PART V

CONCLUSION
The focus of study in this thesis is on the necessity and extent of judicial creativity in interpreting provisions in certain crucial areas in the Constitution of India. Judicial innovation was essential to adapt the constitutional provisions to modern changed context. Creativity of the Court has been mainly in the creation and introduction of certain new concepts not found in any specific provision of the Constitution which, but were essential for its meaningful interpretation. Independence of the judiciary, basic structure and certain elements of social justice cherished as ideal by the makers of the Constitution are some such concepts infused into the Constitution by the judiciary. The second aspect of creativity lies in the attempt of the Court to construe provisions in the Constitution with a view to upholding and maintaining the concepts so infused into the Constitution. Introduction of those concepts into the Constitution was necessary and is justified. The Court was successful in its attempt in construing the constitutional provisions in tune with the judicially introduced concepts.

The cases decided by the Supreme Court dealing with different aspects of the judiciary reveal that the Court was very much concerned with upholding the independence of the institution of judiciary. This concept was first recognized by the Court as an effective check against arbitrariness of the executive. Decisions dealing with appointment of Judges to the higher judiciary and those dealing with transfer of Judges of High Courts stand testimony to this. The concept of judicial
independence as it exists now is one judicially developed. Judiciary was able to
give it a modern content.

Analysis of cases dealing with appointment of judges to the Supreme
Court reveals that the Court construed the provisions with a view to uphold to
judicial independence. The holding\textsuperscript{1} that ‘consultation’ envisaged by the
Constitution was not a formality and that it operated as a check on the executive
arbitrariness is indicative of this. By such a holding the Court was able to rule out
the possibility of unilateral decision by the President. However, the holding did
not completely do away with the possibility of executive arbitrariness in selecting
judges. But, the holding in the \textit{S.C. Advocates}\textsuperscript{2} to the effect that the process of
consultation required the President to act according to the recommendation of the
Chief Justice of India in the normal cases, and that the only freedom enjoyed by
him was not to appoint the recommendee of the Chief Justice of India in
appropriate cases has fully ruled out the chances of executive arbitrariness. The
holding gave pride of place to the opinion of the Chief Justice of India and thus
strengthened independence of judiciary. The concept of judicial independence as
developed by the Court sought to exclude the possibility of arbitrariness of the
Chief Justice of India also. In this respect, \textit{Subhash Sharma}\textsuperscript{3} and \textit{S.C. Advocates}
developed ‘consultation’ as one of ‘participative consultative process’ which
implied that before forming an opinion, the Chief Justice of India has to consult a
collegium consisting of his colleagues. This view got a further confirmation

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\textsuperscript{2} (1993) 4 S.C.C. 441.
\textsuperscript{3} A.I.R. 1991 S.C. 631.
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when it was held\(^4\) that in the absence of such a consultative process the President was not bound to appoint the recommendee of the Chief Justice of India and that such appointments were open to judicial review. The requirement that in selecting persons as judges of the Supreme Court, seniority as judges of High Courts should also be taken into account, further reduced chances of arbitrariness of the Chief Justice of India in selecting Judges to the Supreme Court. The holding that the President was not bound to act unless the Chief Justice of India formed his view after consulting his colleagues and that the President could require the collegium to reconsider the proposal can be appreciated as fine pieces of judicial innovation for promoting judicial independence and for avoiding arbitrariness by the judiciary. While interpreting the provision for appointing judges to High Courts, the Court accepted and recommended the same procedure. To rule out arbitrariness of the Chief Justice of India, and to make ‘consultation’ meaningful, the Court held that the view of the Chief Justice of the High Court concerned deserved the greatest weight.

The holding that the Chief Justice of India be appointed on the basis of seniority and on the recommendation of the out going Chief Justice of India\(^5\) is an example of creativity and vision of the Court. It fills up a gap in the constitutional provision and excludes executive arbitrariness in selecting persons to the post of the head of the judicial family. The impact of the holding on independence of judiciary is evident when viewed in the background of the

\(^4\) Presidential Reference No. 1 of 1998.

\(^5\) S.C. Advocates, supra, n. 2.
instances of supersession due to absence of a clear criterion in the provision for selection of the Chief Justice of India. The Court fathomed the relation between independence of judiciary and the process of appointment of judges and exhibited high creativity in interpreting and giving content to the term 'consultation' in Article 124(2) and 217(1) with a view to uphold judicial independence.

Cases dealing with appointment of Additional Judges, transfer of Judges of High Courts and removal of Judges constitute a tell-tale of the realization of the Supreme Court how security of tenure and judicial independence are intertwined. They reveal the innovative response of the Supreme Court in this respect. The holding that the consultative process followed in appointing permanent judges was applicable in appointing temporary judges and that the executive did not enjoy any discretion to determine the term of such appointment is the outcome of judicial innovation. Incorporation of the concept of legitimate expectation of Additional Judges to be considered for reappointment and their right to judicial review are instances of fine judicial craftsmanship in harmonizing the provision for appointment of temporary judges with the need to preserve independence of judiciary. When a new content given to consultation, appointment of Additional Judges became fully free from the executive discretion and the cause of judicial independence was advanced. The holding that the writ of mandamus could be issued for reviewing the strength of the permanent judges in a High Court reduced the chance of appointment of

6  S.P. Gupta, supra, n. 1.
7  S.C. Advocates, supra, n. 2.
of Additional Judges in cases where appointment of permanent judges was warranted. Had the Court conferred on Additional Judges the right to be re-appointed, the cause of judicial independence would have been protected further.

Judicial innovation is writ large in the decisions relating to transfer of judges of High Courts. The holdings⁸ that public interest is a condition precedent for transfer and that no transfer can be made without consulting the Chief Justice of India are remarkable from the point of view of independence of judiciary. The subsequent decision that the view of the Chief Justice of India is determinative and that before forming a view, he has to consult the Chief Justices of the High Courts concerned provided further impetus to judicial independence. The holding that transfers could be judicially reviewed and that improper transfers could be struck down add strength to these norms. These norms found their way into the Constitution due to creative judicial innovation. However, the concept of public interest will have to be elaborated further clearly and meaningfully if judicial independence is to be protected to its fullest extent. The holding that the opinion of the Chief Justice of India contains elements of public interest and that transfers according to his opinion were not open to judicial review will have adverse impact on independence of judiciary. Though these holdings help protect judiciary from executive arbitrariness, it is yet to be seen how far the judiciary may be protected from the possibility of combined arbitrariness of the President and the Chief Justice of India. Moreover, the Court could have been more

creative by incorporating consent of the judge as a condition precedent for
transfer and it might have been more effective to protect judicial independence.

Removal of judges of the higher judiciary is another conspicuous area in
which the Court exhibited remarkable innovation. With a view to check removal
of judges of the higher judiciary on political grounds and to ensure that removal
is made on the ground of 'misbehaviour', the Court held that misbehaviour
should be proved through the judicial process and that the motion for removal of
judges could be taken up in Parliament only if misbehaviour is so judicially
established. By bringing the removal procedure subject to judicial review, the
Court undoubtedly made a significant contribution to the cause of protection of
independence of the judiciary. The holding that removal under Article 124 is
the only constitutionally envisaged one, that every instance of misconduct may
not constitute misbehaviour and that minor misconduct could be rectified by self-
regulation guard judges against arbitrary removal. The procedure for removal is
thus brought out of the realm of politics so as to assist the cause of judicial
independence. These decisions represent instances in which the Supreme Court
indulged in creative interpretation of the provisions of the Constitution whereby
judiciary has been saved from onslaughts of the legislature.

Cases dealing with the subordinate judiciary also reveal how the concept
of judicial independence was kept in mind by the Supreme Court in interpreting

10 Sarojini Ramaswamy v. Union of India, (1992) 4 S.C.C. 506
the respective provisions in the Constitution. By giving emphasis on the aspect of consultation with the High Court the Court was able to reduce the influence of the executive in appointments of District Judges. The Court developed the concept and importance of consultation stage by stage. For appointing district judges, consultation was to be made with the High Court alone. Recommendations of the High Court had to be implemented, that government could not brush it aside without valid reasons. If the recommendations were not implemented without stating the reasons, a writ of mandamus could be issued to communicate the reasons. The executive could remove District Judges only after consulting the High Court. Similarly, by creatively interpreting Article 235, and by giving wide content to the expression 'control and superintendence' in Article 235 the Court was able to bring all incidents of service of judges of the subordinate judiciary except their appointment and removal under the control and supervision of High Courts. The Court construed Article 235 in such a manner that the power of control and superintendence vested in the High Court would not damage independence of judges of the subordinate judiciary. However, exercise of control by the High Court in a manner prejudicial to judicial independence was struck down by the Court. Evidently, the cases dealing with the subordinate judiciary reveal that independence of judiciary was developed as a shield not only against the legislature and executive but also against the judiciary itself.

Judicial review of the power of Parliament to amend the Constitution is another sphere of superb judicial activism. In this area the Supreme Court of India excelled all other judicial fora at global level. The Court for the first time in the history of constitutional jurisprudence held that the power to amend the Constitution was amenable to judicial review\textsuperscript{16} and propounded a norm-the doctrine of basic structure-for evaluating the validity of amendment to the Constitution. By the doctrine, the first of its kind, the Court was able to overcome the myth that questions of constitutional amendments were political in nature and hence were beyond the purview of judicial review. The creative element of the doctrine lies in bringing constitutional amendments amenable to judicial review without destroying the well-accepted distinction between constitution and law. To work out a coherent doctrine of basic structure, the Court introduced the theory of implied limitations into the Constitution. The doctrine was invoked to check gradual erosion of the identity of the Constitution-basic document of the legal system-in exercise of the power for modifying it according to the requirements of the time. By the doctrine, the Court was able to prevent the Constitution being made a plaything in the hands of the majority party in Parliament. Inability of the Court to make out clearly at the time of the initial formulation of the doctrine its ingredients and the holding that the doctrine had only prospective operation\textsuperscript{17} may be viewed as its negative points. However, formulation of the doctrine, which does not have its parallel in other countries is a crowning glory to the creative interpretation of the Constitution by the Supreme Court.


\textsuperscript{17} Waman Rao v. Union of India, A.I.R. 1980 S.C. 271.
Notwithstanding the scathing criticisms levelled against the doctrine, the Court developed it further and gave it a concrete form. Almost all important features of the Constitution like democratic form of government, federal structure, judicial review, independence of judiciary and rule of law were thus included in the doctrine to prevent their alteration by amendments. By such a development of the doctrine the Court could undoubtedly prevent abuse of the amendment power to serve political ends. In that process the Court not only concretized its contents, but also used it as a principle of constitutional interpretation. Further, the doctrine was invoked by the Court as a criterion also for assessing the validity of legislation and acts of constitutional authorities. In other words, through such a process, the doctrine of basic structure has been developed by the Supreme Court as a criterion for evaluating legislative and executive powers and as a tool to guide exercise of judicial powers.

Interpretation of fundamental rights in the light of the directive principles represents the most modern and creative trend in constitutional interpretation. This trend reveals the judicial perception of the directive principles as a guide for construing the fundamental rights and the attempt of the Supreme Court to construe the scope of fundamental rights in tune with the concept of social justice reflected in the directive principles. Such a judicial response stems from the understanding of the Court that fundamental rights would be meaningless without a tinge of social justice. The creative trend was inaugurated with the

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18 S.C. Advocates, supra n. 2.
interpretation of the fundamental rights to equality and life. By seeking assistance from the related concepts contained in the directive principles, the Court gave more sense and vitality to those rights. Equal pay for equal work and protection of the down trodden and backward classes were read as facets of the right to equality. Right to easy access to justice, right to primary education and right to health and medical care for employees were read as part of right to life. The individual rights in Part III were fused with the social justice envisaged in Part IV of the Constitution. Elucidation of the fundamental rights in the light of social justice reflected in the directive principles can therefore be considered as an instance of high judicial creativity. As a result of such a construction, the nature of those directive principles itself has changed. They ceased to be mere directives for state action but became mandate for it. If left to legislative or executive will for their implementation, the directives would have remained enforceable as ordinary rights. But as a consequence of the innovative interpretation, the Court was able to extend the scope of Article 32 for their enforcement as fundamental rights. This creative judicial response has to be carried further in interpreting other fundamental rights also.

To conclude, notwithstanding the errors committed by the Supreme Court in construing the provisions in the above three areas, they stand testimony to its creative and innovative response in interpreting the Constitution. If this trend is continued, it will be possible to achieve through the judicial process, maintenance of independence of the judiciary, avoidance of destruction of the Constitution through the process of amendment and realisation of social justice
envisaged in the directive principles. It can be hoped that the Court would maintain its energetic and vibrant mind and rise up to the occasions and extend the same to other areas in future.