NLUJ Law Review

Dr. Rangin Pallav Tripathy, *Standard of Proof in Inquiry against Judges: A Case for a Lower Threshold,* 5(2) NLUJ Law Review 85 (2018)

STANDARD OF PROOF IN INQUIRY AGAINST JUDGES: A CASE FOR A LOWER THRESHOLD

DR. RANGIN PALLAV TRIPATHY*

ABSTRACT

Inquiry proceedings against judges to determine their suitability to continue to hold office are unique both in terms of their nature and in terms of the implications on a constitutional democracy. This article attempts to explore the dynamics of the standard of proof to be adopted in such inquiry proceedings.

The article is built around a simple and clear proposition that in order to continue in office, the suitability of a judge must always be beyond reasonable doubt and not his unsuitability. In other words, when a question arises as to whether a judge should continue to hold office, the question should not be whether his unsuitability is proved beyond reasonable doubt. The question should be; whether the suitability of the judge is beyond reasonable doubt? A corollary to this proposition is that if facts unfavourable to a judge are proved in inquiry proceedings on a balance of probabilities, it establishes a reasonable doubt regarding his suitability to hold office. Thus, if the standard adopted in inquiry proceedings is that of proof beyond reasonable doubt, it means we are unwilling to remove judges whose suitability is not beyond reasonable doubt.

* The author is a Harvard Law School, Fulbright-Nehru Post-Doctoral Research Scholar and Assistant Professor of Law (On Leave), National Law University Odisha and may be contacted at rangin[dot]tripathy[attherate]gmail[dot]com.

TABLE OF CONTENTS

I. NATURE OF AN ADJUDICATIVE PROCESS

At the core each adjudicative process is the requirement to prove alleged facts so that the adjudicatory authority can take a decision. Much of the adjudicative process is essentially a contest between parties in proving contrasting versions of facts. The favourable verdict towards a party depends primarily on the capacity of the party to prove that the version of facts alleged by them is true.[268] Thus, the rules and principles governing the process through which facts are to be proved in an adjudicative process are of utmost importance in terms of ensuring the objectives of the adjudicative process.

II. LEGAL PROOF VIS A VIS SCIENTIFIC PROOF

The two questions which gain immediate importance in this context are - who has the obligation to prove facts and how are facts to be proven. The first question is tackled by the concept of 'burden of proof' which identifies the party who has the obligation to prove facts in the overall scheme of the case and also in relation to specific issues. In relation to the second question, we need to differentiate between the scientific notion of proof and the legal notion of proof.[269] Unlike the scientific understanding of proof which comprises of absolute certainty, the term proof in the legal sense is but a calculated estimation of the facts which are likely to have happened.[270] On the basis of the evidence

---

[268] ADRIAN KEANE, THE MODERN LAW OF EVIDENCE 103 (8th ed. Oxford University Press 2008) [hereinafter Keane].
[269] STEVE UGLOW, EVIDENCE: TEXTS AND MATERIALS 76 (2nd ed. Sweet and Maxwell 2006).
[270] *Id.*

produced before it, the adjudicative authority seeks to convince itself of the facts which are likely to have transpired.[271] There is never any absolute objective proof of the facts and there is always a measure of estimation involved which is beyond the realm of direct knowledge.[272] Even with the advancement of technology and scientific techniques, there is always the subjective human involvement in the process. Thus, though we feel that something like fingerprints match is a sufficiently objective indicator of the proof of facts, we tend to ignore the subjective elements of proper collection of fingerprints, integrity of the crime scene and other such factors. Continuous technical advancement has also shown that our reliance on objective standards is contextualised by time.

III. STANDARD OF PROOF

Since, the idea of proof involves estimation by the adjudicative authority, the question of the extent to which evidence must be produced for the adjudicative authority to feel satisfied about making certain estimation, becomes very important.[273] This particular aspect is governed by the facets of 'Standard of Proof'.[274] The concept of standard of proof refers to the guidance as to the degree of conviction induced by the evidence on record which would be sufficient to hold a fact as proved.[275]

In terms of broad categorisation, there have been two standards of proof which are applied by the courts depending on the nature of the

---

[271] STEVE UGLOW, EVIDENCE: TEXTS AND MATERIALS 76 (2nd ed. 2006).
[272] *Id.*
[273] *Id.*
[274] Keane, *supra* note 268.
[275] PETER MURPHY, MURPHY ON EVIDENCE 105 (11th ed. 2009).

case.[276] The standard of 'proof beyond reasonable doubt' is applied in criminal cases and the standard of 'balance of probabilities' is applied in civil cases.[277] Of the two, proof beyond reasonable doubt refers to a higher standard of proof where the evidence adduced must be sufficient so as to not leave a scope of reasonable doubt regarding the conclusion reached.[278] Thus, the evidence must not only be convincing but also free from contradictions. Proof beyond reasonable doubt however, does not mean proof beyond any doubt whatsoever.[279] The doubt must be based on reasonable propositions and not a product of faint possibilities.[280] Proof on balance of probabilities on the other hand, admits of the possibility of contradictory versions being true but favours the version which has more weight than the other. To prove a fact by balance of probabilities is to prove one's version better, even slightly,[281] than the version of the other party.[282] All the court needs to be convinced of is that though both the versions of fact are possible, one version is more likely than the other to be true.[283]

---

[276] PETER MURPHY, MURPHY ON EVIDENCE 105 (11th ed. 2009); Keane, *supra* note 268 at 103.
[277] ALAN TAYLOR, PRINCIPLES OF EVIDENCE 27 (2nd ed. 2000) [hereinafter Taylor].
[278] COLIN TAPER, CROSS AND TAPER ON EVIDENCE 167 (11th ed. 2007).
[279] Thomas Mulrine, *Reasonable doubt: How in the world is it defined?,* 12(1) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 195 (1997).
[280] Miller v. Minister of Pensions, (1947) 2 All ER 372, 373-4 (the United Kingdom).
[281] *See* M. Redmayne, *Standards of Proof in Civil Litigation,* (62) MODERN LAW REVIEW 167 (1999).
[282] Taylor, *supra* note 277 at 29.
[283] Miller v. Minister of Pensions, *supra* note 280.

IV. BACKGROUND OF THE CHOICE OF STANDARD OF PROOF

While it is fairly simpler to classify the two standards of proof and then say that one applies to civil proceedings and the other to criminal proceedings, it is necessary to appreciate the larger context in which the choices of standards of proof are made.

Though the rule of proof beyond reasonable doubt is often cited as a necessary and essential safeguard to ensure that an innocent person is not mistakenly punished in law, it is interesting to note that the origin of this concept was not with the view to protect the accused.[284] This particular standard of proof was conceptualised to protect the soul of jurors in case they punish an innocent person.[285] However, regardless of the idealistic foundation of its origin, there is no doubt that the standard of proof beyond reasonable doubt retains its relevance primarily due to its role in minimising the risk of an innocent man being punished. The logic behind following the standard of proof beyond reasonable doubt, at least in criminal proceedings is very simple; while it is important to punish a person guilty of criminal wrong, it is more important to ensure that the punitive force of the state is not unleashed on a man who could be innocent[286] and thus, the need to ensure beyond reasonable doubt that the man facing criminal sanction is indeed guilty of the crime for which he is being punished. This particular precaution is critically important in

---

[284] James Q. Whitman, *The Origins of Reasonable Doubt*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY 2005, (June 30 2016) http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=fss_papers.

[285] *Id.*

[286] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPARTICK, EVIDENCE 134 (5th ed. 2012).

criminal proceedings due to the nature of consequences which are likely to follow in case a person is convicted; loss of liberty and at times, life.[287] On the other hand, the consequences of a wrong decision in a civil proceeding, though damaging in one way or the other, does not match the severity of a criminal sanction.

Thus, the choice of the standard of proof reflects the risk that the society is willing to take in a given situation if a wrong decision is reached.[288] Generally, the risk is not considered worthy when the consequence can result in an innocent man being incarcerated. On the other hand, the risk seems more manageable in a civil proceeding. For example, if the standard of proof on preponderance of probabilities were to be adopted in criminal proceedings, while the possibility of guilty persons being found innocent will decrease, the possibility of innocent persons being found guilty will increase.[289] Considering the nature of consequences attached to criminal proceedings, this has been found to be a risk not worth the reward.

This risk assessment of the cost of errors in civil and criminal proceedings is at the core of the choice in applying the standard of proof beyond reasonable doubt to criminal proceedings and the standard of proof by preponderance of probabilities in civil proceedings.[290]

---

[287] *Id.* at 134.
[288] CHRISTOPHER ALLEN, PRACTICAL GUIDE TO EVIDENCE 175 (4th ed. 2008).
[289] *Id.* at 176.
[290] *Id.*

V. DEGREES WITHIN A STANDARD OF PROOF

Though it is accepted as a generally uncontested proposition that 'proof beyond reasonable doubt' and 'proof on preponderance of probabilities (also known in some jurisdictions as 'preponderance of evidence'[291]).' are the only two standards of proof,[292] there exists layers of variations in terms of how these standards are applied in individual cases and these are not absolute and rigid formulations.[293] Within the bandwidth of a singular standard of proof, the appreciation of evidence by the court will differ depending on the nature of the facts involved.[294] Thus, the court's inclination to hold something as proved is necessarily dependent on the nature of misconduct being alleged.[295] Therefore, within a

---

[291] *See* Murphy*, supra* note 275 at 105.

[292] Keane*, supra* note 268 at 103.

[293] It needs to be noted, however, in the United States of America, there is a sufficiently wide belief that there are as many as three standards of proof. *See* TERENCE ANDERSON, DAVID SCHUM AND WILLIAM TWINING, ANALYSIS OF EVIDENCE 243 (Cambridge University Press 2010): "In the United States, it is now widely accepted that there are at least three distinguishable standards: proof beyond reasonable doubt, proof on the preponderance of evidence and intermediate standard variously expressed as proof by 'clear and convincing', 'clear, cogent and convincing' or 'clear, unequivocal and convincing' evidence."

[294] Taylor, *supra* note 277 at 29; Bater v. Bater 1951 2 All ER 458 (the United Kingdom), Denning LJ: "It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best CJ and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear'. So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter."

[295] Taylor*, supra* note 277 at 29; Bater v. Bater 1951 2 All ER 458 (the United Kingdom) Denning LJ: "A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even

particular standard of proof categorisation, there are different layers of thresholds which are applied by the courts.[296] Between the standard of preponderance of probabilities/balance of probabilities and proof beyond reasonable doubt, there is the possibility of different degrees of proof being applied by the court depending on the nature of the allegation and the consequences of the proof.[297]

Thus, though at times known by different nomenclature; in any adjudicative process, the choice for standard of proof boils down to proof beyond reasonable doubt and proof by preponderance of probabilities.

VI. NATURE OF INQUIRY PROCEEDINGS AGAINST JUDGES IN INDIA

In most constitutional democracies, members of the higher judiciary are subject to an accountability mechanism wherein they can be removed from office on the ground of some misconduct. Judges of the High Court in Australia can be removed from office on the ground of misbehaviour or incapacity.[298] In South Africa, judges of the Constitutional Court can be removed from office on the ground of incapacity, gross incompetence or gross misconduct.[299] In United States of America, a judge of the Federal Supreme Court can be removed from office on the ground of treason, bribery or other high crimes and

---

when it is considering a charge of criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

[296] Taylor*, supra* note 277 at 30: "Thus, the standard 'floats' according to the subject matter; the more serious the allegation, the greater degree of proof required."

[297] I. H. DENNIS, THE LAW OF EVIDENCE 483 (3rd ed. 2007).

[298] AUSTRALIAN CONSTITUTION § 72(ii).

[299] S. AFR. CONST. 1996 § 177(1)(a).

misdemeanours.[300] In all such jurisdictions where judges can be removed on certain grounds, there is also usually a prescribed or established procedure to inquire into the proof of such grounds.[301]

A. CONSTITUTIONAL AND STATUTORY SCHEME

In India, the judges of the Supreme Court can be removed from office on the ground of proved misbehaviour or incapacity.[302] The Constitution authorises the Parliament to make laws regarding the investigation and proof of the allegations of misbehaviour or incapacity against the judges. Pursuant to this mandate, the inquiry procedure against the judges of the Supreme Court in India is regulated by the prescriptions of the Judges Inquiry Act, 1968. Under the statutory scheme, an inquiry committee is constituted by the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, depending on which House the motion of removal has been initiated.[303]

The proceedings before the inquiry committee are characterised as a judicial process and thus the legality and regularity of the functioning of the inquiry committee can be scrutinised by the courts.[304]

---

[300] U.S. CONST. § 2.
[301] Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act, 2012 (Austl.); Judicial Service Commission Act, 1994 (S. AFR.).
[302] INDIA CONST. art. 124, cl. 4.
[303] The Judges (Inquiry) Act, 1968, No. 51, Acts of Parliament, 1968 § 3(2) (India).
[304] Sub Committee on Judicial Accountability v. Union of India, AIR 1992 SC 320 (India).

B. CHARACTERISATION OF INQUIRY PROCEEDINGS

In independent India, the first inquiry committee was constituted in the year 1991 in relation the allegations against J. V. Ramaswami. The committee consisting of Justice P. B. Sawant of the Supreme Court, Chief Justice P. D. Desai of the Bombay High Court and Justice O. Chinnappa Reddy, retired judge of the Supreme Court (hereinafter **"the P.B. Sawant Committee"**) in its report, *inter alia*, also made observations regarding the nature of the inquiry proceedings. The committee was clear that the proceedings before the committee are neither completely civil nor completely criminal in nature;[305] instead, they were of a sui generis character.

The terminology that the committee settled for in describing the nature of the inquiry proceedings was 'quasi-criminal proceedings'.[306] This determination was based on the use of the word 'investigation' in both Article 124(4) of the Constitution and the Judges Inquiry Act, 1968, the requirement of framing 'charges' against the judge and finding to be recorded in the form of 'guilty' and 'not guilty'. The usage of these terms convinced the committee that the proceedings were 'quasi-criminal' in nature.[307] Since then, there has not been any statement or observation to

---

[305] Law Commission of India, *Judges Inquiry Bill 2005* (Law Commission No. 195, 2006) 109.
[306] *Id.* at 106.
[307] *Id.* at 39, 110.

the contrary by either the higher judiciary in India or the subsequent inquiry committees set up under the Judges Inquiry Act, 1968.[308]

VII. POLICY ON STANDARD OF PROOF IN INDIA

A. P.B. SAWANT COMMITTEE

While enquiring into the allegations against J. V. Ramaswami, the P.B. Sawant Committee held that for a finding of guilt of misbehaviour or incapacity to be sustainable in law, it has to be proved beyond reasonable doubt and not merely on preponderance of probabilities.[309] This determination of the committee was based substantially on its characterisation of the proceedings as quasi-criminal. The committee stressed that 'proof beyond reasonable doubt' provides the most adequate balance in ensuring judicial accountability without breaching the goal of judicial independence. The committee emphasised on the gravity of the charges against a judge of the higher judiciary, the unique nature of the impeachment proceedings, and the possible consequences in case charges against a judge are proved, as relevant factors in settling for the standard of proof beyond reasonable doubt.[310] The committee also cited the fact that corrupt practices in elections are considered as quasi-criminal conduct in nature by the Supreme Court and are required to be proved

---

[308] Subsequent to the case of J. V. Ramaswami, inquiry committees have been set up to inquire into allegations made against J. Soumitra Sen (Judge, Calcutta High Court) and J. P.D. Dinakaran (Chief Justice, Karnataka High Court).

[309] Report of the Inquiry Committee (Volume-I) in Regard to Investigation and Proof of the Misbehaviour Alleged against Mr. Justice v. Ramaswami, Judge, Supreme Court of India, ¶ 101.

[310] *Id.* at ¶ 99.

beyond reasonable doubt.[311] Further, it also refused to equate the removal proceedings of a judge with departmental inquires where proof by preponderance of probabilities is the accepted stating that the removal proceedings of judge is a solemn proceeding. It insisted on a higher degree of proof while removing a judge of the High Court or Supreme Court.[312]

B. KRISHNA SWAMI V. UNION OF INDIA

The same view was reiterated by the Supreme Court of India in the case of Krishna Swami v. Union of India.[313] Though the observations of the court were not in relation to any issue in dispute and thus should not be considered as a binding ratio, the Court was quite emphatic in its inclination to the standard of proof beyond reasonable doubt. However, it is interesting to note that the Court in the same paragraph describes the procedure before the committee as that of a trial of a civil suit under the Code of Civil Procedure, 1908. Despite characterising the inquiry procedure as that of a civil suit, the Court favoured a criminal trial evidentiary standard primarily due to the nomenclature of 'guilty' or 'not-guilty' in Section 6 of the Judges Inquiry Act, 1968 which according to the Court meant that the assessment of the evidence has to be in the same manner as it is done in a criminal case.[314]

---

311 *Id.*
312 Report of The Inquiry Committee (Volume-I) In Regard To Investigation and Proof of The Misbehaviour Alleged Against Mr. Justice V. Ramaswami, Judge, Supreme Court of India, ¶ 99.
313 Krishna Swami v. Union of India, AIR 1993 SC 1407, ¶60 (India).
314 *Id.*

C. INQUIRY COMMITTEE ON SOUMITRA SEN

Though it did not elaborate on the issue or even discuss it as a point of dispute, the inquiry committee in relation to J. Soumitra Sen applied the standard of proof beyond reasonable doubt to determine the allegations. In its report, the committee has accepted the adoption of this standard without any explanation or reasoning.[315]

D. JUDGES INQUIRY BILL 2006

A similar view was also reflected in the Judges Inquiry Bill, 2006 which proposed to substitute the Judges Inquiry Act, 1968 and contained a specific provision clarifying that the standard to be applied in inquiries against judges would be proof beyond reasonable doubt. [316]

E. REMOVAL MOTION AGAINST J. DIPAK MISRA

The matter concerning the removal motion against CJI Dipak Misra presents a curious development in this respect. The matter never reached the stage of an inquiry as the motion was not admitted by the chairperson of the council of States. The allegations against J. Misra centred on abuse of authority, fabrication of documents, submitting false affidavit, and participating in a criminal conspiracy.

A motion to remove J. Dipak Misra was submitted to the chairperson of the council of State by 64 members on 20th April 2018 and the chairperson issued his order refusing to admit the motion on 23rd

---

[315] Report of the Inquiry Committee [Constituted by the Chairman, Rajya Sabha] Volume-I in Regard to Investigation and Proof of the Misbehaviour Alleged against Mr. Justice Soumitra Sen of Calcutta High Court, at 4.

[316] The Judges (Inquiry) Bill, 97 of 2006, explanation to § 20(1) (India).

April 2018. Interestingly, the chairperson adopted the standard of proof beyond reasonable doubt to assess the veracity of the allegations.[317] He held that allegations do not meet the standard of proof beyond reasonable doubt.

The termed 'proved misbehaviour' in Article 124 of the Constitution has been interpreted to mean that the Parliamentary process for the removal of a judge can begin only if the misbehaviour has already been proved by a non-parliamentary authority.[318] This is the interpretative justification of the mechanism of inquiry committee created under the Judges Inquiry Act, 1968. However, it has also been clearly established that the parliamentary process for removal does not begin unless the inquiry committee returns a verdict of guilty in relation to the judge.[319] The motion for removal of a judge is considered pending before any of the Houses of the Parliament only when the inquiry committee has submitted its report holding the judge guilty of either misbehaviour or incapacity. There is no constitutional or statutory mandate that allegations need to be proved before the motion is submitted either in the House of the People or the Council of States.

VIII. QUASI-CRIMINAL PROCEEDINGS?

It is submitted that the characterisation of the inquiry proceedings under the Judges Inquiry Act, 1968 as quasi-criminal and using the

---

[317] M Venkaiah Naidu, Order in the impeachment matter of CJI Misra, (27th April 2018), http://www.livelaw.in/vice-president-venkaiah-naidu-rejects-impeachment-motion-cji-misra/.
[318] Sub Committee on Judicial Accountability v. Union of India AIR 1992 SC 320 (India).
[319] *Id.*

standard of proof beyond reasonable doubt to prove the allegations against judges in the inquiry proceedings are flawed at a very fundamental level.

While it is true that words like 'investigation' and 'proof' have been used in Article 124 (5) and words like 'charge', 'guilty', 'not guilty' have been used in the scheme of the Judges Inquiry Act 1968, to characterise the nature of the proceedings merely on the basis of nomenclature is not logically sound. It is important to locate sufficient elements in substance which will justify the characterisation of 'quasi-criminal' proceedings.

A. REMOVAL NOT A LEGAL SANCTION

Though the inquiry proceeding is a statutory process, the sanction of removal from office itself is not a legal sanction as the same is *non sequeter* to the proof of allegations against a judge.[320] In case of a legal sanction, though the nature and degree of sanction to be imposed once the wrongdoing is proved may be up to the discretion of the adjudicating authority, the very fact that a sanction has to be imposed is not optional unless the wrongdoer is excused under any provision of law. When a person is found guilty of theft and a maximum term of imprisonment is prescribed as a punishment, the judge can very well decide in his discretion the exact duration of the imprisonment within the maximum range. However, the judge cannot, unless under the provision of any law,

---

[320] *See* Rangin Pallav Tripathy, *Defining Misbehaviour for Removal of Judges: The Logical Fallacy and Necessary Politicisation,* 6(1) NIRMA UNIVERSITY LAW JOURNAL 1 (2015).

refuse to imprison the wrongdoer. On the other hand, even after the allegations against a judge are proved, he may or may not be removed. The question of removal of a judge is entirely up to the discretion of the Parliament and there is no constitutional infirmity if a judge is not removed from office even if allegations against him are proved through the inquiry proceedings.

B. CONSTITUENT OF QUASI-CRIMINAL PROCEEDINGS

It is instructive to explore the pronouncements of the higher judiciary in relation to proceedings which do or do not qualify as quasi-criminal proceedings. While reiterating the established principle that proceedings for contempt of court are quasi-criminal proceedings, the Supreme Court has relied on the nature of the consequences which can arise from contempt to court proceedings as justification for its conclusion.[321] The fact that contempt of court proceedings can result in the punishment of imprisonment was an important factor in its attribution. The court noted that traditionally the same is not characterised as criminal proceedings but as quasi-criminal because the procedure is not regulated by provisions of Code of Criminal Procedure, 1973.[322]

Similarly, while holding that the proceedings under Chapter VI A of the Securities and Exchange Board of India Act, 1992 are neither criminal nor quasi-criminal in nature, the court stressed upon the absence

---

[321] Haridas Das and another v. State of West Bengal and others, AIR 1964 SC 1773 (India).
[322] *Id.*

of any punishment contemplated under criminal proceedings.[323] The court identified the nature of liability as arising out of breach of statutory obligations. In another case, while dealing with the same penalty provisions of the SEBI Act, the Bombay High Court has emphasised that use of word like 'penalty' in the statutory scheme are not definitive indicators of the nature of proceedings being criminal or quasi-criminal.[324] The court instead put greater reliance on the nature of the function being discharged by the adjudicatory authority and the determination of the liability of the contravener.

Thus, unless the consequences are in the nature of a criminal sanction or are conceptualised as a penal sanction, there is little reason to classify the proceedings as quasi-criminal in nature. In order to determine whether a legal sanction is in the nature of a penalty, it is important to look into the impact the legislature sought to create through such sanction. Thus, when a provision of law is sought to be enforced in order to create deterrence in relation to certain actions which the legislature considers to be against public interest, the same can be characterised as a penalty.[325] The primary reason behind imposition of a criminal sanction is to discourage people from indulging in actions which are deemed to be harmful to societal interests.[326]

---

[323] The Chairman, SEBI v. Shriram Mutual Fund and another, AIR 2006 SC 2287 (India).
[324] SEBI v. Cabot International Capital Corporation, 2004 (4) Bom CR 700 (India).
[325] Commissioner of Income Tax, West Bengal v. Anwar Ali, AIR 1970 SC 1782 (India).
[326] Gujarat Travancore Agency, Cochin v. Commissioner of Income Tax, Kerala, Ernakulam, AIR 1989 SC 1671 (India).

C. THE PARALLEL WITH ELECTORAL CORRUPT PRACTICES

At this point, it is interesting to note that the Sawant Committee report refers to the fact that corrupt practices in elections under the Representation of People Act, 1951 are considered quasi-criminal in nature and are required to be proved beyond reasonable doubt as an aid in its determination of applying the same standard in inquiry against judges.[327] The Representation of People Act, 1951 definitively has a penal scheme with imprisonment as the prescribed punishment for the violation of many of its provisions. Although indulging in corrupt practices as defined under Section 123 of the Act is not in itself punishable by imprisonment unless the conduct is also covered under the other offences created under the statue.[328] It is important to remember that proof of having indulged in corrupt practices does not merely lead to the concerned candidate's election being invalidated; there are further disqualifications from contesting elections for a certain number of years. This additional sanction of disqualification from contesting elections for a certain number of years in the future is a definitively punitive sanction and is at the core of the adjudication being considered quasi-criminal in nature.[329]

---

[327] However, the report on Soumitra Sen on the other hand categorically states that there is no similarity between inquiry proceedings under the Judges Inquiry Act, 1968 and electoral offences under the election laws. Report of the Inquiry Committee [Constituted by the Chairman, Rajya Sabha] Volume-I in Regard to Investigation and Proof of the Misbehaviour Alleged against Mr. Justice Soumitra Sen of Calcutta High Court, at 4.

[328] *E.g.*, booth capturing, which is a corrupt practice under §123 (8) is also punishable under §135-A with imprisonment up to three years.

[329] Razik Ram v. Jaswant Singh Chouhan, AIR 1975 SC 667 (India).

D. NON-PUNITIVE NATURE OF REMOVAL MECHANISM

However, no such punitive scheme can be located in the process concerning the removal of judges. The provisions which deal with removal of judges are not meant as a deterrent but more in terms of suitability of a person to continue in office. No criminal sanction follows from the inquiry proceedings. The most that might happen to a judge in pursuance of these proceedings is loss of job. There is no criminal sanction like imprisonment, fine, and forfeiture of property which can be imposed on a judge. The clearest indication of this is in the fact that the inquiry proceedings against a judge can be held not simply for alleged misbehaviour but also for alleged incapacity. Thus, the moot point of the removal mechanism is not a punishment for an errant judge which will serve as a caution to the other judges but to deal with the situation when a person is no longer suitable to hold such an important office, whether due to some kind of misconduct or because of physical/mental incapacity. Thus, the provisions are not meant to be penal in nature.

Interestingly, though the inquiry committee which inquired into the allegations against J. Soumitra Sen adopted the standard of proof beyond reasonable doubt, it categorically mentions that inquiry proceedings under the Judges Inquiry Act, 1968 are not comparable to the electoral offences under election laws on the reasoning that the purpose these proceedings is to maintain and uphold proper standards of judicial behaviour by inquiring into judicial conduct.[330] Therefore, the thrust of

---

[330] Report of The Inquiry Committee, *supra* note 315 at 4.

the inquiry proceedings is not to penalise the judges but to ensure that standards of judicial conduct are maintained.

The inquiry proceeding against a judge are not a necessary consequence of the violation of criminal law and more importantly, do not lead to the imposition of any sanction which can be characterised as punitive. There is no constitutional or statutory mandate of any further disqualification for the judge as one can see in the Representation of People Act, 1951. In such a scenario, there is not much ground to hold that the inquiry proceedings are quasi-criminal in nature.

In such a scenario, applying the standard of proof beyond reasonable doubt is not an essentiality as it would be if consequences of the inquiry proceedings entailed a penal sanction. There is no compelling reason to persist with the standard of proof beyond reasonable doubt. On the other hand, it makes much greater sense to rely on the standard of proof by balance of probabilities.

IX. THE DYNAMICS OF PUBLIC CONFIDENCE

Judges of the higher judiciary hold a critically important office in the scheme of constitutional governance which requires of them utmost integrity. At the same time, it requires of the people a considerable amount of trust that judges will not fail them. People retaining this trust

and confidence in the judges is fundamental to the judiciary's capacity to discharge its functions properly.[331]

A. HIGHER STANDARD OF CONDUCT EXPECTED FROM JUDGES

This trust on the part of the people is based on the logical supposition that as constitutional functionaries of considerable importance, judges will abide by a higher standard of ethical conduct. The same is evidenced even in the Restatement of the Values of Judicial Life adopted by the Supreme Court itself.[332] The Bangalore Principles also exalt the need for the judges to adhere to strict codes of ethical conduct in order to maintain the confidence of the public in the institution.[333] Judges are entrusted with considerable power and responsibility in order to discharge their designated functions. When entrusted with such high offices and responsibilities, they are also expected to abide by a stringent code of conduct.[334] It is to ensure the faith and confidence of the people in the democratic institutions is not corroded.[335]

The standard of conduct expected of a judge is commensurate with the magnitude of responsibilities on his shoulder and the depths of trust reposed in him by the people of the country. The public trust and confidence on the judiciary are based on the understanding that judges are

---

331 Shimon Shetreet, *Judicial Independence and Accountability: Core values in Liberal Democracies,* JUDICIARIES IN COMPARATIVE PERSPECTIVE 6 (CAMBRIDGE UNIVERSITY PRESS 2011) [hereinafter Shetreet].
332 Judges Inquiry Bill*, supra* note 305 at 334.
333 Bangalore Principle of Judicial Conduct 2002, cl. 1.6, https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (India).
334 Randy J Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability,* (5) WIDENER LAW SYMPOSIUM JOURNAL 117 (2000).
335 Shetreet*, supra* note 331 at 8.

held to a standard higher than that to other governmental functionaries; and are not likely to be influenced by the corrupting elements which may affect others. A course of conduct which would be excusable for any other person may not be excusable in case of a judge as the whole point of people trusting the judiciary with so much of independence is betrayed.[336] By virtue of the office that they occupy, judges are entitled to significant privileges and facilities. These privileges and facilities are extended to the judges because the functions they discharge is fundamental to the survival our constitutional democracy and thus a certain sphere of independence is ensured. In such a scenario, they are also expected to be much more mindful of their conduct.[337]

B. STANDARD OF PROOF SHOULD PRESERVE PUBLIC CONFIDENCE

The judiciary derives much of its authority from the public faith that it shall remain beyond the influence of the corrosive elements which might affect the other institutions. When there is a sufficient case of such faith being broken, though not necessarily an incontrovertible one, it is difficult for the judiciary to maintain its moral standing.[338] The best example of this can be seen in terms of how the principle of bias operates. Principles of natural justice are violated when there is a sufficient

---

[336] Greg Mayne, *Judicial integrity: the accountability gap and the Bangalore Principles*, (June 23, 2018), https://www.birosag.hu/sites/default/files/allomanyok/kozadatok/obh/7._sz._melleklet__gcr_chapter_3_final.pdf.

[337] Maurice J Sponzo, *Independence vs Accountability,* 26 JUDGES' JOURNAL 13 (1987).

[338] J Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why,* 58 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 241 (2001-2003).

possibility of a judge being biased. One does not need to prove that a judge was indeed biased.[339]

It does not require proof beyond reasonable doubt for faith to be compromised. The standard of proof adopted in inquiry proceedings should reflect respect towards preservation of public confidence in the judiciary. The standard of proof beyond reasonable doubt is an artificial legal construct which is unusual in regular life. While taking decisions or forming opinions, it is unlikely for individuals to adopt the standard of proof beyond reasonable doubt. It is not the prevailing standard for decision making in societal life. Many decisions in both private and public life are in fact riddled with doubts of viability and suitability.

For the image of judiciary to be tarnished, it is not necessary that the unsuitability of any judge has to be proved beyond reasonable doubt. For questions to be raised on the integrity of judiciary, it is adequate if there exists sufficient proof for the unsuitability of the judge to be more probable than his suitability

X. BEYOND REASONABLE DOUBT- SUITABILITY OR UNSUITABILITY?

While knowing something beyond reasonable doubt is indeed desirable, it is important to identify the thing which needs to be ensured beyond doubt. There are two approaches that may be undertaken in this respect. First, it may be insisted that the unsuitability of a judge must be proved beyond reasonable doubt to merit a removal. Otherwise, it may be

---

[339] Shetreet, *supra* note 331 at 8.

insisted that a judge's suitability must be proved beyond reasonable doubt for him to continue to hold office. Under the first approach, even a high probability of unsuitability is not sufficient to trigger the removal mechanism. Under the second approach, a higher probability of suitability is not adequate to if there are reasonable and persistent suspicions about the suitability of the judge. In other words, proof of allegations against a judge on balance of probabilities will be sufficient to raise reasonable doubts regarding his suitability.

A. IMPLICATIONS OF ADOPTING THE STANDARD OF PROOF BEYOND REASONABLE DOUBT

When we allow judges to continue in office because their misbehaviour or incapacity has not been proved beyond reasonable doubt, we permit them to remain in office even though their suitability is not beyond question. Even a proof on balance of probabilities raises reasonable doubt regarding the suitability of the judge to continue to hold office. As we have discussed already, proof beyond reasonable doubt is a higher standard which accommodates the risk of the guilty being declared innocent for the sake of the innocent not being adjudged guilty. Thus, if we stick with the standard of proof beyond reasonable doubt in inquiry proceedings against judges, it means we are willing to take the risk of unsuitable judges continuing in office in order to ensure that a suitable judge is not removed from office. In the parlance of a criminal sanction, this approach makes sense as the cost of an innocent man being punished is much greater than the benefit of a guilty man escaping punishment. On the other hand, to preserve the enormous trust reposed in the judiciary, it

is much more important to ensure that unsuitable judges do not continue in office than to ensure that a suitable judge is never removed. Unsuitable judges continuing in office and adjudicating matters will do greater damage to the integrity of the judiciary than the cost of some suitable judges being removed. The whole edifice of rule of law is dependent on the people seeking the redressal of their grievances with an independent judicial institution and not adopting means of their own. If there is a reasonable perception that judges who are unsuitable are deciding the fates of people, it jeopardises the faith of the public in the viability of the legal system to redress their grievances. This lack of faith strikes at the very foundations of a legalised society by regularising the perception that the judicial mechanism might not be capable of being fair. This perception severely hampers the exclusivity of the judiciary to settle legal disputes in the society. Once people resort to extra-legal arrangements for settlement of their disputes because they do not have sufficient faith in the judges; the whole paradigm of rule of law collapses.

B. THE RIGHT QUESTION

In such circumstances, it needs to be understood that greater the trust, higher the responsibility to uphold it. When faced with the issue regarding the suitability of a judge continuing in office, the question should not be whether the truth of the allegations against him has been proved beyond reasonable doubt. The question should be whether the falsity of the allegations against him has been proved beyond reasonable doubt. One need not be convinced beyond reasonable doubt that a judge is not suitable to continue in office. It is the suitability of a judge which

should be beyond reasonable doubt. Any lingering reasonable suspicion regarding the suitability of a judge to continue in office is damaging to the credibility of the institution. Even a prima facie proof of the lack of suitability of a judge is sufficient to shake the confidence of the people in the credibility of the judicial process. A judge must be beyond reproach at all levels and must be held accountable to a much higher standard of expectations.

Thus, the standard of proof in inquiry proceedings should be proof by preponderance of probabilities. Adoption of this standard would ensure that judges of doubtful suitability do not continue in office. It will ensure that only such judges hold office whose suitability is beyond question and indisputable. The society does not deserve judges whose unsuitability has not been proved beyond a reasonable doubt. It deserves judges who suitability has been proved beyond reasonable doubt.

XI. SIMILAR PROPOSITION IN OTHER JURISDICTIONS

In recognition of the approach discussed above, the Judicial Conduct Tribunal constituted under the provisions of the Judicial Service Commission Act of South Africa[340] is required to make its determination regarding the alleged incapacity, gross incompetence or gross misconduct of a judge of the Constitutional Court of South Africa on a balance of probabilities.[341] In Australia, the members of the second Select Committee constituted by the Senate in relation to the allegations against J. Lionel Murphy, judge of the High Court of Australia, had the liberty to

[340] Judicial Service Commission Act, 1994, Act 9 of 1994 §19 and §21 (S. Afr.).
[341] *Id.* § 26(3) (S. Afr.).

determine the proof of the allegations either by the standard of proof beyond reasonable doubt or by balance of probabilities.[342] The commission of inquiry which inquired into allegations against J. Angelo Vasta, judge of the Supreme Court of Queensland in Australia, also held that the inquiry proceedings were not criminal in nature and thus it is not mandatory for the allegations to be proved beyond reasonable doubt.[343] The commission instead held that the degree of satisfaction will vary according to the gravity of the fact which had to be proved.[344]

XII. CONCLUSION

Preserving the independence of the judiciary is critical in constitutional democracies. Inquiry proceedings against judges should not become a framework of persecution and harassment. It should not become far too easy and simple for a judge to be removed from office. A precarious tenure for judges is most damaging to the fabric of an efficient governance mechanism.

It is important to protect the integrity of the judiciary. A Judge should not be allowed to retain office in the pretext his unsuitability not being proved beyond reasonable doubt when there remain sufficient reasons to question his continuance in office. To reiterate the point; people don't need judges whose unsuitability has not been proved beyond doubt but judges whose suitability is beyond doubt. It is more important to preserve the public confidence on the judiciary than to let judges

---

[342] Judges Inquiry Bill, *supra* note 195 at 212.
[343] *Id.*
[344] Judges Inquiry Bill, *supra* note 195 at 212.

continue in office simply because their unsuitability has not been proved by the strict evidentiary standard of proof beyond reasonable doubt. Adopting the standard of proof by balance of probabilities does not undermine the sanctity of the judicial office. Rather, it provides greater ground for the public to retain confidence in the integrity of the judges.

In any case, determination of unsuitability in inquiry proceedings does not necessarily lead to removal from office. After the inquiry proceedings determine against the concerned judge, the political process in the Parliament to decide upon the removal of the judge still remain. It is not necessary for the Parliament to remove a judge if the inquiry committee has recorded findings against the judge as the removal of the judge is a political sanction. The same was evident in the case of J. V. Ramaswami when he was not removed from office even though the inquiry committee had held the charges against him to be proved. However, if the determination of the inquiry committee is favourable to the judge simply because of a higher standard of proof, then there is no possibility of any further action being taken against the judge.

In such circumstances, it is not desirable that judges be provided a convenient route of escaping effective accountability by adoption of a higher threshold of proof.

To reiterate the point made above; the suitability of a judge to hold office should be beyond reasonable doubt, not his unsuitability to do so. Even a prima facie proof of unsuitability is hazardous to the integrity of the judicial process. Thus, the broader objective of the removal

mechanism should not be to ensure that judges are not removed unless their unsuitability has been proved beyond reasonable doubt. It should be to ensure that only such judges continue in office whose suitability is beyond doubt. The said objective cannot be effectively pursued as long as we adhere to the standard of proof beyond reasonable doubt to test the allegations of misbehaviour or incapacity against judges. The standard of proof which will best serve the interest of the judiciary as an institution is proof by balance of probabilities.