impeachment of High Court judges as well.

[3] Per A.K. Ayyar, *Constituent Assembly Debates Vol. IV* (29.07.1947) sourced from http://parliamentofindia.nic.in/ls/debates/vol4p12.htm.

[4] Per M.A. Ayyangar, *Constituent Assembly Debates Vol. IV* (29.07.1947) sourced from http://parliamentofindia.nic.in/ls/debates/vol4p12.htm.

reference to the need to define the term misbehaviour.[5] Implicit in this understanding was the belief that if the power of removal was vested in high constitutional authorities, they would be in the best position to judge when misbehaviour (or incapacity) had been occasioned.

5. The same understanding held forth in the Judges (Inquiry) Act, 1968 ("JIA, 1968") and its preceding drafting discussions. Though the JIA 1968 itself in its Preamble states,

   "An Act to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a High Court..."

   in Section 2, the term misbehaviour is conspicuously left undefined. In the preceding Judges Inquiry Bill 1964 ("JIB 1964") though an elaborate procedure was established to prove misbehaviour or incapacity with the appointment of a three-member committee, the terms themselves were not defined. In the interim, the matter was referred to a Joint Committee of the Houses of Parliament whose report presented in 1966, clearly suggests that proof of misbehaviour would be a judicial determination by the recommended statutory committee and no further guidelines needed to be set.[6] Equally, the Judges (Inquiry) Bill ("JIB 2005") does not contain a definition of 'misbehaviour'.

6. Judicial dicta of the Supreme Court also cautions against an exhaustive statutory definition of 'misbehaviour'. In *Krishna Swami v. Union of India*[7] a decision by the Supreme Court relating to the impeachment motion relating to Justice V. Ramaswami of the Supreme Court, the dissenting judgment of Justice K. Ramaswamy after giving several instances of misbehaviour, dwelling on the importance of *mens rea* in such a determination, holds:

   "The Constitution or the Act did not define 'misbehaviour'. Several international forums for judicial independence suggested to define misbehaviour but to no avail. No legislature in any democratic country attempted to do so as it would appear to be difficult to give a comprehensive definition to meet myriad situations."

[5] See discussion in *Constituent Assembly Debates Vol. VIII* (25.05.1949) sourced from http://parliamentofindia.nic.in/ls/debates/vol8p7a.htm.
[6] This is elaborately discussed in The Law Commission of India, *195th Report on the Judges (Inquiry) Bill, 2005* (January, 2006) (hereinafter "LCI 195").
[7] AIR 1993 SC 1407.

7. Again, in *C. Ravinchandan Iyer v. Justice A.M. Bhattacharjee*[8] the Court, speaking through Justice K. Ramaswamy, held that every improper act by a judge does not constitute misbehaviour and it is necessary to judge the degree of impropriety of the act based on the context in which it was committed. Thus the Court recognised a distinction between improper behaviour of a judge *per se* and improper behaviour of a judge which is impeachable, and suggested that the distinction between the two would have to be judged on a case-by-case basis in the particular circumstances of each case.

8. From these judicial discussions and legislative history of the term 'misbehaviour' it is clear that defining the term was considered both superfluous and fraught with difficulty. The drafters, as well as members of the Joint Committee of Parliament prior to the drafting of the JIA 1968, were unconcerned with the need to constitutionally or statutorily define misbehaviour, implicitly believing that allegations thereto would be judicially determined on the facts and circumstances of each case by the appropriate institution. In this sense, defining the term would be superfluous. The judgments of the Supreme Court, on the other hand, reflect the practical difficulties of such a process. Not only would any strict definition of an open-ended term such as 'misbehaviour' suffer from the flaw of under-inclusion, the very fact of statutorily defining the term ran the risk of ossifying it such that newer instances of misbehaviour could only be introduced by legislative amendment which would be unduly time-consuming. The alternative of a case-by-case determination of misbehaviour would allow its understanding to remain dynamic as well as ensure that it would not be an under-inclusive category.

C. Critical Analysis of Clause 2(j)

9. The history of the term 'misbehaviour' adverted to above is especially valid in the specific context of the definition of 'misbehaviour' adopted in Clause 2(j) of the Bill. There are two patent flaws in the clause: it is both over-inclusive and under-inclusive in significant ways. First, under Clause 2(j)(vi), a failure to furnish declaration of assets and liabilities in accordance with the Bill would constitute misbehaviour. It is pertinent to note that there is no *mens rea* element involved in this proposition, as was

[8] MANU/SC/0771/1995.

held by the Supreme Court to be a necessary element in judicial misbehaviour.[9] Thus it is entirely possible that a judge who fails to declare assets and liabilities or declares it late can be legally impeached for his inaction since it constitutes misbehaviour and thus is an impeachable offence.[10] This is a clear instance of over-inclusion as impeachment for a relatively minor breach such as the above is vastly disproportionate. Again, clause 2(j)(ix) makes wilful breach of judicial standards misbehaviour. Given the extremely wide and considerably nebulous understanding of judicial standards adopted in Clause 3 of this Bill, critiqued in Chapter II of this report, considering wilful breach of these standards to be misbehaviour which can lead to impeachment is another instance of over-inclusion which this definition suffers from.

10. Secondly, the clause suffers from the vice of under-inclusion. By using the word 'means' in the *chapeau*, the clause has been made exhaustive. Though exhaustive clauses have the benefit of certainty, a significant drawback is that they cover limited ground. This is especially so given the fact that clauses 2(j) (ii), (iii), (iv) and (v) have been derived from the dicta of Ramaswamy J. in *Krishna Swami v. Union of India*,[11] a judgment in which the judge specifically, despite skilfully outlining the contours of misbehaviour, talks of the under-inclusiveness of any attempt to comprehensively define misbehaviour given the vast number of fact situations which may arise. However the Bill, through Clause 2(j)(i) attempts to correct this by using the portmanteau classification of 'conduct which brings dishonour or disrepute to the judiciary.' The phraseology however is so vague so as to make the definition redundant. Thus the definition of 'misbehaviour' is caught between the Scylla of under-inclusiveness and the Charybdis of redundancy, in its current formulation.

11. **One option to remedy the problem of under-inclusion suggested by the 195th Report of the Law Commission and partly sought to be incorporated by the Judges (Inquiry) Bill, 2006 ("JIB 2006") was to make the clause inclusive. The Law Commission felt that "to make complainants, Members of Parliament and**

[9] "Misconduct implies actuation of some degree of *mens rea* by the doer." Per Ramaswamy J., *Krishna Swami v. Union of India*, AIR 1993 SC 1407, ¶72.
[10] Of course it is an entirely different matter whether ultimately the impeachment motion passes in Parliament. But the fact that misbehavior will be proved in the report of the investigation committee under the Bill for such an offence is not only a legal possibility but equally can be a source of considerable harassment for a judge.
[11] AIR 1993 SC 1407.

judges aware of the meaning of the words 'misbehaviour' or 'incapacity'" it was necessary *inter alia* to have a definition of 'misbehaviour'. Given the myriad definitions in various jurisdictions of the term 'misbehaviour' and its varied enumerations in India itself by the Supreme Court, the Sawant Committee enquiring into the misbehaviour of Justice V. Ramaswami and academic commentators, the Commission felt that a broad and inclusive definition of misbehaviour would serve the purpose.[12]

12. However in the JIB 2006 which was drafted incorporating the amendments to the JIB 2005 recommended by the Law Commission, misbehaviour was defined as:

"(W)ilful or persistent conduct which brings dishonour or disrepute to the judiciary; or wilful or persistent failure to perform the duties of a Judge; or wilful abuse of judicial office, corruption, lack of integrity; or committing an offence involving moral turpitude; and includes violation of Code of Conduct."[13]

This provision, with great respect, is poorly drafted and its import is unclear. The use of the conjunction 'and' preceding the term 'includes violation of Code of Conduct' conveys the meaning that irrespective of whether the behaviour of the judge fits any of the categories listed before, it has to be a violation of the Code of Conduct to constitute 'misbehaviour'. Perhaps to offset this onerous stipulation, the word 'includes' has been used to qualify such violations seeking to keep these grounds open-ended. However the Supreme Court has held that the use of 'means and includes' can also constitute an exhaustive classification.[14] In light of this precedent, the meaning of this provision remains ambiguous.

13. Thus there are two options which are open to the Honourable Committee at this stage. Either to dispense with a definition of 'misbehaviour' altogether, consonant with the arguments and implicit beliefs of the constitutional drafters and Supreme Court precedent, or to retain a definition but ensure that its incorporation in the statute does not suffer from the vices outlined above. We believe that the latter option is preferable, for two reasons: *First*, since the objective of the Law Commission in suggesting a definition, i.e. to provide certain parameters by which 'misbehaviour'

[12] LCI 195, at p. 455.
[13] Section 2(j), Judges (Inquiry) Bill, 2006.
[14] *Mahalakshmi Oil Mills v. State of Andhra Pradesh*, (1989) 1 SCC 164; *Hamdard (Wakf) Laboratories v. Deputy Labour Commissioner*, (2007) 5 SCC 281.

can be understood by complainants, parliamentarians and judges is laudable and dispensing with the definition altogether would not serve this end; *second*, this Bill is drafted in such a manner that the logical consequence of non-conformity with several of its provisions, such as adherence to judicial standards, declaration of assets is considered misbehaviour. Thus misbehaviour must be defined in some form under the Bill though carefully addressing the concerns outlined aforesaid.

14. While defining the term, another factor is relevant. In the matter of impeachment, the ultimate decision whether to impeach a judge on the basis of proved misbehaviour is made by the Parliament itself. A Judge of the Supreme Court can, under Art. 124(4), be removed only if the address to the President calling for impeachment secures the requisite majority of both Houses of Parliament (Art. 218 read with Art. 124(4) for a Judge of the High Court). Thus to uphold the principle of fairness that the legislative power of defining grounds for impeachment (and amending them subsequently) is not vested in the same body which executes such a power, it is preferable that one of these powers does not focally belong to Parliament. Since the latter, the power to present an address to the President, impeaching a judge is constitutionally vested in the Parliament by Art. 124(4) it is imperative that the power to define impeachment not be vested focally with Parliament. Instead it may be vested in the Oversight Committee which is the nodal institution contemplated by the Bill with a preponderantly judicial composition.

D. Recommendations

15. **Thus, in order to make the definition inclusive, bypass the flaws of over-inclusion and under-inclusion which currently beset this clause and to ensure that Parliament's power of legislation regarding grounds of impeachment is not fused with its constitutional power to impeach, we recommend that Clause 2(j) be amended to read as follows:**

(j) misbehaviour means wilful conduct of a judge which brings dishonour or disrepute to the judiciary as determined by the Oversight Committee and may include:

(i) Wilful or persistent failure to perform the duties of a Judge; or

(ii) Wilful abuse of judicial office; or

(iii) Corruption or lack of integrity which includes delivering judgments for collateral or extraneous reasons, making demands for consideration in cash or kind for giving judgments or any other action on the part of the Judge which has the effect of subverting the administration of justice; or

(iv) Committing an offence involving moral turpitude; or

(v) Wilful failure to furnish the declaration of assets and liabilities in accordance with the provisions of this Act; or

(vi) Wilfully giving false information in the declaration of assets and liabilities under this Act; or

(vii) Wilful suppression of any material fact, whether such fact relates to the period before assumption of office, which would have a bearing on his integrity; or

(viii) Wilful breach of judicial standards.

16. The first part of the chapeau of the clause '*wilful conduct of a judge which brings dishonour or disrepute to the judiciary'* is derived from a distillation of the key authorities relating to the definition of misbehaviour, both domestically (Supreme Court precedent and the Sawant Committee Report) as well as internationally (based on the sources surveyed by the Law Commission of India in its 195th Report and updated principles of judicial conduct).[15] It provides the threshold which all cases of misbehaviour must meet. This determination of whether the threshold has been met or not, *is not provided* by the statute itself by listing out a set of clauses as the Bill currently seeks to do, but shall instead be determined by the Oversight Committee. This ensures that Parliament itself is not vested with the focal power of definition, amenable to amendment, thereby ensuring that the parliamentary power of legislation is not fused with the parliamentary power of impeachment. Finally the list of clauses currently in the Bill are not dispensed with entirely but recast as guidelines of illustrative cases of misbehaviour which may aid the Oversight Committee to come to its determination of whether in a particular case, there has been misbehaviour or not. This interpretation is secured by the use of the words 'may include' preceding the list.

[15] LCI 195, at p. 455-462.

This means both that fulfilment of these clauses may not itself lead to a finding of misbehaviour if there are particular circumstances in a case which militate against such a conclusion, and also that other manifestations of judicial conduct with the Oversight Committee finds to meet the threshold of misbehaviour can be held to be so.

17. Thus, the above formulation, by retaining 'misbehaviour' in the Bill but vesting the focal power of determining what misbehaviour means in the Oversight Committee ensures that the broad parameters of misbehaviour are laid down thereby providing guidance to parliamentarians, judges and the public as required by the Law Commission of India; the problem of over-inclusiveness and under-inclusiveness are bypassed since the definition itself is not provided for by statute and the incidence of impeachment can be determined on a case-specific basis.

18. On these grounds we submit that the Honourable Committee be pleased to accept this recommendation.

II. Judicial Standards: Clause 3

A. Clause 3 of the Bill should be deleted in entirety for being violative of the independence of the judiciary and recast as guidelines to aid the Oversight Committee to determine judicial standards

19. Clause 3 of the Bill, read with the Schedule provides a list of standards of judicial conduct to which all judges are expected to adhere. Of the 18 enumerated standards [14 enumerated in Clause 3(2) and 4 in the Schedule], 16 are derived from the Restatement of the Values of Judicial Life adopted at a Full Bench Meeting of the Supreme Court on 7th May, 1997.[16] The substantive problems with the clauses themselves when translated from a resolution of the Court into statutory form are dealt with in Chapter II Section B of this Report. This section argues that the very idea of statutorily providing for judicial standards, irrespective of their content, is violative of the independence of the judiciary.

1. Independence of the Judiciary requires impartial and effective adjudication

20. Judicial independence has been held to be part of the basic structure of the Constitution.[17] Though it has been enumerated in a number of ways, it has been consistently held by the Supreme Court as a facet of the rule of law.[18] The need for the judiciary to be independent has thus been treated as axiomatic— a key requirement for any democratic society based on the rule of law.

21. However for our purpose it will be necessary to glean from the theoretical writings on judicial independence and the Supreme Court decisions, a doctrinal understanding of judicial independence, i.e. what does judicial independence mean in practical terms; why do we want the judiciary to be independent in a modern democratic state apart from it being required as an end in itself?

[16] Sourced from: www.paclii.org/PJDP/.../INDIA_Restatement_of_values_2007.doc.
[17] *Indira Gandhi v. Raj Narain,* 1975 (Supp) SCC 1; *Union of India v Sankalchand Sheth* (1977) 4 SCC 193.
[18] *Supreme Court Advocates-on-Record Association v Union of India,* (1993) 4 SCC 441.

22. These questions can be answered by considering the following example: Let us take a hypothetical case situation of a judge with two parties who have come before him to adjudicate a private dispute. Assume that the society in which the judge and the parties live prizes the value of justice and expects its courts to apply the law to reach just results. Now X, a detached observer, non-interested in the dispute and with no knowledge of its particulars, is asked what the judge should do in this case. Though X would most likely not have an opinion regarding the substantive outcome of the case, she would certainly believe that the judge should adjudicate the dispute impartially. In addition she will want the decision given by the judge to be effective and capable of being enforced. If however pressed further on the first point of what adjudicating the dispute impartially demands, she would most likely believe the following:

    i. The judge should not be related to either of the parties in any way
    ii. He should not be in a position to be influenced by the parties or their agents
    iii. He should be safeguarded from threats from the parties or their agents
    iv. He should carry on proceedings openly
    v. He should hear the parties fully and adequately
    vi. He should base his decision on reasons which are valid and relevant

23. Of course, there could be further points which X believes are necessary to ensure impartial adjudication of the dispute. But as a rational, reasonable person, the afore-mentioned points would, in all likelihood, figure in her list of necessities. If these six points, broadly understood as aspects of natural justice are scrutinised, then they can be sub-divided into two types of requirements: independence (points 1-3) and accountability (points 4-6). The requirement of independence in this respect connotes a certain degree of detachment between the judge and the parties. Of course the judge and the parties are members of the same society and it is possible that they (or any combination of them) share certain objective commonalities such as age, gender etc. But these commonalities should be almost entirely irrelevant for the purpose of adjudicating impartially between the parties. This has been explained in terms of a judge showing party impartiality which is necessary and issue impartiality which is not.[19] The requirement of independence hence seeks to ensure the exclusion of

[19] This is a broad distinction, for further qualifications of which see Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing, Aldershot 1999) 64.

improper influences on particular decisions, thereby making the judge a detached and impartial arbiter of the dispute.

24. Accountability factors equally seek to ensure that extraneous considerations are not grounds for the decision. However the approach is markedly different from independence, being based on external checks to the exercise of judicial power rather than reducing restrictions on judicial power as independence factors tend to do. Through these checks, appropriately established, the judge is to be made answerable for his decision, thereby mitigating the possibility of improper influences affecting him. It is in this narrow, literal sense of answerability for decisions taken effectuated through external checks on power, that accountability is used here.[20] Accountability with respect to the judgment in this example flows from the judge both to the public through the medium of open hearings and reasoned judgment as well as to the higher courts (if any) which may reverse the decision on appeal.[21]

25. Two points become clear from this analysis: First, independence of an individual judge is required to ensure impartial adjudication of a dispute; second, independence is one of several factors (accountability is another key factor which has been identified for the purpose of this analysis, but it need not be the only one) which leads to impartial adjudication.

26. This understanding of the rationale for judicial independence helps greatly in understanding what judicial independence means. Three further points hence emerge: First, that absolute independence is not necessary and may not be desirable for a judge; second, following from the first, is that the key question to ask of a judiciary is not whether it is independent or not but rather how independent it is and whether the extent of independence serves the rationale of impartial adjudication adequately. Third, independence and accountability are two independent variables which are both relevant to impartial adjudication, though they follow different approaches to reaching it.

[20] For a theoretical discussion of accountability see Richard Mulgan, 'Accountability: An Ever-Expanding Concept?' (2000) 78 Public Administration 555.

[21] This is termed 'decisional accountability' which can either flow to the public and the litigants (public accountability) or to higher courts (legal accountability). Charles Gardner Geyh, 'Rescuing Judicial Accountability from the Realm of Political Rhetoric' (2006) 56 Case Western Reserve Law Review 911.

27. The second factor which X, our hypothetical observer would want, is for the decision rendered by the judge to be effective. Effectiveness of a decision, i.e. the possibility of it being enforced and thereby ensuring public confidence and respect for the judiciary, cannot be elaborated in an abstract setting. It depends focally on the institutions of government and the interplay between them in specific constitutions. In the Indian Constitution, the drafters were aware of the delicate balance which needed to be worked between the legislature, executive and the judiciary in order to ensure that the judiciary is capable of adjudicating impartially and effectively, thereby securing public confidence. Though the entire gamut of provisions relating to the judiciary in the Constitution, as laid down by the drafters, dealing with aspects of both the jurisdiction of the Courts and their relative autonomy vis-a-vis other wings of government are relevant for determining this balance, in this report only the latter will be considered. Within the latter, there are three specific issues— pre-tenure aspects (appointment), in-tenure aspects (salaries, disciplining, transfer, removal) and post-tenure aspects (post-retirement employment). In this report, only the in-tenure aspect relating to the judiciary and the scope of legislative and executive interference will be discussed since this is directly in issue in the Bill.

28. Insofar as in-tenure aspects relating to judicial functioning is concerned, the Constitution makes two fundamental stipulations— *first* that the salaries of the judges of the higher judiciary shall not be varied to their disadvantage during their tenures (under Art. 125 for Supreme Court judges and Art. 221 for High Court judges); *second*, that judges shall not ordinarily be removed from office except through a complex process of impeachment which would require two-thirds majority of members of both Houses of Parliament present and voting and not less than half of the total membership of each of the Houses [Art. 124(4) for Supreme Court judges and Art. 218 for High Court judges]. The grounds for impeachment would be limited to proved misbehaviour or incapacity and the procedure for such proof would be laid down by parliamentary law [Art. 124(4) read with Art. 124(5)]. Thus it is clear that the intention of the drafters of the Constitution was to ensure that there was minimal interference with the functioning of a judge during his tenure as a judge. The only exception to this was when a judge required to be removed and there too, the remedy was not easily available as a complex two-layered process of impeachment was laid

down which involved the Parliament only in the final stage. This, it was believed, would ensure that the judiciary would remain free from interference, enjoy the confidence of the public as an impartial institution and would hence be able to adjudicate in an effective manner.

2. Statutory laying down of judicial standards affects the potential for impartial and effective adjudication, violates judicial independence and is hence unconstitutional

29. The Bill, by specifying judicial standards statutorily, failure to adhere to which would lead to a charge of misbehaviour with the possibility of impeachment, alters this inter-institutional dynamic significantly. This is because, the legislature, whose only role in the in-tenure issues relating to judges was restricted to the ultimate power to impeach, has, by virtue of this Bill, been vested with the power to lay down and by necessary implication, amend standards which must be followed by judges during their tenures. It is not our argument that any change in this inter-institutional dynamic should *per se* be considered in breach of the constitutional equilibrium; many changes may be necessary in the interest of judicial accountability. However, it is our argument that a change in furtherance of judicial accountability, such as this one, cannot unduly infringe judicial independence. Clause 3, by investing the legislature with considerable power over judges in their functioning, can adversely affect the possibility of impartial and effective adjudication and hence is violative of judicial independence, a part of the basic structure of the Constitution and thus runs the risk of being struck down as unconstitutional by the courts. It is of course, not our argument that the government will actually exercise any of these prerogatives. However the statutory laying down of judicial standards allows the possibility of the government doing so and thereby threatening impartial and effective adjudication and consequently judicial independence.

30. A significant portion of litigation before higher courts today is public in nature and involves the state as one of the parties and legislations are impugned for their unconstitutionality. At this time, investing the legislature with the power to lay down and the theoretical possibility of amending judicial standards which every judge must adhere to during their tenures has the potential to severely threaten impartial and effective adjudication. A number of possible examples are foreseeable:

a. A judge who knows he has violated the Code of Conduct may be favourable to the state in his decision-making to ensure that the ground of misbehaviour is amended;
b. The government may promise removal of certain inconvenient judicial standards if substantive decisions are given in its favour;
c. The government may threaten the judges with stringent amendments to judicial standards to influence substantive judgments.

These illustrative examples point to the clear possibility of judicial independence being violated by the statutory laying down of judicial standards. Hence we believe Clause 3 is unconstitutional and its current form should be deleted.

B. Recommendations

31. It is not our case that judicial standards should not be laid down in some form. It is true, with the recent instance of Justice P.D. Dinakaran, former Chief Justice of Karnataka High Court[22] the example of Justice Ashok Kumar,[23] and the large number of transfers of High Court judges ostensibly for punitive measures (though official reasons are not made public)[24], that the Restatement of Values of Judicial Life, currently governing the field, lacks teeth. To ensure that such judicial standards are effective, we recommend that such a task be made a mandatory function of the Oversight Committee. Thus judicial accountability is enhanced since a judge's failure to adhere to the judicial standards prescribed in the Code of Conduct could lead to a

[22] For detailed representations against Justice Dinakaran, see Campaign for Judicial Accountability and Reform, 'Judge Watch on Justice P.D. Dinakaran' available at <http://judicialreforms.org/justice_dinakaran.htm>

[23] For details see the writ petition W/P Civil No. 375 of 2007 filed before the Supreme Court of India. Campaign for Judicial Accountability and Reform, 'Judge Watch on Justice Ashok Kumar' available at <http://judicialreforms.org/justice_ashok_kumar.htm>; see also *Shanti Bhushan v Union of India* (2009) 1 SCC 657; MANU/SC/8425/2008.

[24] Justice BK Roy, Chief Justice of the Punjab and Haryana High Court, was transferred to the Gauhati High Court in May 2005, after 25 of the then 28 Judges of the Punjab and Haryana High Court went on a strike against him. Thereafter, on a complaint being filed by 15 Judges of the Gauhati High Court against him, the Supreme Court Collegium again transferred him to the Sikkim High Court in September 2005; Justice B J Sethna of the Gujarat High Court, who was in the eye of the storm for several reasons, including allegations of assaulting another High Court Judge in January 2007 was transferred by the Collegium to the Sikkim High Court in April 2007. He however, chose to resign instead of moving to Gangtok; Justice Ajoy Nath Ray, from being the Chief Justice of the Allahabad High Court, the biggest High Court of the Country, was transferred to the Sikkim High Court, the smallest High Court of the Country, purportedly n account of his unpopularity amongst his fellow High Court judges. For details and sources see Animesh Sharma, "In Re Transfers to Punishment High Court" available at http://www.criticaltwenties.in/lawthejudiciary/in-re-transfers-to-%E2%80%98punishment%E2%80%99-high-courts.

complaint against the judge which can result in impeachment or minor measures of punishment, as the Oversight Committee deems fit. At the same time, judicial independence is protected since judicial standards are not being laid down (with the possibility of amendment) by the legislature. Finally, it is achieved in a manner that emphasises effectiveness since standards are being laid down by an independent institution with the direct possibility of action for non-compliance, as opposed to the entirely in-house mechanism which has failed to achieve this purpose.

32. On the basis of the aforesaid grounds, we recommend:

a. ***Clause 3 of the Bill be deleted for being violative of judicial independence***
b. ***The task of laying down of judicial standards be vested in the Oversight Committee by introducing a new provision through an appropriate amendment to Chapter VI.***
c. ***In the said provision, the Oversight Committee may be directed to take into account the illustrative standards laid down in Clause 3 as amended by the recommendations made in Chapter II Section B below, while framing judicial standards.***

C. Alternatively or in addition, the standards laid down in Clause 3 of the Bill should be amended to safeguard the independence of the judiciary

33. In order for the judiciary to be independent, it must be held to clearly defined standards, and those standards themselves must work to safeguard the court's institutional integrity. This section comments on those provisions of Clause 3 of the Bill which are either susceptible to ambiguous and inconsistent interpretation, or which are unrelated to the achievement of the end of judicial integrity.

1. Clause 3(2)(b) prohibits judges from having "close association with individual members of the Bar, particularly with those who practice in the same court in which he is a judge."

34. The phrase 'close association' in this Clause of the Bill is ambiguous. In certain circumstances, a 'close association' with individual members of the Bar may be unavoidable, necessary, or even harmless. For example:
    a. Recent graduates of law schools in India may work as law clerks to judges on the Supreme Court or on the High Courts. Although such graduates will be members of the Bar, and may (or may not) have previously practiced in the same court in which the judge functions, as law clerks they will be required to maintain a 'close association' with the judge during the tenure of the clerkship;
    b. A judge may serve as a member of a charitable trust alongside a member of the Bar, where he may be required to regularly attend meetings with that member of the Bar;
    c. A judge may decide to teach a semester at a law college in close association with a reputed member of the Bar over an intensive four week period where constant dialogue and discussion between the judge and the lawyer may be necessary; or
    d. In some instances a judge may have to hire a lawyer to represent himself in certain matters, e.g. in a right to information case the Supreme Court may have to be represented before a High Court by the Attorney General of India.

35. In each of such instances, it is arguable that a judge has maintained a 'close association' with an individual member of the Bar, but it is not certain that any of these instances conflicts with the goals of judicial propriety, integrity or independence. Further, a 'close association' with individual members of the Bar in some instances may be presumed to exist and unavoidable. For example,

    a. A judge who had juniors in his chamber when he was a senior lawyer;
    b. A judge whose son/daughter/other relative practices law, would necessarily thereby have a 'close association' with an individual member of the Bar, which would be presumed;
    c. In some cases a judge's son/daughter may decide to marry a lawyer's daughter/son, or
    d. A judge's son/daughter may decide to work with a senior lawyer at the Bar as his junior.

36. In the aforementioned circumstances, it would be harsh to penalise a judge for having a 'close association' with members of the Bar with whom he had a close professional relationship in the past, or with whom he shares familial bonds, derived or otherwise, and it may be better to think of a way in which the judge can work despite this 'close association'. Additionally, a penalty should only be imposed when in addition to having a 'close association' with a member of the Bar, the judge's conduct is biased or perceived to be biased in favour of that member. The Guide to Judicial Conduct, 2004 (the 'Guide') of the United Kingdom ('UK')[25] appears to have taken this consideration into account as reflected by Regulation 5(3) of the Guide which reads:

    "*A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.*"

    This provision ensures that judges maintain an arm's length from the members of the Bar but at the same time is not impractically stringent.

[25] The Guide was significantly inspired by the leading international document in this area, the Bangalore Principles of Judicial Conduct, 2002. See http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

37. On these grounds, we would therefore recommend that:

a. The phrase 'close association' be better defined to exclude academic, or charitable associations by way of a proviso; and

b. A lawyer with whom a judge maintains a 'close association' not be permitted to appear before that judge provided certain additional conditions regarding perception of bias are met. Clause 3(2)(c) accommodates this recommendation with respect to "members of [a judge's] immediate family" who are prohibited from appearing before the judge. However, we would recommend that this Clause be amended to include persons such as juniors, or law clerks, who have worked with a judge for a substantial period of time.

These changes can be suitably incorporated in the Bill by amending Clause 3(2)(b) to read:

(2) In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(b) permit any member of the Bar with whom he has a close association, or with whom he had a close association as a member of the Bar, if such person's appearance in his Court will reasonably give rise to the perception of bias, to appear before him or to be involved in any manner with a cause to be dealt with by him, if he has knowledge of such involvement;

Provided that members of the Bar with whom the judge has close academic and/or charitable associations shall not be considered to have a close association with the Judge

Provided further that the words "close association" in this section shall include members (whether seniors, juniors or colleagues) of the chamber(s) to which the Judge belonged and with whom a Judge worked for a substantial period of time.

2. Clause 3(2)(d) of the Bill prohibits a member of the judge's family who is a member of Bar to 'use' the judge's residence (where he actually resides) or other facilities provided to the judge for 'professional work'.

38. Here, the term 'professional work' is ambiguous while the term 'use' is too broad. Although the joint family system is slowly disintegrating in India, most adults live with their parents or spouse's families in their homes. Accordingly, a judge may typically have in his home a son and daughter in law, and/or a daughter, any of whom may be practising law, whether as a litigator or as a transactional attorney. It would be unfair to require that judges' sons / daughters / daughters-in-law not be permitted to read their briefs at home, or to talk to a client on their private cell phones at home. Merely because work of a 'professional' nature is being done at home, that does not by itself create the appearance of impropriety. If, on the other hand, (1) the judge's official residence is shown as an "office", or client meetings are held in the official residence, (2) the judge's official home or office phone is given to a client and telephone calls are received at the judge's residence, these may create the appearance of impropriety. Judicial standards must therefore necessarily accommodate the reasonable expectations of the judge's family, while simultaneously preserving institutional integrity and propriety.

39. Similarly, the term 'use' is unclear. Consider the following two examples:
    a. Will a lawyer who is a daughter of a judge be penalised if she reads a chapter in the commentary on the Civil Procedure Code, 1908, in her father's house, if the commentary belongs to the official Judges' library? Again, if the daughter takes the book outside of the home or in any way leads clients into believing that she has improper access to the judiciary or its resources, that may be reprehensible. But merely reading from a book at home, which happens to belong to the Judges' library, may not be inappropriate.
    b. A judge may ask the driver of his official car to collect his daughter from her law office late at night when it may not be safe for the daughter to come back home using public transportation. On such occasions would be inappropriate for a daughter to use the 'facility' of a judge's official car to travel back home from an office late at night?

40. We would therefore recommend that Clause 3(2)(d) be amended to prohibit the use of a judge's residence as an office or for meeting clients, and from the *repeated and inappropriate use* of the judge's facilities for professional work. This restriction

should apply not merely to judge's children who are members of the Bar, but to all judges' children.

41. These changes can be suitably incorporated in the Bill by amending Clause 3(2)(d) to read:

(2) In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(d) permit any member of his family, whether such person is a member of the Bar or otherwise, to use the residence in which the Judge actually resides as an office or to meet clients or in any other unreasonable or inappropriate manner as may lower the dignity and status of the office of the Judge; and further, permit any such member of his family to use other facilities provided to the Judge repeatedly and in an unreasonable and inappropriate manner as may amount to a misuse of the office of the Judge.

3. Clause 3(2)(f) prohibits judges from expressing views in public on political matters except in a private/academic forum or relating to the administration of a court or its efficient functioning.

42. Article 19(1)(a) of the Constitution of India confers on every Indian citizen the right to the freedom of speech and expression. The recognised exceptions to the fundamental constitutional right on the basis of which the state may enact a law are: sovereignty and integrity of India, security of state, friendly relations with foreign states, public order, decency, morality, contempt of court, defamation, or incitement to an offence. Clause 3(2)(f) does not facially appear to fall within any of the constitutionally enumerated exceptions to the freedom of speech and expression.

43. However, there are two reasons why judges are said to be required not to air their views in public: (1) first, a judge who expresses his opinion on an issue expresses a bias, and creates the appearance that his views are biased. (2) second, the common law tradition mandates that judge made law should not be abstract – it should result from a concrete case before the judge through an adversarial system where two sides have presented competing arguments before a judge.

44. The first of these reasons, however, is fallacious. Those who believe that judges do not suffer from biases, or that they do not have personal likes and dislikes, or views and predilections would only be deluding themselves. Every human being has personal predilections. In fact, by permitting judges to air their views in public, we may be better able to understand each judge's bias, or to address that bias in public debate. Further, it is well known that at the beginning of a case a judge may have a certain view, but that view may change after the lawyers finish their arguments. The goal of merely creating the false impression of the absence of bias does not justify stifling the fundamental right of every judge to express his opinions on the issues of his choice – especially when those opinions may change.

45. However, it should be made clear that an oral or even written expression of opinion by a judge does not constitute a declaration of law. Judge made law deserves the status of law when it is addressed to the particular facts and circumstances of a particular case which comes before a judge, and in which competing points of view are presented by competing sides, through fair due process. The opinion expressed by a judge outside of a judgment, no matter how well thought out, does not form part of the due process of the law, and therefore does not deserve the status of law. Further, such opinions should not be considered authoritative or binding by judges of a subordinate rank to the judges who express such opinions, and should not work to influence the functioning of lower courts.

46. That said, there is an equally strong argument that the judge should not be perceived to be biased. The UK has thought it fit to introduce a provision requiring judges to not decide cases relating to issues on which they have expressed strong views. However, to ensure that views expressed in other cases are not hit by this provision, an exception has been provided. Regulation 3.10 of the Guide states that

"If a judge is known to hold strong views on topics relevant to issues in the case, by reason of public statements or other expression of opinion on such topics, possible disqualification of the judge may have to be addressed, whether or not the matter is raised by the parties. The risk will arise if a judge has taken part publicly in a controversial or political discussion. It will seldom, if ever, arise from what a judge has said in other cases".

47. The immediate counter to this point of view is that a provision similar to Regulation 3.10 treats two judges who share the same strong opinion differently merely because one aired his views in public and the other did not do so. This argument, no doubt, is equally persuasive.

48. In the light of these opposing points of view, whether a provision similar to Regulation 3.10 needs to be adopted is a policy call that the Legislature needs to take. We would therefore recommend that the words "in private forum or academic forum" be deleted from Clause 3(2)(f)(i) of the Bill, and a further proviso be added stating that the judge should make clear whether by way of disclaimer or otherwise that he is only expressing his personal views which cannot be attributed to the court on which he sits, and will not be given the force of law. This would enable a judge to express his views not merely in a private or academic forum but in other forums and instances as well.

49. Additionally, if the Legislature does take the view that a provision similar to the provision in UK law needs to be adopted, we suggest the inclusion of the following clause:

"If a judge is known to hold strong views on topics relevant to issues in the case, by reason of public statements or other expression of opinion on such topics, possible recusal by the judge may have to be addressed, whether or not the matter is raised by the parties.

Provided, views expressed by the judge in other cases are not to be taken into account."

4. Clause 3(2)(h) prohibits a judge from accepting "gifts or hospitality" except from his relatives.

50. The term 'hospitality' is unclear and too broad. As it presently stands, this Clause may prohibit a judge from receiving 'hospitality' from: (1) a law college which is hosting an academic seminar over a few days, and from covering the judge's food, lodging and travel expenses; or (2) a foreign government or court which is hosting a seminar overseas, for which judges must obtain executive permission in any event.

51. Secondly, a provision that prohibits a judge from accepting a gift from any person barring his relatives is too stringent. While accepting gifts from a person/ entity which is even remotely interested in a case before the judge is a concern that needs to be addressed, the solution is not to impose a blanket ban on all gifts that a judge may receive. For instance, a judge may receive a gift of a completely personal nature, hypothetically for his wedding anniversary or some special occasion from his childhood friend. Even such a gift would be prohibited by Clause 3(2)(h).

52. The solution, we believe, is to go in for a well regulated regime for gifts. UK's Guide stipulates such a regime.

    Regulation 5 of the Guide reads:

    "(14)A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.
    (15) A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.
    (16) Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality."

    Thus the prohibition in UK extends only to such gifts that are obtained in relation to the performance of judicial duties. Token gifts and gifts obtained by the Court staff without the knowledge of the judge are also excluded from the ambit of the prohibition. Additionally Regulation 8.8.6 provides,

    "Where a judge is in doubt as to the propriety of accepting any gift or hospitality he or she should seek the advice of the head of the appropriate jurisdiction."

53. The UK rules regulating gifts received by judges are carefully enumerated and nuanced. We submit that the Indian Legislature should consider borrowing from the English approach to allay the concerns of over-inclusion we have expressed:

54. Therefore, we would recommend that a provision which reads as follows be incorporated:

(2) In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(h)(i) A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection, either directly or indirectly, with the performance of judicial duties.

(ii) A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

(iii) A judge may receive a token gift or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Provided, hospitality accepted for an educational or academic purpose is exempt from any prohibition under this Section unless it gives rise to an appearance of partiality."

Explanation 1- For the purposes of this clause, a "token gift or benefit" shall mean any good or service whose market value is negligible

5. Clause 3(2)(i) prohibits a judge from deciding a case in which he or any member of his "family" holds "shares or interest" unless this is disclosed and there is no objection.

55. As it presently stands this Clause is too broad. A judge is prohibited from hearing a case in which he holds 'shares or interest'. However, assume that a judge holds 1 share in X Company Ltd., a company listed on the Bombay Stock Exchange whose issued share capital is 10 crore shares. Assume further that the market price of each share of X Company Ltd. is Rs. 5, and that the judge holds a total portfolio of shares worth Rs. 1 lakh. In such cases, not allowing a judge to decide the case is unnecessary

for at least the following reasons: (1) the judge holds only 1 share which is a small number in comparison to the total number of shares floating around in the public; (2) the value of that share is insubstantial in comparison with the judge's total investments in shares, and with the total market capitalization of the company.

56. A judge is also prohibited from deciding a case in which any member of his 'family' holds shares. While the term 'relative' is defined by the Bill, the term 'family' is not defined and may therefore necessarily be wider. Accordingly, the Clause presently prohibits a judge from hearing a case involving a company in which a distant family member with whom the judge has no 'close association' holds shares. This may be unfair because a judge may have no way of finding out what shares are held by his distant family members, and it may therefore be held that a judge has committed an act of misbehaviour on this account. Further, even if a judge was prohibited from deciding a case in which a 'relative' of his held shares, a defined term, the Clause may still be unfair to the judge if the judge does not maintain any close association or relationship with some 'relatives'. For example, assume that a judge, Mr. X has a wife, Ms. X. Ms. X has a brother, Mr. Y, who is an NRI living in Canada. Mr. Justice X and Ms. X do not maintain any relations with Mr. Y. Mr. Y has a wife residing with him in Canada, Ms. Y, who neither the judge nor his wife maintain a close association with. Miss Y is living separately from Mr. Y, but is still married to Mr. Y. Unbeknownst to any of them, Ms. Y starts trading on shares in the Bombay Stock Exchange, and acquires 10 shares in X Company Ltd. The judge, Mr. X, should not be held as having committed an act of misbehaviour for a deciding a case involving X Company Ltd. merely because Ms. Y, with whom he has no close association, holds some shares in the company.

57. Clause 2(j) of the Bill clarifies that a judge cannot engage in insider trading. An analogy with insider trading law may therefore be apposite. Insider trading law regulates the relationship of a tipper and a tippee.[26] Accordingly, a person who holds unpublished price sensitive information and trades on that information, or passes the information along, is typically punished under insider trading law. However, a person who trades stock with no knowledge of price sensitive information does not commit

[26] *Dirks v. SEC* , 436 US 646 (1983) (US Sup Ct).

any crime. Similarly, a judge who decides a case because he or his family members hold shares in the company may be guilty of misbehaviour. However, a judge who has no knowledge that his distant family member holds shares in a company, and decides a case involving that company, he should not be punished as he has done no wrong. The law may presume that a judge has certain family members who he is bound to know the shareholding of, e.g. spouse, son/daughter, father/mother etc. However, he should have the benefit of disproving his knowledge.

58. Finally, lawyers may find it exceedingly difficult if not embarrassing to object to a judge hearing a case, when a judge discloses his shareholding in a company. Lawyers may have to appear before the judge everyday, and their livelihood may depend upon that judge. Accordingly, no lawyer would want to risk his relationship with a judge by objecting to a judge hearing a case on the ground that he holds shares in a company.

59. We would therefore recommend that a judge should be disallowed from hearing a case involving a company or firm in which: (1) he or any of his 'relatives' (and not merely family members), (2) holds a certain threshold amount of shares: e.g. 2% or more of the total outstanding share capital of a company, or the investment equals 2% or more of the total value of investments made by the judge / relative in shares, whichever is lower. (3) The judge should be entitled to demonstrate that he did not in fact have any knowledge that his 'relative' held shares in that company. Finally, (4) the judge should not be given the opportunity of hearing the case even if the lawyers do not object, since it would be unfair to ask lawyers to object to judges deciding cases where lawyers depend upon judges to earn a livelihood.

60. These changes can be suitably incorporated in the Bill by amending Clause 3(2)(i) to read:

(2) In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(i) hear and decide a matter in which a company or society or trust in which he holds or any relative holds shares or interest; and the fact that he may have disclosed such

holding or interest and no objection to his hearing and deciding the matter is raised shall be irrelevant;

Provided that it shall be presumed that a judge knows about all the shares or interest held by his relative in a company or society or trust, although a judge shall be entitled to prove that he did not have such knowledge.

Explanation: In this section the term "shares or interest" shall be taken to mean shares or interest equal to or greater than 2% of the paid up share capital or interest of the company or society or trust, or shares or interest whose total value amounts to 2% or more of the total investment made by the judge or relative (as the case may be) in shares or interest in companies or societies or trusts taken together, whichever is lower.

6. Clause 2(g) of the Bill defines the term "judge" to include only Supreme Court and High Court judges, but consequently the judicial standards prescribed do not apply to district and subordinate court judges.

61. Although constitutional court judges have greater powers of constitutional adjudication, there is no reason why district and subordinate court judges should not be held to the higher standards that members of the judiciary should be held to. We would therefore recommend that the definition of the term "judge" in Clause 2(g) of the Bill be amended to clarify (with a proviso) that in Chapter II the term "judge" shall include subordinate court judges or the Parliament consider passing an analogous law with a dedicated administrative mechanism for developing and enforcing judicial standards for the subordinate courts in consultation with the higher judiciary.

D. The Judicial Standards to be incorporated in the Bill may be amended to contain comparative lessons

62. The provisions suggested in this Section of our Report are based on an analysis of the comparable legislation in United Kingdom ('UK') and South Africa ('SA').

63. Judicial standards in UK are prescribed in the Guide drafted by a Working Group of judges set up by the Judges Council. Judicial ethics have been prescribed under the

following broad heads: a) Impartiality b) Integrity c) Propriety d) Competence and Diligence e) Personal relationships and Personal bias f) Activities outside the Court g) After retirement.[27]

64. In SA, the recently introduced Code of Judicial Conduct for Judges, 2011[28] ('SA Code of Conduct') adopted pursuant to Section 12 of the Judicial Service Commission Act, 1994 governs judicial ethics. This SA Code of Conduct is along similar lines as Section 3 of the Bill but has a few additional provisions that the present Bill omits.

65. Out of the provisions in English and South African law, the following are noteworthy and the Indian Legislature may consider including some of these provisions which are absent in the Bill currently.

1. Provisions to ensure speedy justice

66. Note 9B of the SA Code of Conduct attempts to reduce the delays in the judicial system and would form a useful addition to the Bill. It states:

"Note 9B
Litigants are entitled to judgment as soon as reasonably possible. The ideal is to deliver all reserved judgments before the end of the term, failing which, early the next term. Criminal proceedings, especially automatic reviews, applications for leave to appeal, and matters where personal liberty is involved, must be dealt with expeditiously."

2. Non-disclosure of confidential information

67. Judges ought to be under a confidentiality obligation with respect to information obtained by them during the course of their judicial duties. Regulation 5.1(10) of UK's Guide imposes such an obligation. It reads as follows:

"Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties."

[27] The Guide to Judicial Conduct, 2004; Also see Diana Woodhouse, "The Constitutional Reform Act 2005 - Defending Judicial Independence the English way", 5(1) *International Journal of Constitutional Law* (2007)153.

[28] For the Parliamentary briefing on the recently introduced Code, see http://constitutionallyspeaking.co.za/parliamentary-briefing-on-code-of-judicial-conduct/.

3. Professional links

68. According to the SA Code of Conduct, judges' professional relations vis-a-vis his previous clients, law firm or any other professional matter should be regulated.

"11. Association:
(5) Upon appointment, a judge severs all professional links and recovers speedily all fees and other amounts outstanding and organizes his/ her business affairs to minimize the potential for conflict of interest.
(6) A judge previously in private practice does not sit in any case in which he or she, or his or her former firm, is or was involved before the judge's appointment; and a judge does not sit in any case in which the former firm is involved until all indebtedness between the judge and the firm has been settled."

4. Reporting requirements

69. Section 15 of the SA Code of Conduct imposes a duty on judges to report corrupt practices in the judicial system that they are aware of. The provision states:

"15 Informing:

(1): A judge with clear and reliable evidence or serious professional misconduct or gross incompetence on the part of a legal practitioner or public prosecutor informs the relevant professional body or a Director of Public Prosecutions."

70. On the basis of the aforesaid provisions, gleaned from select comparative jurisdictions with recently formulated codes of judicial conduct, we suggest that the following clauses be inserted in the present Bill:

(2)In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(o) permit unnecessary postponements and shall strive to hear the case and deliver his judgment as expediently as possible.

(p) disclose for any other purpose not related to the judge's judicial duties, confidential information acquired by him in his judicial capacity.

(q) withhold clear and reliable evidence on serious professional misconduct or gross incompetence on the part of a legal practitioner or public prosecutor from the Chief Justice of India or the Chief Justice of the High Court, as the case may be.

III. Provisions relating to the Making of a Complaint and the Complaints Scrutiny Panel: Chapter IV and Chapter V

A. Scrutiny by the Oversight Committee and referral to the Scrutiny Panel: Clauses 9 and 19

71. In Chapter V, Clause 10 of the Bill provides for the constitution of a Complaints Scrutiny Panel [hereinafter "Scrutiny Panel"] in the Supreme Court and every High Court to scrutinise the complaints against a Judge filed before the Oversight Committee under Clause 7. Under Clause 19 of the Bill, the Oversight Committee, upon the receipt of a complaint relating to misbehaviour of a Judge except the Chief Justice of India, is mandated to refer the complaint to the Scrutiny Panel of the Supreme Court or concerned High Court to scrutinise and report thereon within three months of receiving the complaint. In the case of a complaint against the Chief Justice of India, under Clause 21, the complaint shall not be referred to the Scrutiny Panel but scrutinised by the Oversight Committee itself. In addition the Oversight Committee must maintain all records of complaints sent to the Scrutiny Panel under Clause 20.

72. While the idea of an initial scrutiny of the complaint is both important and relevant, making it mandatory for the scrutiny to be conducted by the Scrutiny Panel in every case is questionable. It is submitted that mandatory scrutiny of every complaint only by a Scrutiny Panel is unnecessary, both in principle and in practice. In principle, the Oversight Committee, as it currently stands, as per Clause 18 comprises a former Chief Justice of India, a judge of the Supreme Court, a Chief Justice of a High Court, the Attorney-General of India and an eminent person nominated by the President. The Scrutiny Panel in the Supreme Court also consists of a former Chief Justice of India and two serving judges of the Supreme Court as per Clause 11(1) and the Scrutiny Panel of a High Court is headed by a former Chief Justice of a High Court and comprises two other High Court judges as per Clause 11(2). Thus it is clear that the composition of both the Scrutiny Panel as well as the Oversight Committee is preponderantly judicial. Given this, there will be no difference in the nature of scrutiny conducted by these institutions. Thus there is little that the Scrutiny Panels can accomplish in the scrutiny of complaints which the Oversight Committee itself cannot.

73. In practice, by making scrutiny of complaints by the Scrutiny Panel mandatory, the Oversight Committee is reduced to a mere clearing house in relation to complaints filed. According to Clauses 9 and 19 of the Bill, the Oversight Committee 'shall' send any complaint it receives to the appropriate Scrutiny Panel for initial scrutiny. Again, if the Scrutiny Panel has recommended further inquiry in its report, the Oversight Committee 'shall', by Clause 22, constitute an Investigation Committee. Thus there is little in terms of actual supervision that the Oversight Committee exercises in relation to the Scrutiny Panel.

74. In addition, requiring every scrutiny to go through a Scrutiny Panel can significantly delay the inquiry process. For instance, constituting a Scrutiny Panel for the Supreme Court and various High Courts involves considerable administrative issues which can potentially delay the proceedings against a Judge. Every time there is a change in the composition of the Scrutiny Panel of either the Supreme Court or a High Court, the Oversight Committee cannot proceed with a complaint unless the Scrutiny Panel is reconstituted. Furthermore, a complaint pending before the Scrutiny Panel will be delayed if the composition of the Scrutiny Panel changes either due to the refusal, resignation, retirement of a member or other extraneous reasons before the report to the Oversight Committee is submitted. Finally, Clause 19 of the Bill allows the Oversight Committee a maximum period of three months to refer the complaint to the Scrutiny Panel; in addition the Scrutiny Panel is provided another three months to submit a report to the Oversight Committee. This time can be reduced substantially, when the Oversight Committee itself engages in the task of scrutiny. In fact, in the case of a complaint against the Chief Justice of India, the Bill, in Clause 21, mandates that the Oversight Committee itself scrutinise the complaint. Clearly, there is no bar against the Oversight Committee conducting the scrutiny of a complaint against a Judge for misconduct or incapacity. By forcing the complaints to be referred to the Scrutiny Panel for scrutiny of complaints, a task which the Oversight Committee itself can do, the Bill has created a non-value adding stage to the process.

75. In fact, earlier legislative bills which were similar in nature to the present Bill did not even provide for a body like the Scrutiny Panel. The JIB 2005 and the JIB 2006 conceived a similar complaints mechanism as envisaged under this Bill. On both occasions, the Bills provided for the constitution of a National Judicial Council

[hereinafter the "NJC"] akin to the Oversight Committee to investigate any allegation of misbehaviour or incapacity of a Judge of the Supreme Court or High Court. JIB 2005, under Clause 7(1), provided for consideration and verification of a complaint against a Judge by the NJC as it deemed appropriate. Clause 7(2) allowed the NJC to determine the procedure for verification as it deemed appropriate in the circumstances of the case. Under JIB 2006, Clause 9(1) provided for the NJC to make such verification or preliminary investigation into the complaint as it deemed appropriate. To this end, Clause 9(2) gave NJC the power to establish the procedure for verification or preliminary investigation as it deemed appropriate in the circumstances of the case. Clause 7 of JIB 2006 also accorded the NJC with the power to appoint a Secretary and such officers and employees as the President determined to assist it in discharging its functions including the verification, preliminary investigation and inquiry into a complaint.

76. The present Bill, by laying down the procedure for creating a Scrutiny Panel and mandating the Oversight Committee to refer *every* complaint to the Scrutiny Panel except complaints against the Chief Justice of India, is forcing a compulsory additional layer in the inquiry process. As in the earlier JIB 2005 and JIB 2006, the manner and procedure for scrutiny of complaints is better left to the wisdom of the Oversight Committee. To this end, the Oversight Committee should be given the power to scrutinise the complaints itself first, and then, if it deems fit under the specific circumstances of a case, refer it to the appropriate Scrutiny Panel.

77. It is recommended that the initial task of scrutiny be entrusted to the Oversight Committee. Additionally, the Oversight Committee should be given the power, where it deems appropriate, to refer the conduct of a scrutiny of a complaint to the Scrutiny Panel and report thereon. A new Clause to this effect needs to be introduced in the Bill.

78. **Please see the recommendations at the end of section B (below) for the amended Clause.**

B. Multiple provisions relating to scrutiny of complaints and time period for scrutiny of complaints: Clauses 9, 19 and 21

79. The Oversight Committee is required under Clause 9 of the Bill to refer all complaints filed under Clause 7 to the appropriate Scrutiny Panel, except as otherwise provided in the Bill. This includes complaints both with regard to misbehaviour or incapacity of a Judge. In case of a complaint against a Judge relating to misbehaviour, the specific governing provision is Clause 19. A combined reading of Clauses 9 and 19 leads to the conclusion that all complaints relating to misbehaviour are governed by Clause 19 whereas complaints relating to incapacity of a Judge are governed by Clause 9, since there is no specific provision relating to the same. Also, under Clause 21, a separate provision is created to deal with scrutiny of complaints against the Chief Justice of India.

80. As a result, the Bill currently provides for three separate provisions dealing with scrutiny of complaints filed under Clause 7. First, Clause 9, which deals with scrutiny of complaints of incapacity of a Judge. Second, Clause 19 laying the procedure for scrutiny of complains relating to misbehaviour by a Judge. Finally, Clause 21 which governs the scrutiny of complaints against the Chief Justice of India. Multiple provisions on the same aspect of the inquiry process, i.e. scrutiny of complaints, create confusion, and lead to gaps in the procedure of scrutiny of different types of complaints that are dealt by Clauses 9, 19 and 21 respectively. It is submitted that all Clauses dealing with the scrutiny of complaints, including the referral of a complaint for scrutiny by the Scrutiny Panel should be merged into one comprehensive Clause to avoid confusion and remove inconsistencies.

81. A key inconsistency in this regard is the time period provided for the conduct of the scrutiny by the Oversight Committee or referral of a complaint to the Scrutiny Panel. Only Clause 19 mandates that the Oversight Committee shall refer the complaint to the concerned Scrutiny Panel within three months of the receipt of the complaint. While Clause 9 clearly lays down the duty of the Oversight Committee to refer a complaint to a Scrutiny Panel for scrutiny, it fails to provide a definite time period to do so. Similarly, in the case of a complaint against the Chief Justice of India, there is again no definite time period within which the Oversight Committee should complete the scrutiny. While Clauses 9 and 19 deal with referral of a complaint for scrutiny to

the Scrutiny Panel by the Oversight Committee, Clause 21 relates to conduct of scrutiny by the Oversight Committee itself. Providing a consistent time period in all these Clauses is essential to expedite the process of inquiry. In the absence of the same, it is possible that the Oversight Committee might sit over a complaint for a long period of time. Therefore, it is submitted that a similar time period as provided for referral of complaints relating to misbehaviour be included for scrutiny of complaints of incapacity and conduct of scrutiny by the Oversight Committee in the case of a complaint against the Chief Justice of India. More importantly, the different Clauses must be merged to create a single comprehensive and consistent provision.

C. Recommendation

82. It is recommended that a new Clause 9 drafted by merging earlier Clauses 9, 19 and 21 be included in the Bill.

83. Thus the modified Clause 9 including the changes discussed in section A (above) will read:

9. (1) Every complaint filed under this Act, shall be scrutinised by the Oversight Committee to satisfy if there are sufficient grounds for proceeding against a Judge within three months from the date of receipt of the complaint.

(2) Notwithstanding sub-section (1), where it deems appropriate, the Oversight Committee may refer a complaint for scrutiny by the Scrutiny Panel within three months from the date of receipt of the complaint against –

(a) an individual Judge of the Supreme Court or the Chief Justice of a High Court, refer the complaint, to the Scrutiny Panel of the Supreme Court to scrutinise and report thereon;

(b) an individual Judge of a High Court, refer the complaint, to the Scrutiny Panel of the High Court in which such Judge is acting as such, to scrutinise and report thereon.

(3) A complaint against the Chief Justice of India shall not be referred to the Scrutiny Panel for scrutiny but shall be scrutinised by the Oversight Committee within three months from the receipt of the complaint.

84. Other changes include:

The new Clause 9 and existing Clause 20 should be placed in Chapter V which should be titled "Scrutiny and Scrutiny Panel".

85. The new Clause 9 necessitates the changes to the below-mentioned Clause as follows:

Clause 10 – The words "received under this Act" need to be replaced with "when referred to it by the Oversight Committee".

Clause 13 – The words "the Oversight Committee or" be added before the words "the Scrutiny Panel".

Clause 14 – The words "Oversight Committee and the" be added before the words "Scrutiny Panel".

Clause 22(1) – The words "*Oversight Committee is satisfied that there are sufficient grounds for an inquiry or*" be inserted before the words "the Scrutiny Panel".

Clause 36 – The Clause shall be reworded as follows:

36. "*Upon the scrutiny of a complaint, if the Oversight Committee is of the opinion that a complaint was filed frivolously or vexatiously or only with a view to scandalise or intimidate the Judge, or* if the Scrutiny Panel refers a case to the Oversight Committee under section 16 *and the Oversight Committee concurs with the conclusion of the Scrutiny Panel on further consideration*, it may authorise the filing of a criminal complaint against the original complainant before a competent court."

IV. Provisions relating to National Judicial Oversight Committee: Chapter VI Part A

A. Composition of the Oversight Committee

86. The Bill envisages the creation of a National Judicial Oversight Committee [hereinafter the "Oversight Committee"] by the Central Government under Clause 17. Clause 18 provides that the Oversight Committee shall consist of – (a) a retired Chief Justice of India designated as Chairperson; (b) a Judge of the Supreme Court designated as a Member; (c) the Chief Justice of a High Court designated as a Member *ex officio*; the Attorney-General of India designated Member *ex officio*; and, an eminent person designated as a Member. It is submitted that the presence of the Attorney-General for India on the Oversight Committee is questionable on grounds of propriety. The Attorney-General as the first Law Officer of the government, has the responsibility of regularly appearing on behalf of the government before the court. On occasions, the possibility of his appearing before a Judge against whom a complaint has been filed cannot be ruled out. In such a circumstance, there is clearly a conflict of interest for both the Judge and the Attorney-General, since the latter will be a member of the Oversight Committee to look into the complaints made against the former. Though the complaint proceedings are confidential, it is necessary both for justice to be done as well as to be seen to be done. Reviewing the JIB 2005, the Law Commission countenanced the possibility of a situation where the cases of the advocate who had given a complaint against the judge may be listed before the same judge, which is to be avoided.[29]

B. Recommendation

87. Owing to the confidentiality requirement, it cannot be provided that the Attorney-General not appear in the Court of the judge under scrutiny/ investigation. Thus, we believe, it is necessary that the Attorney-General, being the first Law Officer of the government, is not made a member of the Oversight Committee. His place may be

[29] LCI 195, p. 450.

taken by a judicial member or an eminent jurist as deemed fit by the Honourable Standing Committee.

C. Omission of Necessary Clauses

1. Tenure, Re-appointment of non-*ex officio* members, Remuneration and Removal of all members of the Oversight Committee

88. The Bill is conspicuously silent on four crucial aspects of the structure and functioning of the Oversight Committee. These are: the tenure and possibility of re-appointment of non *ex-officio* members of the Committee, remuneration and procedure for removal of all members of the Committee.

89. The tenure, remuneration, conditions of service and removability have been held to be key to the independent functioning of an institution.[30] In the current Bill, no provision has been made regarding the remuneration and procedure for removal of the members of the Oversight Committee. Further, regarding the two non *ex-officio* members on the Committee, i.e. the retired Chief Justice of India, the Chairperson of the Committee, appointed by the President after ascertaining the views of the Chief Justice of India, and the eminent person nominated by the President, no length of tenure and possibility of re-appointment have been provided. This, would mean that, in effect both these members can serve on these Committees for life, since non-prescription of a statutory tenure would amount to *de facto* life tenure.

90. Their non-inclusion in the Bill can only be explained by the belief that these aspects may be specified by an appropriate government notification. However it is our view that tenure, salary (at least of non-judges), and possibility of re-appointment of members of the Oversight Committee, the nodal institution for carrying out the purposes of the Bill, constitute parts of the essential legislative function. The 'essential legislative function' according to the Supreme Court refers to that part of the law which consists of declaring its policy and making it a binding rule of conduct.[31] These aspects thus cannot be delegated to the government.

[30] *T.N. Seshan v. Union of India*, (1995) 4 SCC 611.
[31] *In re: Delhi Laws Act*, AIR 1951 SC 332; *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465.

91. In this Bill, the underlying legislative policy is one of the independence of the Oversight Committee in administering the complaint mechanism set up hereunder. Whether and to what extent the Oversight Committee functions independently, will be contingent on the level to which the government is authorised to intervene in issues of setting salaries, removing members, fixing tenures and re-appointing members. Thus by omitting to provide for these aspects statutorily, whether the Oversight Committee is to be an independent institution or not itself is in question, and the said constitutes, in our view, a part of the policy of the Bill, which in turn is part of the 'essential legislative function' which cannot be delegated.

2. Recommendation

92. **Thus we recommend that by appropriate amendments to Chapter VI.A, provisions relating to the tenure and the possibility of re-appointment of non *ex-officio* members and the remuneration and procedure for removal of all members of the Oversight Committee be incorporated.**

3. Regulating its own procedure

93. The Bill is silent regarding the power of the Oversight Committee to regulate its own procedure. The need of a body to regulate its own procedure has been recognised by the Bill to be crucial for the efficient functioning of the Scrutiny Panel (Clause 13) and the investigating committee (Clause 30). The Oversight Committee often performs tasks of a similar nature and hence should be vested with the same power. too, By Clause 21, the Committee is mandated to perform scrutiny of complaints against the Chief Justice of India. Again, after the report of the Investigating Committee, it has to decide as to whether, if the charges are proved, they are serious enough to warrant removal or otherwise to recommend minor measures. Further under Clause 36, when the Scrutiny Panel finds a complaint frivolous or vexatious, then the Oversight Committee must decide whether to authorise filing of a criminal complaint. Finally, under clause 52(1) it can summarily try persons who obstruct its proceedings and criminally punish them. For these reasons it is essential that the Oversight Committee be given the power to regulate its own procedure to carry out its purposes effectively under this Bill.

4. Recommendation

94. **Thus we recommend that by an appropriate amendment to Chapter VI.A the power of the Oversight Committee to regulate its own procedure be incorporated.**

V. Procedure for Inquiry or Investigation into Incapacity of a Judge

A. Provision for inquiry or investigation of charges relating to incapacity of a Judge

95. It is submitted that the procedure for inquiry or investigation into the incapacity of a Judge is not clearly laid down in the Bill. Presently, a complaint of incapacity against a Judge is to be referred to the Scrutiny Panel under Clause 9. After the Scrutiny Panel submits its report, there is no provision providing for the Oversight Committee to refer the matter for inquiry by an investigation committee. In the case of a complaint of misbehaviour, the Oversight Committee is empowered under Clause 22(1) to constitute an investigation committee for the purpose of inquiry into the allegation of misbehaviour by a Judge. In the light of Clause 22(1), Parts B and C of Chapter VI of the Bill dealing with powers, functions and procedure of the investigation committee relate only to an investigation committee constituted to inquiry into a complaint of misbehaviour. Similar provisions for the constitution of an investigation committee in case of a complaint of incapacity are missing in the Bill.

96. While being silent on the question of the constitution of an investigation committee including its powers, functions and procedure for inquiry into incapacity of a Judge, the Bill in Clause 35 has referred to the Oversight Committee's satisfaction of all or any of the charges of incapacity of a Judge. It is unclear on what basis the Oversight Committee will be able to reach this satisfaction if an investigation committee has not been constituted and submitted its report.

97. Also, as per Clause 47(3), the Oversight Committee after receipt of a reference under Clause 47(2) from the Speaker or Chairman (as the case may be) of either House of the Parliament, is empowered to constitute an investigation committee under Clause 22. Where the receipt of the reference from the Speaker or the Chairman pertains to an allegation of physical or mental incapacity, the Oversight Committee is left with no recourse to any provision in the Bill to constitute an investigation committee since Clause 22 omits to mention the possibility of investigation for incapacity.

B. Recommendations

98. To remedy the lack of a provision providing for the constitution of an investigation committee in case of incapacity of a Judge, it is recommended that specific provisions dealing with the constitution of an investigation committee (including its powers, functions and procedure) to inquire into a complaint of incapacity be included in the Bill. Specifically, Clause 22 can be amended to enable the Oversight Committee to constitute an investigation committee to inquire in an allegation of incapacity against a Judge as well.

99. **Thus Clause 22(1) should read:**

The Oversight Committee, shall for the purpose of inquiry of misbehaviour by a Judge, *or his incapacity,* constitute an Investigation Committee (by whatever name so called) to investigate into the complaint in respect of which the *Oversight Committee is satisfied that there are sufficient grounds for an inquiry against the Judge or the* Scrutiny Panel has recommended in its report under Clause (a) of sub-section (1) of Section 12 for making inquiry against the Judge in accordance with the provisions of this Act.

C. Medical Examination of a Judge in case of a complaint of incapacity

100. Under Clause 7 of the Bill, a complaint of incapacity of a Judge can be filed by any person. Incapacity is defined under Clause 2(d) to mean a physical or mental incapacity which is or is likely to be of a permanent character. The Bill does not lay down guidelines or procedure to determine the incapacity alleged *in a complaint*. Needless to say, any complaint of incapacity is likely to require a medical examination of the Judge by experts in the concerned field of medicine.

101. The present Bill provides for medical examination of a Judge *only under Clauses 47(4)-(6).* The trigger for the application of these Clauses is when the Speaker or Chairman (as the case may be) of either House of the Parliament admits a motion to be presented before the President praying for the removal of a Judge and

refers the matter to the Oversight Committee for the constitution of an investigation committee under Clause 47(2). It is pursuant to this reference that the Oversight Committee constitutes an investigation committee which in turn, under Clause 47(4), is empowered to arrange for the medical examination of a judge alleged to suffer from incapacity. Clauses 47(5)-(6) deal with related aspects of medical examination, report of the Medical Board and other matters. Clearly, under the present framework of the Bill, with the provisions for medical examination of a Judge being placed in Chapter VII dealing with the parliamentary presentation of address, it appears as if medical examination by a Medical Board on grounds of incapacity is possible only when a referral is made by either the Speaker or Chairman of either of House of Parliament (as the case may be) to the Oversight Committee.

102. It is submitted that medical examination of a Judge will also need to be conducted during the inquiry or investigation of a complaint by the investigation committee. Therefore, provisions for medical examination of a Judge are needed even when a complaint under Clause 7 is made by any person against a Judge on grounds of incapacity. This gap in the Bill needs to be filled by placing the provisions currently numbered Clauses 47(4)-(6) in the Bill in a part where it will be applicable both to complaints as well as references made to the Oversight Committee under Clause 47.

103. The earlier Bills, JIB 2005 and JIB 2006 contained specific chapters (chapters IV and V respectively) laying down a different procedure for inquiry in the case of a complaint of incapacity of a Judge. Under Clause 11 of JIB 2005, in case of a complaint against a Judge of physical or mental incapacity, the NJC was empowered to arrange for medical examination of the Judge by a Medical Board (as appointed for the purpose) before conducting an investigation into the complaint against the Judge. A similar provision was provided for in JIB 2006. Under Clause 13, the NJC after considering the written statement of the Judge, report submitted by the Medical Board, and material submitted by the Judge before the Medical Board, could amend the charges framed for investigation into the complaint.

D. Recommendations

104. It is recommended the Clauses 47(4)-(6) are removed from Part VII and introduced in Chapter VI Part B to empower the investigating committee to refer a Judge for medical examination by a Medical Board and give its findings in its report to the Oversight Committee under Clause 34 or Clause 35, as the case may be, as these Clauses currently stand. This will ensure that the medical examination provisions apply both to complaints to the Oversight Committee under Clause 7 as well as references made to it by the Speaker or the Chairman (as the case may be) of either House of the Parliament under Clause 47.

105. Thus Clauses 47(4)-(6) are to be placed after Clause 22 in Chapter VI Part B and should read:

(1) Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Council may arrange for the medical examination of the Judge by such Medical Board as may be appointed for the purpose by the Oversight Committee in the case of complaints filed under section 7, and, by the Speaker or the Chairman (as the case may be) of either House of the Parliament.

(2) The Medical Board shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the Council stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

(3) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the investigating committee stating therein the examination which the Judge has refused to undergo, and the investigation committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged.

VI. Penalties Pending and on Conclusion of Inquiry: Chapter VI Part E

A. Penalty Pending the Inquiry

106. Presently, Clause 33 provides that during the pendency of the inquiry by the investigation committee, the Oversight Committee may recommend the stoppage of assigning judicial wok to the Judge concerned in the interest of fair and impartial scrutiny of complaints or investigation or inquiry. This is certainly an important and essential provision to ensure that justice is not only done but seen to be done. It will be extremely improper for a Judge to discharge judicial work when a complaint against him/her is pending. Even JIB 2005 under Clause 21 provided that the NJC could during the pendency of investigation into a complaint may recommend stoppage of assigning judicial work to the concerned Judge. The Law Commission of India, in its 195th Report, said that this Clause was constitutionally valid.

107. It is submitted that besides stoppage of judicial work, there should also be a stoppage of any promotion or elevation of the Judge during the pendency of the complaint as well as a provision to direct the Judge to proceed on leave. As per Clause 33, stoppage of work is not mandated in case of every complaint. It is done only when it appears to the Oversight Committee that it is necessary in the interest of fair and impartial inquiry. Clearly, there could be instances when the Judge is discharging judicial work during the pendency of the complaint and his/her name is considered for promotion or elevation as a Judge of the Supreme Court or the Chief Justice of a High Court or the Supreme Court (as the case may be). Also as the recent instance of the alleged misbehaviour of Justice Dinakaran and the unheeded request of the judicial collegium asking him to go on leave showed,[32] there may be instances, especially when the Judge in question is a Chief Justice, when a mandatory provision directing the Judge to go on leave is necessary in order to prevent him from performing administrative tasks of a Judge.

[32]"Defiant K'taka CJ refuses to go on Leave" *The Times of India*, 6 April, 2010, available at: http://timesofindia.indiatimes.com/india/Defiant-Ktaka-CJ-refuses-to-go-on-leave/articleshow/5764879.cms

108. Elaborating on its justification of stoppage of judicial work, the Law Commission said,

> "*Now, it is well settled that if the Constitution vests power in Parliament to make such a law, such law can also prescribe a procedure which facilitates the achievement of the object of an effective procedure for investigation and proof. It is well-known that if a person is under investigation or disciplinary inquiry, his suspension or withdrawal of work from him may, in a large measure, facilitate a more effective and speedy investigation or inquiry. Those who may give information at the stage of investigation or give evidence in the inquiry may feel inhibited by the presence of the judge sitting in court deciding cases. There is a possibility of a situation where the cases of the advocate who had given a complaint against the judge may be listed before the same judge.*"[33]

This rationale is applicable even in the case of a promotion or elevation of a Judge under inquiry or investigation or requiring him to go on leave. A further enhancement of the stature and position of a Judge either as a Judge of the Supreme Court or the Chief Justice of a High Court or the Supreme Court (as the case may be) or his performing administrative tasks as Chief Justice can inhibit a free and impartial scrutiny, inquiry or investigation of the complaint.

109. Also, the present wording of Clause 33 can create ambiguity on the question of whether the stoppage of judicial work assigned to the Judge concerned is applicable only during the inquiry by the investigation committee or even during other stages of the inquiry such as scrutiny of complaints, or inquiry by the Oversight Committee. Clause 33 does mention that the Oversight Committee can employ this provision "in the interest of fair and impartial *scrutiny of complaints or investigation or inquiry*" [emphasis added] but Clause itself begins as follows: "During the *pendency of the inquiry by the investigation committee*" [emphasis added]. The use of the phrase "*[d]uring the pendency of the inquiry by the investigation committee*" [emphasis added] at the very beginning of the Clause can lead to the interpretation that this provision is applicable only during inquiry by the investigation committee, which will defeat the purpose of this provision. The ability of the Oversight Committee to stop assigning of judicial work should extend to all stages of the inquiry upon the receipt of complaint under Clause 7 or referral under Clause 47(2). Therefore, to avoid any potential ambiguity on this issue, the words "*by the investigation committee*" should be deleted.

[33] LCI, 195, pp. 449-450.

B. Recommendations

110. It is recommended that Clause 33 be modified to include the suspension of any promotion or elevation of the Judge either as a Judge of the Supreme Court or the Chief Justice of a High Court or the Supreme Court (as the case may be) and the direction requiring a Judge to go on leave, during the pendency of the complaint. It is also recommended to delete the words "*by the investigation committee*" in Clause 33.

111. The modified Clause 33 should be:

33. During the pendency of the inquiry, the Oversight Committee may recommend stoppage of assigning judicial work including cases assigned to the Judge concerned, or suspension of promotion or elevation of the Judge as a Judge of the Supreme Court or the Chief Justice of a High Court or the Supreme Court, as the case may be, or direct the Judge concerned to go on leave, or all of the above, if it appears to the Oversight Committee that it is necessary in the interest of fair and impartial scrutiny of complaints or investigation or inquiry.

112. Other changes include:

To reflect the breadth of provisions in Part E Chapter VI, it is also recommended that the title of the same be modified as ***"Interim Measures Pending Inquiry and Penalties on Conclusion of Inquiry"***.

VII. Offences and Penalties: Chapter VIII

A. Clause 51 – Punishment for breaching confidentiality under the Bill

113. Clause 51 provides the punishment for the contravention of Clauses 39, 40 or 43 of the Bill. The prescribed punishment for these contraventions is simple imprisonment for a term which may extend to one month or a fine extending to five hundred rupees or both. It is submitted that the punishment prescribed is very low given the serious nature of offences made out in Clauses 39, 40 and 43.

114. Clause 39 seeks to maintain confidentiality of the inquiry process including the name of the complainant and every person who participates in the inquiry process, the name of the Judge complained against, and contents of the complaint, any documents or proceedings. Clause 40 seeks to provide protection to a complainant (at his request), including keeping his identity confidential, from everybody and also the Judge complained against. Clause 43 is an overarching provision which declares that all papers, documents and records of proceedings relating to the inquiry process of a complaint. Clauses 39, 40 and 43 are essentially aimed at maintaining the confidentiality of the various aspects of the entire inquiry process. Emphasising the importance of maintaining confidentiality, the Law Commission posited that inquiry into misbehaviour and incapacity a judge involve sensitive matters pertaining to a high constitutional functionary and any disclosure of such information at any stage would not only endanger a fair conduct of investigation and inquiry but also irredeemably tarnish the image of a judge even before the conclusion of the statutory and constitutional processes.[34]

115. Given the important nature of these provisions, it is submitted that the punishment for contravention of these Clauses should be enhanced to create sufficient deterrence to prevent the violation of these provisions.

B. Recommendations

[34] LCI 195, p. 467.

116. It is recommended that the punishment be enhanced to simple imprisonment for a minimum term of six months extending up to one year or a minimum fine of fifty thousand rupees extending up to one lakh rupees.

117. The new Clause 51 will be as follows:

51. If any complainant or other person, who participates in the scrutiny or investigation or inquiry as a witness or as a lawyer or in any other capacity, contravenes the provisions of section 39 or section 40 or section 43, shall be liable for punishment with *simple imprisonment for a minimum term of six months which may extend to one year and also a fine of minimum fifty thousand rupees which may extend to one lakh rupees.*

C. Clause 53(1) – Punishment for frivolous or vexatious complaints

118. Clause 53(1) provides the punishment for filing a frivolous or vexatious complaint under Clause 7 of the Bill. The Clause provides that if a complaint is found to be frivolous or vexatious or made only with intent to scandalise or intimidate the Judge, then the person making the complaint is punishable with *rigorous imprisonment* which may extend to *five years* and also a fine which may extend to *five lakh rupees*. It is submitted that the punishment and penalty is very severe and not commensurate to the offence under consideration. Further, it is much harsher than the punishment recommended by the Law Commission of India with respect to JIB 2005 or accorded in other statutes for similar offences committed therein.

119. The punishment provided for in Clause 53(1) is comparable or more than the punishment awarded for some serious criminal offences under the Indian Penal Code, 1860. These include rioting, bribery, sedition, forgery, kidnapping, extortion, etc. Forestalling the making of a frivolous or vexatious complaint or complaints with a view to scandalise or intimidate a Judge is certainly desirable, yet it is not does not meet the threshold of a serious criminal offence at par with the offences described aforesaid to warrant such severe quantum of punishment.

120. The Law Commission, in its 195th Report reviewing the JIB 2005, recommended that the Parliament should provide appropriate sanctions for making a complaint which is either frivolous or vexatious or is not in good faith, with an intent to cause harassment to a Judge. Specifically, the Law Commission recommended a sentence leading to imprisonment for a term extending to one year and also to a fine extending to rupees twenty five thousand.[35] JIB 2006 contained a provision sentencing vexatious or frivolous complainants which was in tandem with the recommendation of the Law Commission.[36]

121. Under the Contempt of Courts Act, 1971, which is a broadly comparable legislation since the offence in question involves adversely affecting the reputation of a Judge or the judiciary, a person committing a contempt of court is punishable with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. Under the Karnataka Lokayukta Act, 1984, making a false and frivolous or vexatious complaint under the Act is punishable with imprisonment for a term not less than six months but extending to three years and with fine not less than two thousand rupees but extending to five thousand rupees.[37] Also, the punishment for insulting or interrupting the Lokayukta or Upalokayukta during investigation or inquiry, or bringing into disrepute the Lokayukta or Upalokayukta, is simple imprisonment for a minimum period of six months not extending beyond one year or fine or both.[38] Punishment for the same offences under corresponding legislations across India is similar in quantum.[39] Clearly, the punishment for vexatious or frivolous complaints which tend to scandalise a public officer or abuse the process of law under other statutes is lesser than the punishment being envisaged under the Bill.

122. It is submitted that not only is the quantum excessive for the offence in question, it has the potentially regressive effect of deterring genuine complainants from filing complaints for the fear of such excessive punishment (if the complaint is held to be vexatious or frivolous or made with a view to scandalise or intimidate the

[35] LCI 195, pp. 453-454
[36] Clause 26(1), [The] Judges (Inquiry) Bill, 2006.
[37] Section 20, [The] Karnataka Lokayukta Act, 1984.
[38] Section 17, [The] Karnataka Lokayukta Act, 1984.
[39] See [The] Rajasthan Lokayukta and Up-Lokayuktas Act, 1973; [The] Madhya Pradesh Lokayukt and Up-Lokayukt Act, 1981; [The] Andhra Pradesh Lokayukta and Upa-Lokayukta Act, 1983.

Judge). While it is important to avoid such an adverse effect, it is also acknowledged that the punishment must be strong enough to prevent filing of frivolous or vexatious complaints which can harass the judiciary. A balance needs to be struck between these two competing aims. This can be done by prescribing a minimum punishment which is high enough to deter meddlesome interlopers to abuse the process under the Bill, but not high enough to cast a fear of punishment on genuine complainants.

D. Recommendations

123. It is recommended that the punishment envisaged under Clause 53(1) to deal with the issue of frivolous or vexatious complaints against Judges be modified to reflect the levels recommended by the Law Commission. Consequently, the punishment would be simple imprisonment for a minimum term of six months extending up to one year and also to a minimum fine of fifty thousand rupees extending up to one lakh rupees.

124. Thus the modified Clause 53(1) will read:

53. (1) Any person who makes a complaint which is found, after following the procedure under this Act to be frivolous or vexatious or made with an intent to scandalize or intimidate the Judge against whom such complaint is filed, shall be punishable with *simple imprisonment for a term of minimum six months which may extend to one year and also a fine of minimum fifty thousand rupees which may extend to one lakh rupees.*

VIII. Time limit for Investigation Committee: Clause 29(4)

A. Time given to investigation committee to conduct inquiry

125. Clause 29(4) requires that the investigation committee hold every inquiry as expeditiously as possible and in any case complete the inquiry within a period of six months from the date of the receipt of the complaint. The proviso to the Clause allows the Oversight Committee, for reasons to be recorded in writing, to extend the period for completion of the inquiry by a further six months.

126. While it is reasonable to provide the investigation committee with a single extension of six months beyond the initial period of six months, it is possible that this proviso can be interpreted to offer more than one extension to the investigation committee. Such further extensions can lead to inordinate delays in the submission of the final report, a feature many inquiry commissions suffer from. To avoid a potential abuse of this extension mechanism, it is essential to limit the number of extensions and total time given to the investigation committee to complete its inquiry of a complaint.

127. Furthermore, this Clause only mandates the investigation committee to "complete the inquiry" within the prescribed period without mentioning the submission of its report. To avoid any doubt over real import and future interpretation of this Clause, it is recommended that this Clause be extended to cover both inquiry and submission of report based on that inquiry.

B. Recommendations

128. It is recommended that the proviso to Clause 29(4) be limited to providing not more than one extension and a total period not exceeding one year for the investigation committee to both complete the inquiry and submit its report based on that inquiry.

129. Thus the modified Clause 29(4) should read:

29. (4) The Investigating Committee shall hold every such inquiry as expeditiously as possible and in any case complete the inquiry *and submit its report to the Oversight Committee* within a period of six months from the date of receipt of the complaint:

Provided, that the Investigation Committee for reasons to be recorded in writing, may extend the period for completion of the inquiry by a *maximum period* of six months.

IX. Clause 34 and 35: Minor Measures

A. The basis on which the Oversight Committee should distinguish between "charges proved do not warrant removal" in Clause 34(1)(b) and "they are of serious nature warranting removal" in Clause 35 should be laid down

130. By Clauses 34 and 35 in Chapter VI Part E, at the conclusion of an inquiry against a judge on the grounds of misbehaviour or incapacity, the Oversight Committee has three options: it can dismiss the complaint if no charges have been proved [Clause 34(1)(a)]; it can issue advisories or warnings if the charges have been proved but the Committee finds the charges proved do not warrant removal [Clause 34(1)(b)]; it can advise the President to proceed with impeachment proceedings if the charges are proved and they find the charges serious enough to warrant removal [Clause 35]. This determination of whether the charges 'are of serious nature warranting removal' shall be by the subjective satisfaction of the Oversight Committee.

131. The Supreme Court has held that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote.[40] In a case relating to the subjective satisfaction of the government in ascertaining public interest, the Court held that though it will not replace the government's judgment with its own there must be *prima facie* evidence on the basis of which the matter was deemed by the government to be in public interest.[41] In another case relating to the subjective satisfaction of the government in determining whether there was an emergency or not which would lead to expediting a process, the Court held that such exercise of subjective satisfaction could be

[40] *Shalini Soni v. Union of India*, (1980) 4 SCC 544.
[41] *Western M.P. State & Electric Power Supply Corporation v. State of Uttar Pradesh*, (1969) 1 SCC 817.

questioned by the Court on the ground of non-application of mind, *mala fide* decisions or not considering all the relevant materials necessary to take a decision.[42]

132. To offset the challenge on the basis of improper exercise of subjective satisfaction, by way of abundant caution, we believe it is necessary to provide the factors the Oversight Committee must take into account to distinguish between the two categories listed above. Though such factors are currently not provided in the statute, despite this, the intention of Parliament in seeking to make a classification between misbehaviour of a judge that is impeachable and misbehaviour which is not, is salutary. The Supreme Court,[43] the National Commission to Review the Working of the Constitution[44] and the 195th Report of the Law Commission[45] have all adverted to the necessity of such a distinction. The rationale expressed has been that conduct which is unbecoming of a judge, yet not so egregiously improper to warrant misbehaviour, should result in sanction in some form. Two questions hence arise:

1. What forms should this sanction, (hereinafter 'minor measures) take?
2. How can such minor measures be incorporated in the Bill in a constitutional manner?[46]

B. Forms of Minor Sanctions

133. Clause 34(1) (b) of the Bill limits minor measures to issuing advisories and warnings. It would be apposite at this stage to undertake a comparative survey of foreign jurisdictions to analyse the minor measures imposed on federal judiciaries therein.

[42] *First Land Acquisition Collector v. Nirodhi Prakash Gangoli*, (2002) 4 SCC 160.
[43] *C. Ravinchandan Iyer v. Justice A.M. Bhattacharjee*, MANU/SC/0771/1995.,
[44] Report of the National Commission to Review the Working of the Constitution (New Delhi, 2002), Chapter 7, ¶7.3.8 available at http://lawmin.nic.in/ncrwc/finalreport/v1ch7.htm
[45] LCI 195, p. 35.
[46] Whether the imposition of the minor measures is constitutional or not is a question which has been extensively researched and explicated by the Law Commission in its 195th Report with the conclusion that such measures are *per se* constitutional, i.e. competent for the Parliament to legislate and not violative of judicial independence. See LCI 195. This argument is thus not reiterated in this thesis.

1. Survey of foreign law

134. A number of foreign countries have adopted a variety of minor sanctions. The provisions listed below cover the wide spectrum of sanctions used:

1. Under USA's law governing federal judges (excluding Supreme Court judges), in addition to temporary suspension from office, sanctions include providing for private and public censuring and directing the judge to voluntarily retire. United States Code, Title 28, Section 354 provides:

*"(a) **Actions Upon Receipt of Report.—***
(1) Actions— The judicial council of a circuit, upon receipt of a report filed under section 353 (c)—
(A) may conduct any additional investigation which it considers to be necessary;
(B) may dismiss the complaint; and
(C) if the complaint is not dismissed, shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.
(2) Description of possible actions if complaint not dismissed.—
(A) In general— Action by the judicial council under paragraph (1)(C) may include—
(i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;
(ii) censuring or reprimanding such judge by means of private communication; and
(iii) censuring or reprimanding such judge by means of public announcement.
(B) For article III judges.— If the conduct of a judge appointed to hold office during good behavior is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include—
(i) certifying disability of the judge pursuant to the procedures and standards provided under section 372 (b); and
(ii) requesting that the judge voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply.
(C) For magistrate judges.— If the conduct of a magistrate judge is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.
(3) Limitations on judicial council regarding removals.—
(A) Article iii judges.— Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.
(B) Magistrate and bankruptcy judges.— Any removal of a magistrate judge under this subsection shall be in accordance with section 631 and any removal of a bankruptcy judge shall be in accordance with section 152.
(4) Notice of action to judge.— The judicial council shall immediately provide written notice to the complainant and to the judge whose conduct is the subject of the complaint of the action taken under this subsection.

(b) Referral to Judicial Conference.—
(1) In general.— In addition to the authority granted under subsection (a), the judicial council may, in its discretion, refer any complaint under section 351, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.
(2) Special circumstances.— In any case in which the judicial council determines, on the basis of a complaint and an investigation under this chapter, or on the basis of information otherwise available to the judicial council, that a judge appointed to hold office during good behavior may have engaged in conduct—
(A) which might constitute one or more grounds for impeachment under article II of the Constitution, or
(B) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.
(3) Notice to complainant and judge.— A judicial council acting under authority of this subsection shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge whose conduct is the subject of the action taken under this subsection."

2. In New Zealand, the disciplinary authority can direct the concerned judge to convey an apology to the complainant pursuant to procedure contained in page 5 of the "Complaints and Judicial Conduct" issued by the Judicial Conduct Commissioner, which states :

   "For complaints of substance, the Head of Bench will determine how to deal with the matter appropriately. The Head of Bench will consider responses such as asking the Judge to apologise to the complainant, or by offering the Judge appropriate assistance to avoid the inappropriate conduct happening again."

3. French law (Article 45 of Regulation N° 58-1270 dated 22 December 1958) provides the disciplining authority with numerous sanctions namely:[47]
   a) reprimand with inscription in the administrative file;
   b) displacement;
   c) withdrawal of certain specialized judicial functions;
   d) prohibition from appointment to the functions of single presiding judge for a maximum of five years;
   e) lowering of hierarchical level;
   f) temporary exclusion of functions for a maximum duration of one year, with total or partial

[47]Eric J. Maitrepierre, "Ethics, Deontology, Discipline of Judges and Prosecutors in France"; http://www.unafei.or.jp/english/pdf/RS_No80/No80_29VE_Maitrepierre.pdf.

g) annulations of salary;
h) downgrading;
i) retirement or admission to cease his or her functions when the judge or the prosecutor is not
j) entitled to a retirement pension;
k) dismissal with or without suspension of the right to get a pension

4. In Canada, there exists an informal practice by which the disciplining authority issues an "Expression of Disapproval" of the judge's conduct. This takes the form of a letter sent by the Chairman of the disciplining authority to the judge.[48]
5. Some US State laws provide the disciplining authorities with different kinds of sanctions and other modes of monitoring judges as well:
   a) Under Californian law,

      (i) as part of a preliminary investigation, the investigation commission may monitor the actions of the judges for two years. This is provided for by Rule 112 of the State of California Commission on Judicial Performance, Commission Rules which states

      "The commission may defer termination of a preliminary investigation for a period not to exceed two years for observation and review of a judge's conduct. The judge shall be advised in writing of the type of behavior for which the judge is being monitored. (Such disclosure shall not limit the commission's consideration of misconduct involving other types of behavior which may be observed or reported during the period of monitoring.)"

      (ii) After preliminary investigation the disciplining authority may issue a notice of private admonishment followed by notice of public admonishment. These are provided for by Rules 113 and 115 of State of California Commission on Judicial Performance, Commission Rules which state:

      "Rule 113
      Notice of Intended Private Admonishment
      If after a preliminary investigation the commission determines that there is good cause for a private admonishment, the commission may issue a notice of intended private admonishment to the judge by certified mail. The notice shall

[48] See S. Bindman, "Weatherill Judge Chastised for Attacking Cheering MPs" The Ottawa Citizen (17 April 1998) A9; referred to in footnote 47 of Kim Ratushny, 'Toward the "Independence of Judges" in Ukraine?', 62 *Saskatchewan Law Review* 567. Also see Ivan C. Rand Memorial Lecture, 'The Rule of Law and Judicial Independence: Protecting Core Values in times of Change', 45 *University of New Brunswick Law Journal* 3.

include a statement of facts found by the commission and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 114.

…

Rule 115

Notice of Intended Public Admonishment

If the commission determines following a preliminary investigation that there is good cause for public discipline, the commission may issue a notice of intended public admonishment to the judge by certified mail. The notice shall include a statement of facts found by the commission and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 116."

(iii) After a formal hearing, the Commission may publicly censure, or publicly or privately admonish a judge.

(iv) When formal proceedings are instituted, the notice of charges, the answer by the judge and all subsequent papers and proceedings are open to the public pursuant to Rule 102(b) which states:

"(b) (Disclosure after institution of formal proceedings) When the commission institutes formal proceedings, the following shall not be confidential:

(1) The notice of formal proceedings and all subsequent papers filed with the commission and the special masters, all stipulations entered, all findings of fact and conclusions of law made by the special masters and by the commission, and all determinations of removal, censure and public admonishment made by the commission;

(2) The formal hearing before the special masters and the appearance before the commission."

b) Under Connecticut law, judges may be suspended for a definite period or publicly censured pursuant to Section 51-51m of the General Statutes of the State of Connecticut, which states:

"The Judicial Review Council may take any action upon a majority vote of its members present and voting, except that twelve members of the Judicial Review Council shall constitute a quorum for any action to publicly censure a judge, compensation commissioner or family support magistrate, suspend a judge, compensation commissioner or family support magistrate for any period, refer the matter to the Supreme Court with a recommendation that a judge or family support magistrate be suspended for a period longer than one year or refer the matter to the Supreme Court with a recommendation that a judge or family support magistrate be removed from office or to the Governor with a recommendation that a compensation commissioner be removed from office and the concurring vote of seven of such members shall be required."

6. The sanctions provided by UK law are limited and include suspension from judicial office by the Lord Chief Justice in consultation with the Lord Chancellor.

135. From this survey, it emerges that the fundamental rationale for imposing minor measures for judicial misbehaviour not amounting to impeachable misbehaviour is the need to foster judicial accountability. It is axiomatic that misbehaviour by a judge should not go unpunished, a situation which would be occasioned if misbehaviour is considered the only remedy for an errant judge. However this attempt at fostering judicial accountability must respect judicial independence at the same time, i.e. no attempt to impose minor measures must itself threaten the possibility of impartial and effective adjudication.

136. The key question therefore in the context of the Bill is which of these minor measures earlier referred to will successfully ensure the twin objectives of promoting judicial accountability without compromising judicial independence and the need for impartial and effective adjudication at the same time. Distilled, the ancillary question which remains is to what extent the minor measures imposed should be public in nature.

137. We are of the view that while several provisions surveyed above are salutary, in an Indian context, a sanction that is public in nature is likely to affect the confidence of the people in the judiciary. A judge who has, for instance been publicly reprimanded is not likely to instil confidence in future litigants whose case comes up before him. Hence we believe that the only sanction that is public in nature should be impeachment as in such cases, the judge stops hearing cases henceforth. For minor measures, we believe accountability can be equally sought through private actions against the judge, especially actions which hinder his professional development.

C. Recommendations

138. **On this basis, to harmonise the need for judicial accountability with the concomitant need to preserve judicial independence, we recommend that Section 34(1)(b) be amended to include wider powers of minor sanctions for the Oversight Committee. We believe that Section 34(1)(b) should now read as follows:**

"If the Oversight Committee on receipt of the report from the investigation committee is satisfied that –

(b) all or any of the charges have been proved but the Oversight Committee is of the opinion that the charges proved do not warrant removal of the Judge, it may, by order impose one of the following sanctions:

(i) send a letter of advice to the Judge with a warning about the possibility of impeachment if such misbehaviour is repeated;

(ii) censure or reprimand the Judge by means of private communication;

(iii) recommend to the Chief Justice of India to lower the seniority of the Judge for the purpose of appointment as Chief Justice of a High Court or promotion to the Supreme Court of India, in case of High Court judges;

D. Incorporating Minor Measures in the Bill

139. To assist the Oversight Committee in exercising its discretion, it will be necessary to provide certain guidelines on the basis of which the committee can distinguish between misbehaviour that is 'of a serious nature to warrant removal' and other types of misbehaviour which are not. This, we believe, can be best accomplished by the insertion of an Explanation to Clause 34(1) and renumbering Clause 35 as Clause 34(1)(c). The Explanation will provide an indication of what will constitute 'misbehaviour of a serious nature'. It is instructive to note that the changes suggested hereunder will have no impact on the proof of incapacity and is relevant only to cases of misbehaviour.

140. To make the determination of what constitutes 'misbehaviour of a serious nature' we believe the following factors must be considered: the gravity, frequency, wilfulness and criminality of the offending conduct of the judge. The factors are now considered individually:

1. Gravity: Gravity of the offending conduct is a key determinant of its seriousness. Eg. A judge who uses his judicial office to take an undue advantage from the state government in procuring two pieces of additional furniture in his house must be

treated on a different footing as one who uses his judicial office to make the state pay for personal trips made abroad over a long period of time.

2. Frequency: The number of times an offending conduct takes place is another key determinant of whether the conduct is serious enough to warrant removal. Eg. A judge who allows a close relative to appear before him in Court once may be treated differently from a judge who allows a close relative to appear before him in Court regularly.
3. Wilfulness: The Supreme Court[49] and the Sawant Committee[50] has held that *mens rea* is key to a determination of misbehaviour. The three types of *mens rea* contemplated are intention, knowledge or reckless disregard of rules. Accordingly, a judge who failed to disclose a material fact which may have a bearing on his integrity unknowingly may be considered different from a judge who intentionally suppressed such a fact.
4. Criminality of the offending conduct: If the misbehaviour in question involves, in the opinion of the Oversight Committee, a criminal offence, then it should automatically be considered an offence 'of a serious nature to warrant removal'.

E. Recommendations

141. **On this basis we recommend:**

a. Clause 35 be renumbered Clause 34(1)(c)

b. An explanation be added after Clause 34(1)(c) which reads:

"Explanation: For the purposes of this section, whether any of the charges of misbehaviour are 'of a serious nature to warrant removal' shall be determined by the Oversight Committee after taking into account the gravity, frequency, wilfulness, criminality and other relevant characteristics of the offending conduct of the judge."

[49] *Krishna Swami* v. *Union of India,* AIR 1993 SC 1407.
[50] LCI 195, 370.

F. Clause 34 and Clause 35 should provide a time limit within which the Oversight Committee must take a decision

142. Under clause 35 of the Bill, if the Oversight Committee is satisfied that an allegation of misbehaviour or incapacity of a Judge is proved and is of a serious nature warranting his/her removal, it shall request the Judge to voluntarily resign. If the Judge fails to do so, the Oversight Committee is then required to advise the President to proceed for the removal of the Judge. Again under Clause 34, it can dismiss the complaint if no charges have been proved [Clause 34(1)(a)] or it can issue advisories or warnings if the charges have been proved but the Committee finds the charges proved do not warrant removal [Clause 34(1)(b)]. While these clauses clearly lay down the procedure to be followed by the Oversight Committee in case of a serious proven misbehaviour or incapacity, it fails to provide appropriate time lines for the same. It is submitted that the Oversight Committee should be cast with the duty to take its decision to request the Judge for resignation, following which to advise the President for the removal of the Judge, to impose minor measures or to dismiss the complaint within a definite time period.

143. In the absence of strict deadlines the Oversight Committee can potentially sit over its findings which will defeat the purposes of the Bill. The Bill has sought to provide concrete time periods for actions by the Scrutiny Panel and the investigation committee under clauses 12(2) and 29(4). To ensure that the provisions of the Bill are actively implemented, it is essential the Oversight Committee too is mandated to act upon the report of the investigation committee within a definite period of time.

G. Recommendations

144. Clause 34 [which includes the current Clause 35 as Clause 34(1)(c)] must provide in a separate sub-clause:

"Any decision taken by the Oversight Committee under sub-section (1) must be taken within one month of the receipt of the report of the investigation committee."

X. Other Recommendations: Formulation of a Judicial Development Scheme

A. The Honourable Standing Committee may be pleased to consider the formulation of a Judicial Development Scheme under the auspices of the Oversight Committee

145. The present Bill, as stated in the Statement of Objects and Reasons, has been formulated with the objective of 'strengthen(ing) the institution of the judiciary by making it more accountable.'[51] It has sought to accomplish this task by instituting a system of public complaints relating to the misbehaviour or incapacity of judges of the Supreme Court or the High Courts. Public complaints, once scrutinised and investigated, can lead to a motion of impeachment under the Constitution, a process, which could earlier only be triggered by a motion adopted by 100 members of the Lok Sabha or 50 members of the Rajya Sabha, under Section 3(1) of the Judges (Inquiry) Act, 1968 (sought to be repealed by this Bill). As the long-drawn out episode of investigating misbehaviour charges against Justice Dinakaran, former Chief Justice of the Karnataka High Court shows, such a system of public complaints, leading to a possible impeachment motion was the need of the hour. However, it is our submission that this is not the only mechanism by which judicial accountability can be increased without compromising judicial independence. *First*, there may be several instances of judicial misbehaviour not amounting to impeachment. For these cases, minor measures, short of impeachment have been recommended in Chapter IX. *Second*, there may be a paradigmatically variant way of ensuring judicial accountability, not necessarily through corrective action, but rather through an optimal degree of transparency and dialogue between relevant actors.[52] One key soft accountability measure which we believe can be usefully considered by the Standing Committee is

[51] Per Statement of Objects and Reasons, ¶5.

[52] In academic literature, these are broadly termed as 'soft accountability' measures, in contra-distinction to 'hard accountability' measures such as removal for breach. See Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing, Aldershot 1999) Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing, Aldershot 1999).

our proposal for the development of a Judicial Development Scheme under the auspices of the Oversight Committee.

1. The Judicial Development Scheme: An Outline

146. The fundamental rationale for developing a Judicial Development Scheme ('JD Scheme') in India is to institute a system for periodic evaluation of higher judicial officers by an independent institution on the basis of a set of pre-determined scientific criteria, the results of which will be used by the judiciary internally for its development, training and administration and will be disseminated publicly under certain circumstances to ensure transparent functioning. In order to develop it in a manner in which judicial accountability is furthered without compromising on judicial independence the six following factors have to be carefully considered:

a. Rationale:

147. Judicial Development Schemes ["JD Scheme(s)"] also known as Judicial Performance Evaluation Programmes can be set up for several purposes. The purposes usually range from providing feedback to judges, giving the public information about the judiciary thereby increasing its confidence in the institution to using the evaluation for judicial discipline.[53]

148. In India, in our opinion, JD schemes must be focally directed at improving the quality of the judiciary through synthesised data regarding its functioning, use the data collected in administrative decisions such as promoting judges, transferring judges and assigning of cases to judges and also to give the public appropriate information about the judges and their evaluation.

b. Administration:

149. The next question which arises in the implementation of JD schemes is which institution is best placed to administer it. Evidence from the United States where such schemes are common, suggest that in most states they are administered by

[53] For a conspectus of judicial evaluation programmes in the USA with specific examples of state level programmes and proposals for federal level programmes, see Rebecca Love Kourlis and Jordan M. Singer. "A Performance Evaluation Program for the Federal Judiciary" 86 *Denver University Law Review* 7(2008).

independent commissions, whereas in states such as Utah the nodal agency is a body almost wholly comprising judicial members.[54] An independent agency has significant benefits over an in-house body as well as a statutory body. In comparison with the former, the agency can carry out its tasks in a transparent manner thereby furthering the goal of accountability; in comparison with the latter, an independent agency does not give cause for criticism based on legislative interference with the judicial process, i.e. it is not violative of judicial independence.

150. In India too, if the Honourable Committee were to accept this recommendation, the power to administer the JD Scheme would be vested in the Oversight Committee set up by this Bill. The Committee, would be an independent institution comprising predominantly of judicial members and thereby would not be accused of violating judicial independence. At the same time it would be able to foster judicial accountability, since institutionally it would be separated from the judiciary. Thus it would combine the merits of judicial accountability with the fundamental need to preserve judicial independence.

c. Criteria

151. The next key issue is the criteria on the basis of which judges are to be assessed. The Oversight Committee must be responsible for developing a set of criteria, taking into account the rationale for setting up such a programme. Thus it must keep in mind factors, feedback on which will assist the judge to improve his/ her performance, assist the Chief Justice of India or the High Courts to assign cases to judges, create a record which can be used for the purposes of promotion or transfer of judges and allow the public a snapshot of judicial performance on a prescribed basis.

152. The American Bar Association Black Letter Guidelines for the Evaluation of Judicial Performance, 2005 provides legal ability, integrity and impartiality, professionalism and temperament, administrative capacity and communication skills

[54] Marla N. Greenstein *et al,* "Improving the Judiciary through Performance Evaluations" in Gordon M. Griller and E. Keith Stott Jr., *The Improvement of the Administration of Justice* (7th edn., American Bar Association, 2001).

as the five criteria to be used.[55] This document may serve as a broad guideline for an analogous development of criteria in India.

d. Methodology

153. There are three stages in every JD Scheme:

i. Data collection
ii. Data synthesis and evaluation
iii. Data dissemination

154. Methodological issues pertain to the technical specifics of Stages (i) and (ii). Methodological issues relating to data collection involve formulating a questionnaire, deciding who shall be the respondents, how large must the sample size be etc; data synthesis and evaluation involves the methodological questions of setting the threshold level, the margin for error, how to generate the results, whether to provide a ranking etc.

155. These issues in an Indian context must be delegated to an appropriate expert authority. Appointment of such an authority should be a power delegated to the Oversight Committee by appropriate rules under statute.

e. Frequency and Dissemination

156. The frequency of this exercise is another aspect of the JD Scheme which must depend on the Oversight Committee to determine on the basis of appropriate rules. It must be determined keeping in mind both the rationales of the programme, the criteria used and the costs of such an exercise. Equally, it is not necessary that every evaluation must necessarily be publicly disseminated. Public dissemination must be controlled since excessive negative publicity may have the converse effect of denuding confidence in the judiciary. Thus public dissemination of JD Scheme results must not be holistic. Instead, judge-specific results must be announced on promotion, transfer or retirement of a judge thereby optimally providing information to the public. Of course, information will be available internally within the judiciary for administrative purposes at all times.

[55] Available at www.**aba**net.org/jd/lawyersconf/pdf/jpec_final.pdf.

f. **Safeguards**

157. In any JD Scheme it is necessary to ensure safeguards to preserve judicial independence such that judges are not adversely affected in their task of adjudicating impartially and effectively. This, we believe, can be best accomplished in India by clearly providing that JD Scheme data shall not be used for any disciplinary purpose whatsoever.[56] Thus a complaint against a judge for misbehaviour, incapacity of a reference for impeachment cannot rely on any JD Scheme results. This will ensure that judges are not pressurised into acting in a certain manner to get favourable JD Scheme results, while the results themselves can be used for the purposes for which the programme was designed.

B. Recommendation

158. **On the aforesaid basis, we recommend that the Honourable Committee be pleased to vest the Oversight Committee with the function of formulating, through appropriate rules, a Judicial Development Scheme for judges of the Supreme Court and the High Courts in Chapter VI.A of the Bill.**

159. It must be noted that the successful development of such a Scheme requires greater research and analysis, more than can be provided within the limited scope of responding to the present Bill. If the Committee so desires, we will be available to assist the Committee by preparing a comprehensive report on the formulation of a Judicial Development Scheme in India, which may be achieved either by necessary amendment to this Bill or formulation of a standalone legislation. Our report shall tackle theoretical questions relating to judicial independence and accountability, comparative questions relating to working of analogous schemes in other jurisdictions and practical questions relating to implementation of such a scheme in India.

[56] This is analogous to Guideline 2-3 of The American Bar Association Black Letter Guidelines for the Evaluation of Judicial Performance, 2005, available at www.**aba**net.org/jd/lawyersconf/pdf/jpec_final.pdf.

Summary of Recommendations

1. **Clause 2(j)**

The amended clause 2(j) should read:

(j) *misbehaviour means wilful conduct of a judge which brings dishonour or disrepute to the judiciary as determined by the Oversight Committee and may include:*

(ix) *Wilful or persistent failure to perform the duties of a Judge; or*

(x) *Wilful abuse of judicial office; or*

(xi) *Corruption or lack of integrity which includes delivering judgments for collateral or extraneous reasons, making demands for consideration in cash or kind for giving judgments or any other action on the part of the Judge which has the effect of subverting the administration of justice; or*

(xii) *Committing an offence involving moral turpitude; or*

(xiii) *Wilful failure to furnish the declaration of assets and liabilities in accordance with the provisions of this Act; or*

(xiv) *Wilfully giving false information in the declaration of assets and liabilities under this Act; or*

(xv) *Wilful suppression of any material fact, whether such fact relates to the period before assumption of office, which would have a bearing on his integrity; or*

(xvi) *Wilful breach of judicial standards.*

2. **Clause 3**

a. Clause 3 of the Bill be deleted for being violative of judicial independence
b. The task of laying down of judicial standards be vested in the Oversight Committee by introducing a new provision through an appropriate amendment to Chapter VI.
c. In the said provision, the Oversight Committee may be directed to take into account the illustrative standards laid down in Clause 3 as amended by the

recommendations made in Chapter II Section B below, while framing judicial standards.

d. Alternatively or in addition, the standards laid down in Clause 3 of the Bill should be amended to safeguard the independence of the judiciary; the amended provisions should read as follows:

(3)(2) In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(b) permit any member of the Bar with whom he has a close association, or with whom he had a close association as a member of the Bar, if such person's appearance in his Court will reasonably give rise to the perception of bias, to appear before him or to be involved in any manner with a cause to be dealt with by him, if he has knowledge of such involvement;

Provided that members of the Bar with whom the judge has close academic and/or charitable associations shall not be considered to have a close association with the Judge

Provided further that the words "close association" in this section shall include members (whether seniors, juniors or colleagues) of the chamber(s) to which the Judge belonged and with whom a Judge worked for a substantial period of time.

(d) permit any member of his family, whether such person is a member of the Bar or otherwise, to use the residence in which the Judge actually resides as an office or to meet clients or in any other unreasonable or inappropriate manner as may lower the dignity and status of the office of the Judge; and further, permit any such member of his family to use other facilities provided to the Judge repeatedly and in an unreasonable and inappropriate manner as may amount to a misuse of the office of the Judge.

(f) The words in private forum or academic forum" be deleted from Clause 3(2)(f)(i). The following sub-clause (iii) may also be added:

"If a judge is known to hold strong views on topics relevant to issues in the case, by reason of public statements or other expression of opinion on such topics, possible recusal by the judge may have to be addressed, whether or not the matter is raised by the parties.

Provided, views expressed by the judge in other cases are not to be taken into account."

(h)(i) A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection, either directly or indirectly, with the performance of judicial duties.
(ii) A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.
(iii) A judge may receive a token gift or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.
Provided, hospitality accepted for an educational or academic purpose is exempt from any prohibition under this Section unless it gives rise to an appearance of partiality."
Explanation 1- For the purposes of this clause, a "token gift or benefit" shall mean any good or service whose market value is negligible

(i) hear and decide a matter in which a company or society or trust in which he holds or any relative holds shares or interest; and the fact that he may have disclosed such holding or interest and no objection to his hearing and deciding the matter is raised shall be irrelevant;

Provided that it shall be presumed that a judge knows about all the shares or interest held by his relative in a company or society or trust, although a judge shall be entitled to prove that he did not have such knowledge.
Explanation: In this section the term "shares or interest" shall be taken to mean shares or interest equal to or greater than 2% of the paid up share capital or interest of the company or society or trust, or shares or interest whose total value amounts to 2% or more of the total investment made by the judge or relative (as

the case may be) in shares or interest in companies or societies or trusts taken together, whichever is lower.

e. In addition, we suggest that the following clauses be inserted to the judicial standards present in the Bill:

(3)(2) In particular, without prejudice to the generality of the foregoing provision, no Judge shall—

(o) permit unnecessary postponements and shall strive to hear the case and deliver his judgment as expediently as possible.

(p) disclose for any other purpose not related to the judge's judicial duties, confidential information acquired by him in his judicial capacity.

(q) withhold clear and reliable evidence on serious professional misconduct or gross incompetence on the part of a legal practitioner or public prosecutor from the Chief Justice of India or the Chief Justice of the High Court, as the case may be.

3. Provisions relating to the Making of a Complaint and the Complaints Scrutiny Panel: Chapter IV and Chapter V

a. Clause 9

The amended clause 9 should read:

9. (1) Every complaint filed under this Act, shall be scrutinised by the Oversight Committee to satisfy if there are sufficient grounds for proceeding against a Judge within three months from the date of receipt of the complaint.

(2) Notwithstanding sub-section (1), where it deems appropriate, the Oversight Committee may refer a complaint for scrutiny by the Scrutiny Panel within three months from the date of receipt of the complaint against –

(a) an individual Judge of the Supreme Court or the Chief Justice of a High Court, refer the complaint, to the Scrutiny Panel of the Supreme Court to scrutinise and report thereon;

(b) an individual Judge of a High Court, refer the complaint, to the Scrutiny Panel of the High Court in which such Judge is acting as such, to scrutinise and report thereon.

(3) A complaint against the Chief Justice of India shall not be referred to the Scrutiny Panel for scrutiny but shall be scrutinised by the Oversight Committee within three months from the receipt of the complaint.

b. Other aligned changes

- The new Clause 9 and existing Clause 20 should be placed in Chapter V which should titled "Scrutiny and Scrutiny Panel".
- Clause 10 – The words "received under this Act" need to be replaced with "when referred to it by the Oversight Committee".
- Clause 13 – The words "the Oversight Committee or" be added before the words "the Scrutiny Panel".
- Clause 14 – The words "Oversight Committee and the" be added before the words "Scrutiny Panel".
- Clause 22(1) – The words "Oversight Committee is satisfied that there are sufficient grounds for an inquiry or" be inserted before the words "the Scrutiny Panel".

- Clause 36 – The Clause shall be amended as follows:

36. Upon the scrutiny of a complaint, if the Oversight Committee is of the opinion that a complaint was filed frivolously or vexatiously or only with a view to scandalise or intimidate the Judge, or if the Scrutiny Panel refers a case to the Oversight Committee under section 16 and the Oversight Committee concurs with the conclusion of the Scrutiny Panel on further consideration, it may authorise the filing of a criminal complaint against the original complainant before a competent court.

4. Provisions relating to the National Judicial Oversight Committee: Chapter VI Part A

a. Clause 17

Owing to the confidentiality requirement, it cannot be provided that the Attorney-General not appear in the Court of the judge under scrutiny/ investigation. Thus, we believe, it is necessary that the Attorney-General, being the first Law Officer of the government, is not made a member of the Oversight Committee. His place may be taken by a judicial member or an eminent jurist as deemed fit by the Honourable Standing Committee.

b. Additions to Clauses

By appropriate amendments to Chapter VI.A, provisions relating to the tenure and the possibility of re-appointment of non ex-officio members and the remuneration and procedure for removal of all members of the Oversight Committee be incorporated.

By an appropriate amendment to Chapter VI.A the power of the Oversight Committee to regulate its own procedure be incorporated.

5. Procedure for Inquiry or Investigation into Incapacity of a Judge

a. Clause 22(1)

The Oversight Committee, shall for the purpose of inquiry of misbehaviour by a Judge, or his incapacity, constitute an Investigation Committee (by whatever name so called) to investigate into the complaint in respect of which the Oversight Committee is satisfied that there are sufficient grounds for an inquiry against the Judge or the Scrutiny Panel has recommended in its report under Clause (a) of sub-section (1) of Section 12 for making inquiry against the Judge in accordance with the provisions of this Act.

b. Clauses: 47(4)-(6)

Clauses 47(4) to (6) are to be placed after Clause 22 in Chapter VI Part B and should read:

(1) Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Council may arrange for the medical examination of the Judge by such Medical Board as may be appointed for the purpose by the Oversight Committee in the case of complaints filed under section 7, and, by the Speaker or the Chairman (as the case may be) of either House of the Parliament.

(2) The Medical Board shall undertake such medical examination of the Judge as may be considered necessary and submit a report to the Council stating therein whether the incapacity is such as to render the Judge unfit to continue in office.

(3) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the investigating committee stating therein the examination which the Judge has refused to undergo, and the investigation committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged.

6. Penalties Pending and on Conclusion of Inquiry: Chapter VI Part E

a. Clause 33

The amended Clause 33 should read:

33. *During the pendency of the inquiry, the Oversight Committee may recommend stoppage of assigning judicial work including cases assigned to the Judge concerned, or suspension of promotion or elevation of the Judge as a Judge of the Supreme Court or the Chief Justice of a High Court or the Supreme Court, as the case may be, or direct the Judge concerned to go on leave, or all of the above, if it appears to the Oversight Committee that it is necessary in the interest of fair and impartial scrutiny of complaints or investigation or inquiry.*

b. Other aligned changes

To reflect the breadth of provisions in Part E Chapter VI, it is also recommended that the title of the same be modified as “Interim Measures Pending Inquiry and Penalties on Conclusion of Inquiry”.

7. Offences and penalties: Chapter VIII

a. Clause 51

The amended Clause 51 should read:

51. If any complainant or other person, who participates in the scrutiny or investigation or inquiry as a witness or as a lawyer or in any other capacity, contravenes the provisions of section 39 or section 40 or section 43, shall be liable for punishment with simple imprisonment for a minimum term of six months which may extend to one year and also a fine of minimum fifty thousand rupees which may extend to one lakh rupees.

b. Clause 53

The amended clause 53 should read:

53. (1) Any person who makes a complaint which is found, after following the procedure under this Act to be frivolous or vexatious or made with an intent to scandalize or intimidate the Judge against whom such complaint is filed, shall be punishable with simple imprisonment for a term of minimum six months which may extend to one year and also a fine of minimum fifty thousand rupees which may extend to one lakh rupees.

8. Time limit for Investigation Committee

Clause 29(4)

The amended clause 29(4) should read:

29. (4) The Investigating Committee shall hold every such inquiry as expeditiously as possible and in any case complete the inquiry and submit its report to the Oversight Committee within a period of six months from the date of receipt of the complaint:

Provided, that the Investigation Committee for reasons to be recorded in writing, may extend the period for completion of the inquiry by a maximum period of six months.

9. Clause 34 and 35: Minor Measures

a. Clause 34(1) should incorporate clause 35 and now read as follows:

"If the Oversight Committee on receipt of the report from the investigation committee is satisfied that –

(a)....

(b) all or any of the charges have been proved but the Oversight Committee is of the opinion that the charges proved do not warrant removal of the Judge, it may, by order impose one of the following sanctions:

(i) send a letter of advice to the Judge with a warning about the possibility of impeachment if such misbehaviour is repeated;

(ii) censure or reprimand the Judge by means of private communication;

(iii) recommend to the Chief Justice of India to lower the seniority of the Judge for the purpose of appointment as Chief Justice of a High Court or promotion to the Supreme Court of India, in case of High Court judges;

(c) all or any of the charges of misbehaviour or incapacity of a Judge have been proved, and that they are of serious nature warranting his removal, it shall request the Judge to voluntarily resign, and if he fails to do so, advise the President to proceed for the removal of the Judge and the President shall refer the matter to Parliament.

"Explanation: For the purposes of this section, whether any of the charges of misbehaviour are 'of a serious nature to warrant removal' shall be determined by the Oversight Committee after taking into account the gravity, frequency, wilfulness, criminality and other relevant characteristics of the offending conduct of the judge."

b. A new clause 34(4) should be added to provide:

(4) Any decision taken by the Oversight Committee under sub-section (1) must be taken within one month of the receipt of the report of the investigation committee.

10. Formulation of a Judicial Development Scheme

In Chapter VI.A of the Bill, the Honourable Committee be pleased to vest the Oversight Committee with the function of formulating, through appropriate rules, a Judicial Development Scheme for judges of the Supreme Court of India and the High Courts.

About us and Contact Details

The Pre-Legislative Briefing Service (PLBS);

E-mail: prelegislativebriefingservice@gmail.com; **Phone**: (0)9948357943/ (0)9831504617

Aims and Objectives*:*

- To provide rigorous, independent and non-partisan legal and policy analysis of Bills introduced in Parliament
- To suggest appropriate legal reform to enable bills to pass tests of constitutionality if challenged
- To suggest appropriate policy reform if the legislative policy is to be sound in principle and efficacious in practice

Project Members:

1. **Arghya Sengupta,** B.A.LL.B. (Hons.), National Law School of India University, Bangalore (2008), Rhodes Scholar (2008), B.C.L., University of Oxford (2009)
   Current Status: M.Phil. Candidate in Law, University of Oxford
   Contact: arghya.sengupta@law.ox.ac.uk; Phone: +447760929431

2. **Varun Hallikeri,** B.A., LL.B. (Hons.), National Law School of India University, Bangalore (2008).
   Current Status**:** Candidate for the Masters in Arts and Diplomacy at the Fletcher School of Law and Diplomacy, Tufts University.
   Contact: varunhallikeri@gmail.com; Phone: +16175012945

3. **Anirudh Krishnan**, B.A., LL.B. (Hons.), NALSAR University of Law, Hyderabad (2008), Solicitor, England and Wales, Author, "The Law of Reservation and Anti-discrimination" (2008)
   Current Status: Candidate, B.C.L., University of Oxford (2011)
   Contact: anirudhkrishnan@sarvaassociates.com; Phone: +447503225741

4. **Abhinav Chandrachud**, B.L.S., LL.B., Government Law College, Mumbai (2008) LL.M., Harvard Law School (2009)
   Current Status: Associate Attorney, Gibson, Dunn & Crutcher LLP
   Contact: abhinav.chandrachud@gmail.com; Phone: +16179533981

Acknowledgements: *The aforementioned members are grateful to Mr. V. Niranjan and Mr. T. Prashant Reddy for their assistance in preparing this Report.*

Disclaimer: *The authors have no financial or personal interest in this matter. All views contained herein are reflective only of the authors and not the institutions where they are employed or studying.*