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A NATIONAL JUDICIAL COMMISSION JUDICIAL APPOINTMENTS AND OVERSIGHT

– Vaidya Gullapalli
& Jayaprakash Narayan

INTRODUCTION

The Indian judiciary has always been accorded independence in our constitutional framework and respect in the minds of the people. It has, in recent decades, been regarded by many as the branch of government most responsive to the needs of ordinary Indians and to the responsibilities of the Government enshrined in the Constitution. For much of its history the judiciary has been regarded as largely fair and incorruptible. Yet former Chief Justice of India S.P.Bharucha's recent assessment that 1 in every 5 judges is corrupt is, if not an indication of how much the third branch of government has fallen, then at least a warning sign of the direction in which we are headed.

Under British rule, in several cases, members of the civil service, employees of the executive, served as judges. It was this undesirable degree of vulnerability of the judiciary to executive influence that resulted in the Constituent Assembly according judicial independence the highest priority in the Constitution's construction of the judiciary.

The suggestion that the appointment of Supreme Court and High Court judges by the President should be "with the concurrence" of the Chief Justice of India (in the case of the Supreme Court) and with that of the Chief Justice of the High Court (in the case of the High Court) was rejected in favour of executive appointments "in consultation with" the Chief Justice of the Supreme Court or High Court. Also rejected was the proposition that judicial appointments should be approved by a two-thirds vote in the Rajya Sabha.

Over the ensuing decades, there were frequent allegations that the executive exerted too much control over judicial appointments. In 1974, in *Shamsher Singh v. State of Punjab*, the Supreme Court stated that appointments to the Supreme Court or High Court must have the approval of the Chief Justice of India. There was a brief withdrawal from this stance in *S.P.Gupta* in 1981 when the Supreme Court gave the President the option to disregard the Chief Justice's recommendation. Since then, however, the march towards judicial control over judicial appointments has continued.

The framers were even more successful at insulating the judiciary from executive or legislative oversight. Not a single Supreme Court or High Court judge has been removed from the bench through the impeachment process, despite almost incontrovertible evidence of misconduct in at least one case. The Constitutional requirement of a two-thirds majority in both Houses of Parliament for the impeachment of a judge has effectively guaranteed the judiciary protection from removal regardless of conduct.

The Indian judiciary is an anomaly. In no other country of the world is the judiciary so insulated from the will of the executive and legislative branches, and, as an extension of this, from the will of the people. In time, this has turned the judiciary's position as the champion of the people into something of a contradiction, as the least accountable branch of government has styled itself the most responsive to the people.

IN RECENT YEARS

In 1990, the then Union Minister for Law and Justice introduced the 67th Constitutional (Amendment) Bill in Parliament. The Bill provided for the creation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges. The composition of the Commission was to be different for Supreme Court and High Court appointments. For appointments to the Supreme Court it would comprise the Chief Justice of India and the two Supreme Court judges next in seniority. For appointments to the High Court it would comprise the Chief Justice of India, the Supreme Court judge next in seniority, the Chief Minister of the concerned State, the Chief Justice of the relevant High Court, and the High Court judge next in seniority.

No action was taken on the bill but the system of Supreme Court appointments that it envisaged was mandated three years later by the Supreme Court itself. In *Supreme Court Advocates-on-Record Association vs. Union of India* (1993 (4) SCC. 441) the Court ruled that the Constitution's provision that the President appoint Supreme Court judges in "consultation with such Judges of the Supreme Courts...as the President may deem necessary" (Article 124(2)) meant that the advice of the Supreme Court judges was binding upon the President. It also resolved that the judges involved in this 'consultation' would be the Chief Justice of India and the two judges next in seniority. This decision was upheld in 1998 in the *Third Judges* case, only slightly modified to involve the Chief Justice of India and the four judges – rather than two – next in seniority as well as all Supreme Court judges from the candidate's High Court.

The Court also laid down a system for appointments to the High Court. The Constitution requires the President to consider the opinion of the Chief Justice of the High Court in question, the relevant Governor, and the Chief Justice of India. The Court ruled that the Chief Justice of the High Court and the Governor must make their recommendations but that the advice of the Chief Justice of India, delivered in consultation with the two judges next in seniority, would prevail.

The system of appointment to the higher courts, as stipulated by the Constitution and as interpreted by the Supreme Court, has always placed the highest premium on judicial independence. India is unique in the degree of judicial control over judicial appointments. In no other country in the world, does the judiciary appoint itself.

Unfortunately, the strong insistence on judicial independence in the appointments process has had its attendant problems.

Unaccountability: Neither the executive nor the legislature has much say in who is appointed to the Supreme Court. In the case of the High Courts, the Chief Minister (via the Governor) has a say but the final word rests with the Supreme Court. It is accepted that the judiciary must not be directly vulnerable to public approval or disapproval of its actions. We have successfully avoided this evil in our system of appointments but have invited in another whereby people are left with no say, however indirect, in the composition of the judiciary. As Thomas Jefferson said, "A judiciary independent of a king or executive alone is a good thing; but independence of the will of the nation is a solecism, at least in a republican government".

Political, caste, and communal considerations: Appointments to the High Court have been unable to keep pace with the vacancies, stalled by the haggling over political, caste, and communal considerations at every step, as they pass from the Chief Justice of the High Court to the Chief Minister to the Supreme Court and the Law Minister. According to the 2004 year-end review of

the Ministry of Law and Justice there were 143 vacancies in the 21 High Courts out of a sanctioned strength of 719 judges leaving almost 20% of the judges' posts vacant.

Questions of merit: The current system of appointments is not open to public scrutiny and it is therefore difficult to determine the criteria for appointments. In many cases it seems that seniority is used as a proxy for merit.

Thus, our chief concerns with the current system of appointment are the lack of accountability and transparency, the difficulty in getting people of adequate ability onto the bench, and the significant delays in appointing judges to the High Courts.

Around the world, appointment or selection commissions are being chosen as an integral part of an effective, open system of judicial appointments. These commissions bear little resemblance to that featured in the 67th Amendment Bill. The proposed National Judicial Commission was dominated by members of the judiciary whereas most functioning commissions in other parts of the world are dominated by members or appointees of the legislative and executive branches.

Such commissions continue to gain traction around the world, in civil law and common law jurisdictions (in March 2005, a Judicial Appointments Commission was passed into law for England and Wales). The effectiveness of such commissions depends, not surprisingly, on how closely their structure and role is tailored to the goals of the appointment process. The main questions to be answered with regards to such a commission are the following:

1. How will the composition of the commission represent the executive, legislature, and judiciary, and who will nominate the individuals appointed?
2. Will the commission supply recommendations or issue binding advice?
3. Will the commission also be responsible for the oversight of the judiciary?

In this paper we look at five countries and two states that use judicial appointment or selection commissions. Due to the diversity of their missions we will refer to such commissions as 'nominating commissions'. In some of the countries whose appointment process is discussed, historical forces have determined that the prime concern is insulating the judiciary from the other branches of government. In others, it is placing judges above the machinations of political parties and the election process. And in others, it is ensuring that the judiciary, though not elected by the people, is fairly drawn from the people and sufficiently representative of them. In all these cases, nominating commissions, assembled through input from different branches of government, to screen candidates and make recommendations or appointments, have been the solution.

The commissions used in these jurisdictions represent a range of answers to the above questions. The mix of judicial, legislative, and executive representatives varies, though nearly all include some mix; in some cases the commission creates a list of candidates from which the executive must make his or her choice, in others the commission merely recommends candidates, and in still others the commission's recommendations are binding upon the executive; finally, in some of these jurisdictions the appointment or selection commission also oversees judicial conduct though in most there is another body responsible for this.

The commissions discussed here belong to both common law and civil law jurisdictions. These include England and Wales, Canada and Ontario Province, New York State, France, Germany, and South Africa. England and Wales was the most recent to create a judicial appointments commission, signed into law in March 2005. In all cases, except for England and Wales, these

commissions were written into or added on to the Constitutions. A discussion of their composition, duties, procedure, and the nature of their recommendations follows.

In many of these jurisdictions councils are responsible for judicial oversight. In these cases there is a discussion of the body's membership, duties, and procedure. This information can provide a background against which to consider the needs of the superior judiciary in India with respect to appointment and oversight.

ENGLAND AND WALES

Appointments

The Judicial Appointments Commission of England and Wales was established primarily to increase diversity on the bench and bring transparency to the appointment process. Though the judiciary was widely regarded as talented and honest, the lack of diversity was sufficiently troubling that the Government decided to develop an appointments process that would include input from voices that were previously excluded.

To that end, the new Commission includes lawyers and non-lawyers. The composition of the Commission is as follows:

- 6 lay members, 1 of whom is the Chairperson
- 5 judicial members: 1 Lord Justice of Appeal, 1 judge of the High Court, 1 Circuit Judge, 1 District Judge, and another Lord Justice of Appeal or judge of the High Court
- 1 practising barrister in England and Wales
- 1 practising solicitor of the Supreme Court of England and Wales
- 1 Justice of Peace
- 1 member of a tribunal or someone holding a similar office

The six lay members and one lay justice will be appointed by a panel comprising:

- Someone who has never been a member of the Commission or on the staff of the Commission, and has never been a practising lawyer, a member of parliament, a civil servant, or a judicial officer.
- The Lord Chief Justice of England and Wales
- The Chairperson of the Commission

The Secretary of State for Constitutional Affairs (formerly, the Lord Chancellor) may increase the number of Commissioners but may not decrease the number.

Commissioners are appointed for five-year terms and may serve no more than two terms. The Judicial Appointments Commission will make recommendations to the Secretary on all judicial appointments. In the event of a vacancy it will submit one name to the Secretary for consideration. The Secretary has three choices. He or she can either appoint the candidate or recommend them for appointment (depending on their authority for the court in question), ask the Commission to reconsider the candidate, or reject the Commission's candidate. The Secretary can only reject the recommendation or ask the Commission to reconsider their recommendation once, and must submit his or her reasons for doing so in writing. The Commission is free to resubmit a candidate returned to it for reconsideration but cannot resubmit a rejected candidate. The Secretary must then appoint or recommend for appointment the candidate submitted by the Commission.

No judicial appointments can be made until the Appointments Commission has selected the person concerned. This includes appointments to all courts and tribunals. In 2001-2002 this amounted to over 900 appointments. Due to the volume of appointments it is not possible for the Commissioners to personally interview all candidates.

Oversight

Judges in England and Wales hold office during ‘good behaviour’.

The Constitutional Reform Bill 2005 also established a Judicial Appointments and Conduct Ombudsman to receive and investigate complaints against members of the judiciary. The Ombudsman will also handle complaints about the appointment process.

The Queen appoints the Ombudsman on the advice of the Secretary. No one who is in the civil service or is a practising barrister or solicitor in England and Wales, Scotland, or Northern Ireland is eligible for the post. The Ombudsman can serve for a total of two terms, each for no more than five years.

CANADA

Appointments

Canada has a federal court system and provincial court systems. The federal government is responsible for all appointments to both the federal courts and the apex courts in the provinces, known as the ‘Courts of Appeal’. There are 1067 federal judges’ posts in Canada. On March 1, 2005 only 24 were vacant.

The Supreme Court is Canada’s court of last resort, hearing appeals from all provincial and federal courts. The Federal Court is the Canadian federal trial court, hearing cases that arise under federal law. Judges of the Supreme Court and the Chief Justice of the Federal Court are selected by the Prime Minister in consultation with the Minister of Justice. Judicial Advisory Committees have been a part of the selection process for judges of the Federal Court since 1988 and it is these responsibilities I will discuss here. Parliament, except for the Prime Minister, has no part to play in the appointment of judges of the Federal Court and no power to review these appointments.

The committees are responsible for evaluating or simply commenting on judicial candidates. There is one in each province and territory except in Ontario, where there are three, and Quebec, where there are two, based on larger populations and a higher number of judicial posts to fill. Each candidate is considered by the committee in his or her region of practice or by the committee the Commissioner for Federal Affairs decides is most appropriate. In the case of candidates who are sitting judges in the superior courts in the provinces the committees do not evaluate the candidates but do comment on the Personal History forms that the candidate submits.

Composition of the Committees

Each judicial advisory committee has seven members – three lawyers, three laypersons and one judge. The Minister of Justice appoints all members, three directly, and four from lists of nominees. The provincial law society and local branch of the Canadian Bar Association each provide a list of lawyers, the provincial Chief Justice provides a list of judges, and the provincial Attorney-General or Minister of Justice provides a list of laypersons.

Members serve two-year terms with the possibility of renewing their terms once.

Duties of the Committees

The committees are advisory and do not actively recruit candidates; they only consider names submitted by the executive. To be considered for the federal bench one must have been a member of the bar for at least ten years. Applications must be submitted to the Commissioner for Federal Affairs. They must include both a Personal History Form and a signed Authorization Form, which allows the Commissioner to obtain a statement of their current and past standing with the law societies in which they hold or have held membership. It is also possible to nominate other people.

After receiving the applications the Executive Director, Judicial Appointments will forward them to the appropriate committee for comment. Professional competence and general merit are the primary considerations. Committee members should also consider criteria related to professional competence and experience, personal characteristics, and potential impediments to appointment. In the case of candidates who are not already on superior courts in the provinces, the committees are asked to assign candidates to one of the three categories – highly recommended, recommended, and unable to recommend. In the case of candidates who are sitting judges on the superior courts, the Committee merely comments on the candidate based on material presented in the Personal History Form. Committee comments are confidential. These comments are then provided to the Provincial Minister for Justice. The comments are not binding on the Ministers but by convention Ministers only appoint candidates recommended by the committee. The Governor General then makes the appointments on the advice of the Cabinet.

Oversight

As far as removal of judges goes, Canadian federal judges, like their counterparts in England and Wales, “shall hold office during good behaviour”, under Section 96 of the Constitution Act, 1867. It is not the Judicial Advisory Committee that is involved in proceedings against judges. It is the Canadian Judicial Council, created in 1971 with statutory authority to investigate complaints against federal judges. Its powers are detailed in Part 2 of the Judges Act. The Council consists of 39 Chief and Associate Chief Justices/Chief and Associate Chief Judges of courts whose members are appointed by the federal government. The Court’s only jurisdiction under the Judicial Act is to recommend removal of a judge. If a judge resigns, an inquiry is terminated.

The Council begins an inquiry either on receipt of a written complaint about a judge’s conduct from a member of the public or when the Minister of Justice of Canada or the Attorney General of a province requests the Council to do so. (It is mandatory that the Council act on such ‘requests’.) Complaints from a member of the public are first screened in subcommittee. If the complaint seems serious enough to merit consideration it is passed on to a panel of up to five judges, often followed by a fact-finding investigation by an independent counsel. The panel can either close the file or recommend a formal investigation to the full Council. If the Council decides to initiate a formal investigation it will create an Inquiry Committee consisting of two Council members and a lawyer appointed by the Minister of Justice.

The Inquiry Committee has the power to summon witnesses, take evidence, and require production of documents. Any judge whose conduct is being investigated is entitled to be heard and to be represented by counsel. The Inquiry Committee’s report goes to the full Council. This report may include a recommendation that the judge in question be removed from office.

After receiving this report, the Council may or may not receive further submissions from the judge under investigation. It must issue a recommendation to the Minister of Justice that the judge be removed, or not be removed, from judicial office. The Minister then passes on this

recommendation to the Governor in Council. The Governor in Council must present this recommendation in Parliament within 15 days.

If we break the procedure down into its constituent steps, we see that there are multiple stages in the inquiry and dismissal process in which people from outside the judiciary are involved. The first is when a complaint is referred to the panel and the panel can refer it to an independent counsel for investigation. The second is during the formulation of a report for the Council by the Inquiry Committee since one of the three members of the Inquiry Committee is a lawyer appointed by the government. Next, the Council's recommendation for removal goes to the Minister of Justice. And finally, the Parliament must approve of the dismissal.

Since the Judicial Council was constituted only twelve complaints have gone through the full inquiry process. Six of them were referred to the council by attorneys-general. A vote by Parliament on whether to remove a judge has never occurred though several judges have resigned over the course of inquiries.

PROVINCIAL APPOINTMENTS AND OVERSIGHT

Appointments

In Canada, judicial committees play a much larger role in the appointment of judges to the lower provincial courts, those filled by the provincial governments and not the federal government. A look at the Ontario Judicial Appointments Advisory Committee (JAAC) will offer a good illustration of the work of these provincial committees. JAAC was the outcome of a pilot program run from 1988 until 1995. The committee idea was tested as way to depoliticise the judicial appointments process. JAAC was formally established in 1995.

As of January 5, 2005 there were 275 full-time judges in the Ontario provincial courts. In an average year, the JAAC meets over two dozen times and reviews applications.

Composition of Committee

The Committee has thirteen members. Legislation requires that the composition of the committee represent the diversity of Ontario province. There are seven lay members appointed by the Attorney General and six from the legal community – three lawyers, two judges, and a member of the judicial council. All members serve for a renewable term of three years. The legislative branch is not represented in the composition of the committee. Though the Attorney General appoints more than half the membership of the committee, the committee as a whole is considered independent of the Attorney General and the Government. The committee must produce an annual report presented in the provincial parliament. Members of JAAC themselves cannot be considered for judicial appointment until two years after they leave the committee.

Duties of the Committee

Unlike the advisory committees for federal appointments, the provincial committees advertise vacancies and invite applications. JAAC advertises vacancies in the local law society's newsletter as well as asking professional organizations to carry a copy of the advertisement. Only lawyers of ten years standing at the bar are eligible for consideration. The selection process involves three stages prior to interviews. The first is review of candidates' curriculum vitae and the lengthy Judicial Candidate Information Form (designed to include information not included in a CV). Letters of support on behalf of the candidate are not allowed though candidates must submit a list of references that may be called by the committee. Each committee member selects those candidates whom they find qualified to proceed to the second stage of reference checks and confidential

inquiries. A new list is made of all those candidates who are selected by at least three members. If a member believes a qualified candidate is not on the list he or she may have that name added. The list is then circulated to all the members. In selecting and subsequently ranking candidates the committee considers professional excellence, community awareness, personal characteristics important to performance on the bench, and demographic factors.

The second step is contacting at least four references supplied by the candidates. The third is making discreet inquiries of judges, court officials, lawyers, law associations, and community and social organizations – basically, professionals with first-hand experience of the candidate.

Based on the information obtained, the committee members select the candidates to be interviewed. The Committee sits in its entirety for the interviews – usually 16 interviews over the course of two days. After each interview the committee discusses the interviewee. Finally, after the final interview and after considering candidates interviewed earlier in the year who have applied for the current vacancy, the committee draws up a short ranked list of at least two candidates to submit to the Attorney General. The only other materials submitted to the Attorney General are the candidates' application forms. The Attorney General receives this information as soon as all necessary checks and clearances have been run on the candidates under consideration. The Attorney General will receive the short ranked list roughly four months after the committee first advertises for the vacant post. The committee does not inform candidates as to whether their names are or are not on the short list presented to the Attorney General. The Attorney General is required to make an appointment from the list.

In cases of unexpected vacancies, due to illness, death, or sudden resignation, the committee may, on the request of the Attorney General, recommend a candidate interviewed in the previous twelve months without advertising the vacancy. However, it is only in exceptional cases that the committee can abandon the policy of advertising all vacant posts.

In a given year, the committee will review hundreds of applications, conduct hundreds of inquiries, and interviews scores of applicants. Three-quarters of the 275 full-time judges on the Ontario Court of Justice were appointed after the creation of JAAC. In that time, one-third of all appointees have been women. 14 judges of the Ontario Court of Justice were appointed in 2004 alone.

Oversight

The provincial judicial councils, like the appointment advisory councils, have far wider powers than their federal equivalents. Also, in all the provinces save Nova Scotia the councils include lay members. In Ontario, the judicial council consists of six judges and six non-judges. A subcommittee investigates all complaints and makes recommendations to a larger review panel. The panel includes two judges, a lawyer, and one lay member. If the Council determines that there has been judicial misconduct a public hearing will be held and the Council will decide on appropriate disciplinary measures. The most severe sanction that the Council can impose on its own is suspension without pay for 30 days. However, it can also recommend to the province's Attorney General that the judge be removed from office. The Attorney General must table this suggestion in the legislative body within 15 days. The Attorney General may not introduce such a recommendation except when the Judicial Council arrives at it.

THE UNITED STATES OF AMERICA – STATE COMMISSIONS

BACKGROUND

The United States judiciary is divided between the state court systems and the federal system. The state courts have exclusive jurisdiction over all cases brought under state laws or the state constitutions. The federal courts have exclusive jurisdiction over cases involving the United States government, the United States Constitution and federal law, or controversies between states, or between the United States and foreign governments. They may also hear cases involving litigants from different U.S. states carrying more than \$75,000 in potential damages and have exclusive jurisdiction over all bankruptcy cases.

The United States Constitution dictates the appointment procedure for judges to the Supreme Court requiring the President to appoint judges with the ‘advice and consent’ of the Senate. Though not required by the Constitution, this procedure has been adopted for all federal judges.

Judges in the 50 state court systems and the court system of the District of Columbia are appointed in a variety of other ways, outlined in the following table:

	Partisan Elections	Non-partisan elections	Governor appoints with help of commission	Governor appoints without help of commission	Legislature appoints with help of commission	Legislature appoints without help of commission
Court of last resort (in all 50 states)	8	13	23 + District of Columbia	4	1	1
Intermediate appellate courts (in 41 states)	6	11	20	2	-	2
Trial courts (in all 50 states)	8 as well as 14 districts of Kansas and most of Missouri	19	15 + District of Columbia as well as 17 districts of Kansas and 4 counties of Missouri	3	1	1

The current methods used for the selection of judges to state courts in the United States developed in reaction to the once prevalent system of popular election of judges. Though, for each level of the judiciary, almost half the states retain election as the method of judicial selection a greater number have embraced judicial commissions or ‘merit selection’ as a way to select the most competent candidates for judicial offices while keeping them above the fray of partisan politics. 23 of the 50 states and the District of Columbia use commissions to present the governor or legislature with the list of possible candidates for the courts of last resort (usually known as the state Supreme Court). Of the 41 states that have intermediate appellate courts, between the trial courts and the court of last resort, 20 employ judicial commissions. At the lower, trial court level, 16 states use commissions as part of the appointment process.

No two nominating commissions are similar but most are non-partisan, composed of lawyers and non-lawyers, appointed by a combination of public and private officials. A good example of these commissions is that of New York State, used for the selection of judges for the state's highest court, the Court of Appeals*.

NEW YORK

Appointment

New York State created the Commission on Judicial Nominations in 1977 in the midst of a wave of reform in the judiciary. The adoption of the 'merit selection' or commission model was prompted by the concern that judicial elections were expensive and demeaning and that the process did not attract the most qualified candidates. The governor was a proponent of the constitutional reform necessary to create the commission system of appointment. This passed in the necessary two consecutive legislative sessions in 1976 and 1977 and voters approved the amendment in the 1977 elections.

The commission has twelve members:

- 4 appointed by the Governor
- 4 appointed by the Chief Judge of the Court of Appeals
- 1 appointed by the President pro tem of the state Senate
- 1 appointed by the Speaker of the state Assembly
- 1 appointed by the minority leader in the Senate
- 1 appointed by the minority leader in the Assembly

Of the members appointed by the Governor, no more than two may be from the same party and no more than two may be members of the bar. The same applies to the members appointed by the Chief Justice, thus ensuring that the selection process has no partisan bias.

The commission submits a list of nominees to the governor who is required to select someone from the list. The governor's appointee must then be confirmed by the state Senate.

Unlike most states with the merit system, New York does not have a system of retention elections – in which each appointed judge is required, after a one- or two-year probationary period to present themselves to the public for a yes-no vote on whether they should continue in their post.

Judges of some of the other courts in New York are also screened by commissions, though the use of commission for courts other than the Court of Appeals has not been written into the Constitution.

Oversight

To complement the Commission on Judicial Nominations is New York's Commission on Judicial Conduct, created by a constitutional amendment in 1976 as part of the same wave of judicial reform. Its composition and jurisdiction were altered by a second constitutional amendment in 1978 to result in the current Commission.

* New York is one of the few states in which the court of last resort is not called the Supreme Court. The Court of Appeals is the court of last resort in New York State while the Supreme Court of New York is an intermediate appellate court.

The Commission has 11 members serving four-year terms.

- 4 appointed by the Governor
- 3 appointed by the Chief Judge of the Court of Appeals
- 1 appointed by the President pro tem of the state Senate
- 1 appointed by the Speaker of the state Assembly
- 1 appointed by the minority leader in the Senate
- 1 appointed by the minority leader in the Assembly

Thus, the Commission on Judicial Conduct has a composition very similar to that of the Commission on Judicial Nominations, with only one fewer appointee of the Chief Judge of the Court of Appeals.

The Commission's duties are laid out in Article 6, Section 22 of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York. The State Constitution says that the Commission

shall receive, initiate, investigate and hear complaints with respect to the qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system...and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

All of the states and the District of Columbia have adopted Commissions to “insure compliance with established standards of ethical judicial behaviour, thereby promoting public confidence in the integrity and honor of the judiciary.”

The Commission meets several times a year to review all written complains and to decide whether to investigate or dismiss them. After the Commission authorizes an investigation it assigns it to a staff attorney who works with an investigative staff. If necessary, witnesses are interviewed and court records examined. The Commission may ask the judge under investigation to testify under oath. The judge is entitled to be represented by counsel and may submit material for the Commission's consideration.

FRANCE: CONSEIL SUPERIEUR DE LA MAGISTRATURE (CSM)

The issue of judicial appointments has been a contentious one in France stemming from the Constitution's assignment of the judiciary to a position of less power and independence than the executive and legislature. While the Conseil Supérieur de la Magistrature (CSM) is a Constitutional body, created by Article 64 in 1883 to assist the President in selecting both judges and public prosecutors (considered part of the judiciary), until the new Constitution of 1946 the President did not share the power to appoint the CSM's members with the members of Parliament. In 1958, in the Constitution of the Fifth Republic, the exclusive authority to appoint members of the CSM was returned to the President, a move not reversed until 1993. The 1993 amendment also widened the CSM's jurisdiction, enlarged its membership, and handed it an advisory role in both the nomination and disciplining of judges.

The CSM's membership is as follows:

- The President
- The Minister of Justice
- Three prominent citizens who are neither judges nor members of Parliament, nominated by the President of the republic, the president of the National Assembly, and the president of the Senate, respectively
- One judge from the Council of State (apex administrative court, under the control of the executive), who is elected by the Council of State's general assembly
- Five judges
- Five public prosecutors

(The President and Minister of Justice sit as ex officio members.)

The council consists of two sections – one dealing with judges and one dealing with public prosecutors. The section dealing with judges includes only one of the five prosecutors while that dealing with prosecutors includes only one judge. The 10 judges and prosecutors are elected by their colleagues. Thus, the executive's power in making judicial appointments has been severely curtailed. Furthermore, when the CSM sits as a disciplinary body it sits without the President and minister of justice.

The CSM plays the primary role in the appointments to the Court of Cassation (the highest court for civil and criminal appeal), of the chief judges of the Courts of Appeals, and of the chief judges of the *tribunaux de grande instance* (the major trial courts). For these 350 positions, the CSM advertises positions, reviews applications, interviews candidates and submits its recommendations to the President. Technically, the President can refuse to appoint a candidate proposed by the CSM but in reality the President is always limited to appointing a judge proposed by the council. In addition, the council's approval is required for all lower court appointments.

Oversight

Only serious complaints against judges are referred to the CSM. The Minister of Justice and the chief judges of the Courts of Appeal and of the appellate tribunals all have the authority to initiate disciplinary proceedings against a judge. The less severe disciplinary measures such as a negative appraisal and a warning that remains on the record for at least three years are handled within the relevant court. If the problem seems sufficiently grave the head of the court can refer the matter to the Ministry of Justice. The Ministry then conducts an investigation and can decide to negotiate a punishment, such as transfer, with the judge.

If these negotiations are unsuccessful or the charge is sufficiently grave then either the head of the court or the Ministry will submit a report to the CSM. The judge has the right to see the charges, his or her record, and all documents involved in the investigation. The judge also has the right to counsel and to summon witnesses. All proceedings happen in private. The CSM can impose a range of sanctions:

1. A reprimand that will appear in the judge's file
2. Transfer
3. Withdrawal of certain functions
4. Lowering in rank
5. Mandatory retirement
6. Dismissal with pension
7. Dismissal without pension

A judge sanctioned by the CSM can appeal to the Council of State, but only on points of law.

GERMANY: JUDICIAL SELECTION COMMITTEES

In Germany, the Federal Constitutional Court, Federal Court of Justice, and federal specialized courts (administrative, social, labour, fiscal, and patent) are under the control of the federal government (*Länder*). Article 95.2 of the Basic Law provides for the selection of the judges for the federal courts, excluding the Federal Constitutional Court, by a Judicial Selection Committee.

The judges of each of these courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag.

The details of selection are provided in the Judicial Selection Act. The Committee is designed to represent the interests of federal and state executives as well as those of the parliament. It is chaired by the federal Minister of Justice and consists of 16 state Ministers of Justice and 16 members nominated by the federal parliament. The federal Minister of Justice does not, however, have a vote on the committee. Committee members, including the Minister of Justice, have the right to propose candidates. The Committee's selection is based on review of candidates' personal files and the presentations of two Committee members. Though the final nomination comes from the Committee it also considers the evaluation of a committee of Federal Court judges. The evaluation is an important factor but is ultimately non-binding.

The "unwritten but firmly observed tradition" is that proportional representation is accorded to all political parties, regions, and both Catholics and Protestants. Candidates are nominated from the states in revolving order, with parties alternating the nominations in proportion to their representation in the federal or state parliaments. So a significant amount of political negotiation happens prior to the actual vote in the Judicial Selection Committee.

The selection process has come under criticism for not weighting the judiciary's opinion – as represented in the non-binding evaluation – enough and for compromising separation of powers by allowing so much input from politicians and political parties.

Oversight

Articles 97 and 98 of the Basic Law deal with the removal of judges. The relevant text is below:

Article 97(2): Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

Article 98(2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed.

Thus, Germany offers an example of the legislative branch having sole control over federal judicial appointments while only the judiciary, specifically the Federal Constitutional Court, has the authority to remove federal judges. Appointments to the Federal Constitutional Court itself, though, are made entirely by the two houses of the legislature.

SOUTH AFRICA: JUDICIAL SERVICE COMMISSION

The South African Constitution provides for a Judicial Service Commission. Section 178 describes its composition as follows:

There is a Judicial Service Commission consisting of

- a. the Chief Justice, who presides at meetings of the Commission;
- b. the President of the Constitutional Court;
- c. one Judge President designated by the Judges President;
- d. the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
- e. two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
- f. two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
- g. one teacher of law designated by teachers of law at South African universities;
- h. six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
- i. four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
- j. four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
- k. when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.

Appointment

In the selection of judges, the Judicial Service Commission acts in two roles – appointment and recommendation – depending on the court in question. With regards to appointment to the Supreme Court, the Commission recommends judges, presenting the President with a list of candidates with three more names than the number of positions to be filled. The President can refuse to appoint anyone on the Commission's list, supplying a reason for the refusal. However, when the Commission presents a second list the President must appoint someone from the list. In the case of the appointment of the Chief Justice and the Deputy Chief Justice of the Supreme Court, the Commission's recommendation is not binding. In all instances, the Commission's decisions require the support of a simple majority of its members.

The Commission has even greater authority in the appointment of all judges. The Constitution stipulates that the President *must* appoint all other judges on the advice of the Commission. In effect, the Commission has the appointment power.

South Africa is notable for the public nature of the appointment process. When a vacancy occurs in a court the head of that court informs the Commission. The Commission publishes the vacancy and receives applications and nominations. A subcommittee reviews the applications and decides on a short list. At this point the names of the persons who will be interviewed, those on the short list, are published.

As part of preparation for the interview the Commission contacts professional organizations and the candidate's own employer for evaluations. This is similar to the steps taken by Ontario's JAAC though the JAAC uses this information earlier on, in the preparation of its short list. If any of the

individuals or organizations contacted by the Commission make a negative comment on a candidate that candidate is invited to respond to the comment.

All candidates are interviewed even if the number of candidates is equal to the number of posts open. The interviews are held in public and the transcripts are posted on the Internet.

Oversight

Section 177 of the Constitution, regarding the removal of officers says that if the JSC finds that “the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct” then the National Assembly can pass a resolution, supported by a two-thirds majority, calling for the removal of that judge. The President must then remove that judge from office. President can also suspend a judge who is being investigated by the JSC.

To date¹, no judges have been impeached. Notwithstanding the Constitutional provisions there has been no procedure for the JSC to follow in processing complaints about judges. Two draft Bills that would fill this vacuum are currently under consideration – the Judicial Service Commission Amendment Bill and the Judicial Conduct Tribunal Bill. The Judicial Service Commission Amendment Bill details procedures for processing complaints about judges. It provides for the creation of a committee within the JSC to draft and maintain a code of conduct and also maintain records of all judges’ financial interests to prevent any conflict of interests. It also provides for the creation of all-judge subcommittees, headed by the deputy Chief Justice, to process complaints about judges. As it receives complaints it would either dispose of them or recommend them to the JSC for a formal inquiry by a judicial conduct tribunal, an ad hoc tribunal of two judges and an outsider (the creation of the Judicial Conduct Tribunal Bill). The subcommittee would also act as a body of appeal in all disciplinary matters involving judges.

Complaints could be lodged by anyone by way of affidavit and will be categorized by the Deputy Chief Justice. If a complaint were frivolous, hypothetical, or related to a judgment that could be appealed or reviewed it would be referred to the head of the relevant court. An article in the South African *Daily News* on April 22, 2005 reported that in the experience of other countries, 90% of complaints fell into this category.

This Bill has been seven years in the making. Some judges in South Africa are reportedly unhappy and threatening to resign over the involvement of politicians in disciplining judges. Some judges favoured the creation of a Judicial Council, consisting of five judges who would consider complaints on their own. The Council would have the power to dismiss a complaint, reprimand a judge following an investigation, or refer the matter to the JSC if it was an impeachable offence. However, ruling party MP’s wanted this power to be vested in the JSC itself.

SUMMARY

The variety of commissions in use and the various uses they are put to for judicial appointments and oversight are summarized in the following tables:

¹ Judges will Quit’, The Mail and Guardian Online, 1 April 2005

APPOINTMENT COMMISSIONS

	No. of members	Members' background	Appointment of members	Binding or non-binding recommendation
England and Wales	15	Lawyers, judges, laypersons	Judiciary and laypersons	Recommendation can only be rejected once
Canada	7	Lawyers, judges, laypersons	Executive, judiciary, Bar	Non-binding but convention restricts choice to Commission's recommendations
Ontario Province	13	Lawyers, judges, laypersons	Executive, judiciary, Bar	Appointee must be from Commission's shortlist
New York State	12	Lawyers and laypersons, representatives of more than one political party	Executive, legislature, judiciary	Appointee must be from Commission's shortlist
France	10 + President of Republic and Minister of Justice ex officio	Judges, prosecutors, and three who are neither judges nor legislators	Executive, legislature, judiciary	In theory non-binding but President limited to Council's recommendations. Binding for lower courts.
Germany	32 + Federal Minister of Justice ex officio	State Ministers of Justice and appointees of federal legislature	State and federal executive, federal legislature	Binding
South Africa	23	Ministers, legislators, lawyers, law professors, judges	Executive, legislature, judiciary, legal profession, law teachers	For Supreme Court, non-binding, though President can ask for a new shortlist only once. Binding for lower courts.

OVERSIGHT COUNCILS

	Members' background	Body responsible for inquiry	Authority empowered to remove judges
England and Wales	Lay person who has never held a judicial post	Judicial Appointments and Conduct Ombudsman	Legislature
Canada	Judiciary	Oversight commission's inquiry committee consisting of two commission members and appointee of Minister of Justice	Legislature
Ontario Province	Judiciary and laypersons	Oversight commission	Legislature
New York State	Appointees of executive, legislature, and judiciary	Oversight commission	Oversight commission
France	Judges, prosecutors, and three who are neither judges nor legislators	Oversight commission	Oversight commission
Germany	N/A	Federal Constitutional Court	Federal Constitutional Court
South Africa	Ministers, legislators, lawyers, law professors, judges	Oversight commission	Executive after a 2/3rds resolution in the legislature

A NATIONAL JUDICIAL COMMISSION FOR INDIA

The Supreme Court of India and the High Courts set the standard for judicial conduct and competence in the country. We must see that only candidates of the highest integrity and ability are appointed to these courts and that, once judges, they perform their duties with honesty, dedication and skill. This requires a degree of scrutiny in judicial appointments and oversight impossible under the current system. It is vital that we create a National Judicial Commission, combining input from the elected branches of government and the judiciary, to appoint and oversee the judges of the Supreme Court and High Court.

The experience of diverse jurisdictions described above supports the inclusion of the Prime Minister and legislators in the appointment process. This is essential to ensure that the judiciary, while remaining independent of other branches of government in fulfilling its duties, is not completely insulated from the input and vigilance of the peoples' representatives. We cannot expect the judiciary to appoint itself and then oversee itself. Both these elements are inappropriate in a democracy. The best solution is a National Judicial Commission (NJC) drawn from the executive, legislature and judiciary. The most practical and acceptable composition would be a seven-member NJC with the following members:

- The Vice-President as Chair of the Commission
- The Prime Minister or the Prime Minister's nominee
- The Speaker of the Lok Sabha
- The Law Minister
- The Leader of the Opposition in the Lok Sabha
- The Leader of the Opposition in the Rajya Sabha
- The Chief Justice of India

In matters relating to the appointment and oversight of High Court judges the Commission will also include the following members:

- The Chief Minister of the concerned State
- The Chief Justice of the concerned High Court

The NJC can be authorized to solicit views of jurists, representatives of the Bar and the public in any manner the Commission deems fit. Also, NJC can have the option of inviting two jurists to be non-voting members.

One question which needs to be addressed is whether the advice of NJC should be binding on the President. In this respect, the procedure adopted for the Judicial Appointments Commission of England and Wales seems well-suited for our situation. Upon the Commission's recommendation, the President can either appoint the candidate, return to the Commission for further consideration, or reject the candidate. Rejection or returning a name should be backed by reasons recorded in writing and communicated to the Commission. If rejected, the Commission cannot resubmit the candidate. But if a name is simply returned, the Commission would be free to **resubmit** a candidate returned for reconsideration. The President should then appoint a candidate whose name has been resubmitted for appointment.

Then we need to address the question of oversight of the higher judiciary. Clauses (4) and (5) of Article 124, Article 217 and Article 218 govern the procedure for removal of judges of Supreme Court and High Courts. However, past experience shows that this mechanism has failed, and the

Parliament could not effectively exercise oversight functions in respect of judiciary. Given this background, it would be most appropriate if NJC is entrusted with the responsibility of oversight of judiciary. The Judges Enquiry Act could be suitably amended to empower NJC to constitute a committee comprising of a judge of the Supreme Court, a Chief Justice of a High Court and an eminent jurist to investigate into complaints. Upon receiving the report of the Committee, NJC would consider it, duly giving an opportunity to the judge concerned to present his case. The NJC can then recommend dropping of charges, or censure or removal. Dropping of charges or censure would require a majority support, while removal would require support of two-thirds of the members of NJC. The recommendation made by the NJC will be binding on the President. Such a procedure will harmoniously reconcile the requirement of restraint and balance in dealing with the higher judiciary with the need for effective, independent and bipartisan oversight of judiciary.

The creation of such a Commission will require changes in three places in the existing laws. Any change in the process of appointment for the Supreme Court will require that Article 124 of the Constitution be changed to provide for a National Judicial Commission. A similar change will have to be made to Article 217. Also, since the commission is to have the authority to oversee and discipline judges, further changes will need to be made to Article 217 (Clause 4). As per Article 218, such a change would apply equally to the High Courts. Finally, the Judges (Inquiry) Act, 1968 dictates the procedure for an inquiry into judicial misconduct currently in use. This must be changed to reflect the use of a standing Commission, responsible for the inquiry into as well as the removal of judges against whom charges of corruption or gross incompetence are established.

Though the various commissions discussed here differ in authority, structure, and procedures, a single feature holds for all of them – public confidence is high in judicial appointment and oversight processes that use commissions. While this alone is not sufficient reason to create nominating commissions it clearly represents that the greater the range of inputs and the more transparent the process of appointment, the more people will trust judges and the judicial system. Overall, the use of a commission for selection and oversight will go a long way in making our higher judiciary more competent and trustworthy, and deserving of the lustre it once had.

– *Vaidya Gullapalli is an intern who worked on this paper for Lok Satta. She has been recently admitted into the Harvard Law School.*

– *Jayaprakash Narayan is the National Coordinator of Lok Satta and Coordinator of VOTEINDIA movement.*

RELEVANT STATUTES

- The Constitution of India, Articles 124 and 217
- Judges' (Inquiry) Act, 1968
- Constitutional Reform Act 2005 (establishing a Judicial Appointments Commission for England and Wales and a Judicial Appointments and Conduct Ombudsman)
- Canada Constitution Act
- Canada Judicial Act, Part 2
- Constitution of the State of New York
- Judiciary Law of the State of New York
- The French Constitution
- The German Basic Law
- The German Judicial Selection Act
- South African Constitution

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Text of Articles 124 and 217 of the Constitution of India

124. Establishment and constitution of Supreme Court. – (1) There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than twenty-five other Judges.

(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
- (b) a Judge may be removed from his office in the manner provided in clause (4).

(2-A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.

(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and –

- (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
- (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
- (c) is, in the opinion of the President, a distinguished jurist.

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).

(6) Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(7) No person who has held office as a Judge of the Supreme Court shall plead or act in any Court or before any authority within the territory of India.

217. Appointment and conditions of the office of a Judge of a High Court. – (1)

Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years :

Provided that –

- (a) a Judge may, by writing under his hand addressed to the President, resign his office;
 - (b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;
 - (c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.
- (2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and –
- (a) has for at least ten years held a judicial office in the territory of India;
 - or
 - (b) has for at least ten years been an advocate of a High Court or of any two or more such Courts in succession;
- (3) If any such question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

THE JUDGES (INQUIRY) ACT, 1968

[Act No. 51 of 1968 dated 5th. December, 1968]

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

BE it enacted by Parliament in the Nineteenth Year of the Republic of India as follows: -

1. Short title and commencement

- (1) This Act may be called the Judges (Inquiry) Act, 1968.
- (2) It shall come into force on such date¹ as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions

In this Act, unless the context otherwise requires,-

- (a) "Chairman" means the Chairman of the Council of States;
- (b) "Committee" means a Committee constituted under section 3;
- (c) "Judge" means a Judge of the Supreme Court or of a High Court and includes the Chief Justice of India and the Chief Justice of a High Court;
- (d) "prescribed" means prescribed by rules made under this Act;
- (e) "Speaker" means the Speaker of the House of the People.

3. Investigation into misbehaviour or incapacity of Judge by Committee

(1) If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,-

(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;

(b) in the case of a notice given in the Council of States, by not less than fifty members of that Council;

then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same.

(2) If the motion referred to in sub-section (1) is admitted, the Speaker or, as the case may be, the Chairman shall keep the motion pending and constitute, as soon as may be, for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom-

(a) one shall be chosen from among the Chief Justice and other Judges of the Supreme Court;

(b) one shall be chosen from among the Chief Justices of the High Courts; and

(c) one shall be a person who is, in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist;

Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman:

Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

(3) The Committee shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held.

(4) Such charges together with a statement of the grounds on which each such charge is based shall be communicated to the Judge and he shall be given a reasonable opportunity of presenting a written statement of defence within such time as may be specified in this behalf by the Committee.

(5) Where it is alleged that the Judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the Committee may arrange for the medical examination of the Judge by such Medical Board as may be appointed for the purpose by the Speaker or, as the case may be, the Chairman or, where the Committee is constituted jointly by the Speaker and the Chairman, by both of them, for the purpose and the Judge shall submit himself to such medical examination within the time specified in this behalf by the Committee.

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

(7) If the Judge refuses to undergo medical examination considered necessary by the Medical Board, the Board shall submit a report to the Committee stating therein the examination which the Judge has refused to undergo, and the Committee may, on receipt of such report, presume that the Judge suffers from such physical or mental incapacity as is alleged in the motion referred to in sub-section (1).

(8) The Committee may, after considering the written statement of the Judge and the medical report, if any, amend the charges framed under sub-section (3) and in such a case, the Judge shall be given a reasonable opportunity of presenting a fresh written statement of defence.

(9) The Central Government may, if required by the Speaker or the Chairman, or both, as the case may be, appoint an advocate to conduct the case against the Judge.

4. Report of Committee

(1) Subject to any rules that may be made in this behalf, the Committee shall have power to regulate its own procedure in making the investigation and shall give a reasonable opportunity to the Judge of cross-examining witnesses, adducing evidence and of being heard in his defence.

(2) At the conclusion of the investigation, the Committee shall submit its report to the Speaker or, as the case may be, to the Chairman, or where the Committee has been constituted jointly by the Speaker and the Chairman, to both of them, stating therein its findings on each of the charges separately with such observations on the whole case as it thinks fit.

(3) The Speaker or the Chairman, or, where the Committee has been constituted jointly by the Speaker and the Chairman, both of them, shall cause the report submitted under sub-section (2) to be laid, as soon as may be, respectively before the House of the People and the Council of States.

5. Powers of Committee

For the purpose of making any investigation under this Act, the Committee shall have the powers of a civil court, while trying a suit, under the Code of Civil Procedure, 1908, in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on oath;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) such other matters as may be prescribed.

6. Consideration of report and procedure for presentation of an address for removal of Judge

(1) If the report of the Committee contains a finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, then, no further steps shall be taken in either House of Parliament in relation to the report and the motion pending in the House or the Houses of Parliament shall not be proceeded with.

(2) If the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in sub-section (1) of section 3 shall, together with the report of the Committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

(3) If the motion is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

7. Power to make rules

(1) There shall be constituted a Joint Committee of both Houses of Parliament in accordance with the provisions hereinafter contained for the purpose of making rules to carry out the purposes of this Act.

(2) The Joint Committee shall consist of fifteen members of whom ten shall be nominated by the Speaker and five shall be nominated by the Chairman.

(3) The Joint Committee shall elect its own Chairman and shall have power to regulate its own procedure.

(4) Without prejudice to the generality of the provisions of sub-section (1), the Joint Committee may make rules to provide for the following among other matters, namely:-

(a) the manner of transmission of a motion adopted in one House to the other House of Parliament;

(b) the manner of presentation of an address to the President for the removal of a Judge;

(c) the travelling and other allowances payable to the members of the Committee and the witnesses who may be required to attend such Committee;

(d) the facilities which may be accorded to the Judge for defending himself;

(e) any other matter which has to be, or may be, provided for by rules or in respect of which provision is, in the opinion of the Joint Committee, necessary.

(5) Any rules made under this section shall not take effect until they are approved and confirmed both by the Speaker and the Chairman and are published in the Official Gazette, and such publication of the rules shall be conclusive proof that they have been duly made.

Foot Notes

1. Appointed date is 1st. January, 1969 vide G.S.R. 35, dated the 1st January, 1969.
