

Guarding the guardians

The Centre proposes to establish a National Judicial Council to examine allegations of misconduct or incapacity against senior judges, but questions remain over just how much teeth it should have. **Omair Ahmed** presents a legislative brief on the Judges (Inquiry) Bill.

HIGHLIGHTS OF THE BILL

The Judges (Inquiry) Bill, 2006 establishes a National Judicial Council (NJC) to conduct inquiries into allegations of incapacity or misbehaviour by High Court and Supreme Court judges.

- ? The NJC shall consist of the Chief Justice of India, two Supreme Court judges and two High Court Chief Justices to investigate High Court judges; or the Chief Justice of India and four Supreme Court judges to investigate Supreme Court judges.
- ? The NJC shall investigate complaints submitted by any person, or upon receiving a reference from Parliament based on a motion moved by 50 Rajya Sabha or 100 Lok Sabha MPs. It may also entertain complaints from any other source.
- ? If the allegations are proven, the NJC may impose minor measures or recommend the removal of the judge. Removal of a judge shall be through impeachment by Parliament.
- ? A judge may appeal to the Supreme Court against his removal or against any minor measures imposed upon him.

KEY ISSUES AND ANALYSIS

The NJC, in consonance with recommendations of the Law Commission, is composed solely of serving members of the Supreme Court and High Court. The Standing Committee has stated that there should be wider participation in the process.

- ? The Bill allows a judge to appeal his removal before the Supreme Court after impeachment. The Standing Committee has observed that this would undermine the finality of a Presidential Order that should not be challenged.
- ? The Standing Committee cautioned against an open system of complaints by any person, and suggested an impartial Empowered Committee to filter all complaints before they were investigated by the NJC.
- ? The Law Commission had stated that the provisions of the Bill, including minor measures, would withstand constitutional scrutiny. While the Standing Committee agreed, it recommended a re-examination of its constitutional validity.
- ? The inquiry by the NJC is to be in camera, and not in an open court. The Supreme Court had held in a previous case that the judge being investigated had the right to request a public trial.

PART A: HIGHLIGHTS OF THE BILL [1]

Context

In India an investigation into the misbehaviour or incapacity of Supreme Court and High Court judges is governed by the Judges (Inquiry) Act, 1968. That Act provides for an inquiry of a judge by an investigative committee set up for the purpose, if a motion is moved in Parliament for the removal of the judge. The only penalty is that of removal by impeachment. There has been only one case in which a judge, Justice Ramaswami of the Supreme Court, has been investigated for misconduct under the Judges (Inquiry) Act, 1968. Though the Inquiry Committee ruled against him, the motion was not passed in Parliament.

Currently the appointment and oversight of judges is exclusively by the judiciary. In 2003 the Constitution (98th Amendment) Bill to establish a National Judicial Commission and amend Articles 124, 217, 224 and 231 of the Constitution relating to the appointment of judges and acting judges, and the creation of common High Courts for two or more states, was introduced. The Bill lapsed due to the dissolution of the Lok Sabha. After the formation of the 14th Lok Sabha, a concept paper on a National Judicial Commission was prepared by a member of the National Advisory Council (NAC) for discussion. [2] The Judges (Inquiry) Bill, 2005 was drafted by the government and forwarded to the Chief Justice of India (CJI) for comments, who

recommended that the Law Commission should examine it. The Law Commission presented its report on the 2005 draft version of the Bill in January 2006.

The revised Judges (Inquiry) Bill, 2006 incorporated almost all the Law Commission's recommendations. It replaces the 1968 Act and establishes a National Judicial Council (NJC). Any complaint by any person against High Court and Supreme Court judges, as well as a motion for removal of a judge moved in Parliament, shall be investigated by the NJC. If any charges relating to misbehaviour and incapacity of a judge are proved, the NJC may recommend removal, or impose minor measures as stipulated under the Bill, if the NJC determines that the infraction does not merit removal.

Key features

National Judicial Council

- ? The Bill establishes a National Judiciary Council (NJC) to conduct investigations of allegations of misbehaviour and physical or mental incapacity of Supreme Court and High Court judges. The NJC shall recommend removal of the judge or impose minor measures if the allegations are proved.
- ? If the complaint is against a Supreme Court judge, the NJC shall consist of the CJI and the four senior most Supreme Court judges. If the complaint is against a High Court judge, the NJC shall consist of the CJI, two senior most Supreme Court judges and two High Court Chief Justices. If the complaint is against any member of the NJC, he shall be replaced by the judge next in seniority.
- ? The NJC shall issue a code of conduct that sets guidelines for the behaviour of judges. The code shall include that all High Court and Supreme Court judges shall reveal their assets and liabilities on an annual basis to the respective Chief Justice. [3]

Complaint and Reference Procedures

- ? Any person may make a complaint involving an allegation of misbehaviour or incapacity against a judge, to the NJC. The complaint has to be filed within two years of the alleged infraction. If the complaint is found to be frivolous, vexatious or not made in good faith, the complainant may be punished with up to one year imprisonment and a fine up to Rs 25,000. The NJC may also choose to entertain a complaint from any other source.
- ? If Parliament admits a motion for the removal of a judge on the grounds of misbehaviour or incapacity signed by least 100 MPs in the Lok Sabha, or by 50 MPs in the Rajya Sabha, it shall be referred to the NJC for investigation. The motion for removal shall be kept pending until the NJC submits its report.

Investigation and Inquiry

- ? The NJC may constitute an investigative committee comprising one or more of its members to conduct a preliminary investigation to determine if there are sufficient grounds to frame charges. During the preliminary investigation or inquiry, the NJC may recommend the stoppage of judicial work to the judge concerned, including already assigned work. Information or documentation about the case shall not be revealed except on the direction of the NJC. The NJC may, at the request of the complainant, keep his identity confidential and accord other protection.
- ? If the NJC proposes to conduct an inquiry after a preliminary investigation, or in the case of a reference from Parliament, the NJC shall frame definite charges against the judge and communicate these to him. The concerned judge shall be given reasonable opportunity to present a written statement of defence.
- ? An inquiry shall be conducted by the NJC in camera. It shall be completed within six months, which could be extended by a further six months for reasons recorded in writing by the NJC. If requested by the NJC, the central government may appoint an advocate to conduct the case against the judge.
- ? If all or any of the charges are proved during the course of the NJC's inquiry, but the NJC believes they do not merit removal of the judge, it may impose minor measures. Minor measures are defined as meaning the following: (i) issuing advisories, (ii) issuing warnings, (iii) withdrawal of judicial work for a limited time including cases already assigned, (iv) request to the judge to voluntarily retire, and (v) public or private censure or admonition.

- ? If the NJC is satisfied that the charges against a judge have been proved, and he should be removed, the NJC shall advise the President accordingly. The President shall cause the findings to be laid before both Houses of Parliament, and a motion shall be taken up in one of the Houses to impeach the judge.
- ? In case of a reference from Parliament, the NJC shall submit its findings to the Speaker of the Lok Sabha, or the Chairman of the Rajya Sabha, as the case may be. If the NJC findings state that all or any of the charges have not been proven, or the charges proved do not warrant removal, the motion in Parliament shall not be proceeded with. In case the NJC recommends removal, Parliament shall take up the findings and the impeachment motion in whichever House, or Houses, it was pending. The Constitution specifies that such a motion shall be passed only if a majority of two thirds of those voting, and half the total strength in each House, votes in favour of the motion.
- ? A judge has the right to appeal to the Supreme Court against any minor measures imposed by the NJC, as well as against a removal order from the President pursuant to an impeachment motion in Parliament.

PART B: KEY ISSUES AND ANALYSIS

There are a number of conceptual issues in the Bill that need to be addressed. These are: (i) who should be judging the misbehaviour or incapacity of judges; (ii) whether an impeachment by Parliament of a judge should be open to appeal; (iii) what should be the procedure of making complaints against judges; and (iv) the constitutional validity of the Bill. These four, as well other issues, are discussed below.

Judging the judges

The Supreme Court has, in several decisions, analysed issues relating to appointment and oversight of judges solely by the judiciary. The 67th Constitutional (Amendment) Bill, 1990 proposed the creation a National Judicial Commission composed of serving judges headed by the CJI for judicial appointments. The Bill was not passed but the Supreme Court mandated the creation of such a commission in a 1993 decision which stated that the President had to consult the serving judiciary alone in appointing judges. [4] In the Ramaswami case, the Supreme Court held that any body investigating the judicial conduct should be predominantly composed of the judiciary. [5] In 1997, the Supreme Court passed two resolutions establishing in-house procedures for examining any complaints against a judge, and adopting "The Restatement of Values of Judicial Life" against which judicial conduct would be measured. The decision that only judges would oversee judicial appointments was upheld in another Supreme Court decision in 1998. [6]

The Law Commission, chaired by Justice M. Jagannadha Rao, submitted its 195th report on an earlier draft of the Judges (Inquiry) Bill in 2006. It stated that the judiciary must be held accountable, but that the oversight should be with a committee consisting solely of the serving judiciary. It argued that this is the norm on the independence of the judiciary, [7] and gave the examples of the United States, United Kingdom, Canada, Germany and Australia, in which judicial

A judge has the right to appeal to the Supreme Court against any minor measures imposed by the NJC, as well as against a removal order from the President pursuant to an impeachment motion in Parliament.

oversight is exclusively within the control of the judiciary.

An expert paper was written for the NAC on a proposed National Judicial Commission to oversee both the appointment and oversight of judges. It stated that the Commission proposed by the 67th Amendment was "dominated by the judiciary whereas most functioning commissions in other parts of the world are dominated by members of appointees of the legislative and executive branches". [2] It suggested a National Judicial Commission composed of the members from the legislature, the judiciary and the executive whose decisions would be binding on the President (this would require amendments to the Constitution).

The Standing Committee, while deliberating on this Bill, stated that there was a "general consensus among the Committee Members that the proposed judicially exclusive composition of the National Judicial Council is not in consonance with the principle of accountability." It stated that either the NJC should be expanded to include non-judicial members representing the legislature and the executive, or, alternatively, an Empowered Committee, with members from the judiciary, executive, legislature and the Bar, should be set up to screen complaints before they were investigated by the NJC.

Table 1: Suggested judicial oversight bodies in India

	Law commission & Judges (Inquiry) Bill, 2006	NAC Expert Paper	Standing Committee Recommendations
Composition	<p>If the complaint is against a Supreme Court judge: CJI and the four most senior Supreme Court judges.</p> <p>If the complaint is against a High Court judge: CJI, the two most senior Supreme Court judges and two High Court Chief Justices.</p>	<p>Vice President (Chairman); PM, or PM's nominee; Lok Sabha Speaker; Law Minister; Leader of Opposition (Rajya Sabha); Leader of Opposition (Lok Sabha); CJI.</p> <p>In case of High Court decisions, the CM of that state, and Chief Justice of that High Court included.</p>	<p>Empowered Committee (to screen complaints): One member each nominated by the Prime Minister, CJI, Bar Council, and two MPs (one nominated from the Rajya Sabha by the Chairman, and one nominated from the Lok Sabha by the Speaker).</p> <p>NJC: As in the Bill</p>
Function	Investigating judicial misbehaviour or inability.	Appointment and investigating judicial misbehaviour or inability.	Screening complaints of judicial misbehaviour or inability.

Sources: Judges (Inquiry) Bill, 2006; NAC2; Standing Committee on Personnel, Public Grievances, Law and Justice; PRS.

The basic features of some judicial oversight bodies in other countries are summarised in Table 2.

Table 2: Judicial Oversight Bodies in Some Countries

	Investigative Body	Qualifications	Authority to remove judges
England & Wales	Judicial Appointments Commission & Ombudsman.	Lay person with no legal experience.	Legislature.
Canada	Two oversight commission members and appointee of Justice Minister.	Judges.	Legislature.
United States	Judicial Council.	Judges.	Judiciary & Legislature.
Ontario Province	Oversight commission.	Judges and lay persons.	Legislature.
New York	Oversight	Appointee of executive,	Oversight commission.

State	commission.	judiciary and legislature.	
France	Oversight commission.	Judges, prosecutors, & three who are neither judges nor of the legislature.	Oversight commission.
Germany	Federal Constitutional Court.	Judges.	Federal Constitutional Court.
South Africa	Oversight Commission.	Ministers, legislators, lawyers, law professors, and judges.	Executive, after a resolution by two-thirds of legislature.
India (Current)	Inquiry Committee.	Judges and eminent jurist.	Legislature.
India (Proposed)	National Judicial Council.	Judges.	Legislature.

Sources: NAC; Judges (Inquiry) Act, 1968; Judges (Inquiry) Bill, 2006; 195th Law Commission Report; US Court of Appeals; PRS

Appeal to the Supreme Court after Impeachment

In a 1992 ruling, the Supreme Court had held that the Inquiry Committee under the Judges Inquiry Act, 1968 was only an investigative body, and that the question for judicial review would arise only after an impeachment motion was passed by the Parliament. [8] The Law Commission quoted this judgment and determined that the remedy of judicial review cannot be ousted because it is part of the "basic structure of the Constitution and cannot be removed even by constitutional amendment". The Law Commission recommended an appeal process, whereby a Judge would have the right to appeal to the Supreme Court against both minor measures imposed by the NJC, or an order for his removal from the President pursuant to an impeachment motion in the Parliament.

The Standing Committee has recommended against including any provision for appeal after a removal order has been passed by the President following an impeachment motion in the Parliament. The Committee said that constitutionally mandated due process is inherent in the process for removal, and any appeal would amount to an action against the constitutional authority of the President and was unwarranted. With regard to appeals against minor measures, the Standing Committee stated that the judiciary has the inherent power to review in cases of apparent injustice, and that a specific appeal process was not necessary in the Bill.

Complaints Procedure

In the Ramaswami case, the Supreme Court had cited that the provision of proving the misbehaviour or incapacity of a judge was separate from that of his impeachment, and thus Article 124(4) of the Constitution was a judicious mix of both legislative and judicial functions. The Law Commission cited this to clarify that complaints could come from outside of the Parliament because that was part of the judicial function, which was informational. It cited similar cases that had been decided in the US and Canada, in which it was ruled that the legislature could delegate such functions to a judicial council. [9]

In respect of the Bill providing for complaints from "any person", the Standing Committee cautioned against an "open system of complaints by any person" subjecting judges to both genuine and frivolous complaints. The Committee contrasted this with the Parliamentary reference procedure in the Bill where a stipulated number of MPs is required to support a motion for a judge's removal before it was referred to the NJC, and observed that "an individual is being equated with 100 MPs of Lok Sabha and 50 MPs of Rajya Sabha for making a complaint against a judge." The Standing Committee therefore recommended that an impartial

Empowered Committee, comprising of members from the legislature, executive, judiciary and the Bar should be created to screen complaints, and recommend which ones need to be investigated by the NJC.

Constitutional Validity

Articles 124 and 218 of the Constitution deal with the removal of judges in cases of proved misbehaviour or incapacity but contain no provisions for any other form of disciplining. The Judges (Inquiry) Act, 1968 only dealt with provisions for inquiry against a judge and his removal for proved misbehaviour or incapacity. In the Ramaswami case, the then CJI had advised Justice Ramaswami against doing any judicial work until the investigation was over and appointed a committee to determine whether the allegations made it infeasible for Justice Ramaswami to act as judge. The committee said that, "(only if) upon a careful analysis of all the material, the appropriate authorities find facts from which an inference of moral turpitude becomes inescapable and if the Chief Justice of India agrees that those assessments are bona fide and the facts proved reasonably justify or admit of such inferences, then and then alone, could it be said that it will be an embarrassment for the Judge to discharge judicial functions." Consequently Justice Ramaswami was allowed to resume his duties.

In 1995, in a case involving a former Chief Justice of the Bombay High Court, the Supreme Court had held that, "the yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating judge / Chief Justice of a High Court could be disciplined by self-regulation through in-house procedure. This in-house procedure would fill in the constitutional gap." In a previous case a former Chief Justice of the Bombay High Court had halted the assignment of work to four judges of the Bombay High Court after allegations of misbehaviour against the judges. [10]

The Law Commission stated that the NJC should be enabled to impose minor measures against the judge if he was found guilty and the offence did not warrant removal. It stated that the United States and Canada have established minor measures to discipline judges despite having no such clause in their Constitutions. The US Supreme Court has upheld the constitutionality of such measures reasoning that it was permissible for the judiciary to regulate itself and set its own house in order. [11]

The Standing Committee felt that the Bill did not need a constitutional amendment but nevertheless it stated that "the issue of Constitutional validity of this Bill be thoroughly examined once again before proceeding further with the Bill because many witnesses including jurists were of the opinion that this Bill will not withstand constitutional validity in its present form". It also said that requesting a judge to voluntarily retire was a process of removal and should not be included as a "minor measure", as proposed in the Bill.

Closed process

All the proceedings of the NJC are in camera and no information on the cases shall be released except by the direction of the NJC. The Law Commission opined that this is in accordance with international standards. The Supreme Court has, however, held that the judge being investigated could request that the hearing be held in public,⁵ which is in line with the resolution of the World Conference on the Independence of the Judiciary (1983). [12] The Bill does not specify whether the findings of the Inquiry proceedings and decisions beyond the scope of the Right to Information Act, 2005. The 1983 World Conference resolution states that the decisions of such an inquiry may be made public. [13] The Standing Committee held that an annual report should be laid before Parliament to further accountability.

The Standing Committee cautioned against an "open system of complaints by any person" subjecting judges to both genuine and frivolous complaints.

Differences from Law Commission Recommendations

The Law Commission recommended a number of changes to the 2005 draft Bill, all of which were accepted except for two. First, it stated that any misbehaviour committed up to two years before the Act was passed could be investigated. The Law Commission reasoned that such a retrospective action would not violate Article 20 (1) of the Constitution (which prohibits conviction of an offence unless it was a violation of the law at the time of its commission) as misbehaviour is not treated as an "offence", nor does the Bill create a new type of offence. The Bill only permits complaints about actions committed after its enactment. Second, both the 2005 draft Bill and the Law Commission stated that if the case was against a High Court judge, the CJI

shall nominate the two senior most High Court Chief Justices to the NJC. The new Bill does not contain the words "senior most", leaving the choice of nomination to the CJI.

Disclosure of assets

The Bill does not specify whether the details of assets disclosed annually by judges to the respective Chief Justice shall be made public. Pursuant to a Supreme Court judgement, [14] all candidates for elections to Parliament or state legislatures have to declare their assets, and their disclosures are made public. In the US, all judicial officers are required to disclose their assets and income. [15]

Omais Ahmed

15 Jan 2008

Omais Ahmed is a researcher with [PRS Legislative Research](#), a unit of the Center for Policy Research in New Delhi. PRS is an independent initiative to make the process of law-making in India more transparent, better informed and participatory.

Notes

1. This Brief has been written on the basis of the Judges (Inquiry) Bill, 2006 introduced in the Lok Sabha on 19th December, 2006. The Standing Committee on Personnel, Public Grievances, Law and Justice (Chairperson: E. M. Sudarsana Natchiappan) presented its report on August 17, 2007.
2. "A National Judicial Commission: Judicial Appointments and Oversight?", Concept Papers, National Advisory Council, [see link](#)
3. "The Restatement of Values of Judicial Life adopted by the Chief Justices' Conference of India, 1999" shall function as a code of conduct until a new one is issued.
4. Supreme Court Advocates-on-Record Association vs. Union of India (1993 (4) SCC. 441).
5. Sub Committee of Judicial Accountability vs. Union of India, (1991) 4 SCC 699.
6. Presidential Reference A.I.R. 1999 SC 1.
7. The International Commission of Jurists promoted the draft principles on the Independence of the Judiciary, known as the Siracusa Principles, in 1981. It said that any disciplinary proceedings involving the judiciary should be before a court or board composed of and selected by members of the judiciary. The Beijing Statement of Principles of Independence of Judiciary, 1995, and the Latimer House Principles and Guidelines for the Commonwealth 1998, state that judicial oversight should be by the judiciary, when parliamentary procedure and removal by vote of the people do not exist.
8. Mrs Sarojini Ramaswami vs. Union of India (1992)4 SCC 506.
9. The Hastings Case (1987) in the US and Gratton vs. Canadian Council 1994(2) F.C. 769 in Canada.
10. Ravichandran Iyer vs. Justice A. M. Bhattacharjee (1995 (5) SCC 457).
11. Chandler v. Judicial Council, (1970) 398 US 74.
12. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (Resolution 1988/25) asked governments to take into account the principles of Dr. Singhvi's draft on the UN Basic Principles on the Independence of the Judiciary (1985). The draft states that the inquiry will be kept confidential except at the request of the judge. The Minimum Standards of Judicial Independence laid down by the International Bar Association in 1982 also state that the procedure should be in camera, unless requested by the judge, as did the resolution adopted at the World Conference of the Independence of Judiciary (1983).
13. Dr. Singhvi's draft states that judgments shall be published. The resolution adopted at the World Conference of Independence of Judiciary (1983) stated that judgments may be released.
14. People's Union of Civil Liberties & Anr. vs. Union of India & Anr.(1993) case nos. 490, 509 & 515 of 2002.
15. "Ethics in Government Act" (1978), [see link](#)