CHAPTER-IV

CONDITIONS OF SERVICE OF JUDGES OF THE HIGHER JUDICIARY

Security of tenure constitutes another important aspect of independence of the judiciary since it involves the problem of independence of judges during the long span of their tenure. Security of tenure is of high significance as its presence is necessary for exercising truly judicial mind of Judges. Without such security one may find it difficult to keep up one’s character, individuality, honesty, courage and independence as a Judge. Security of judicial tenure depends upon the conditions of their service. There are a lot of aspects to the concept of security of tenure such as term of appointment, salary and allowances, displacement and removal from service. These matters are so intertwined with independence of judiciary, that exercise of power by the executive in relation to any one of them is likely to affect the security of tenure of Judges, thereby causing adverse impacts

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1 Judicial officers have to perform the duties of office “without fear or favour affection or ill will”. See, the Constitution of India, Schedule III, forms of oaths or affirmations of Judges.

2 For the concept of independence of judiciary, see, supra, chapter, I
on the independence of the Judges. In modern times the concept of security of tenure is wide enough to include due promotion also.

The concept of security of tenure of Judges, which forms such an important aspect of the concept of independence of judiciary is, but, of recent origin. The view that independence of judiciary and security of tenure of Judges are indelibly linked did not gain recognition in the early days when judiciary was established as a separate organ of the State. In Grate Britain, the concept emerged only in the eighteenth century. Till then, judicial service was at the pleasure of the Crown which meant that judges were to serve only during the pleasure of the Crown. They were known as the King’s Judges. It just meant that continuance in and conditions of service of a judge were unilaterally determined by the Crown. Change came with the Act of Settlement of 1700. It specified that judges could continue in service during “good behaviour” instead of that at the

3 "Among the traditional safeguards of judicial independence, the most notable is that of tenure. It means that a judge has a guaranteed right to reach the mandatory age of retirement or until the expiry of his term of office and may not be removed except for incapacity or proved misbehaviour. It also means that the term of office, emoluments and other conditions of service or judges (such as e.g. age of retirement) shall not be altered to their detriment. When this elementary safeguard is destroyed and the judges are put on the sufferings of the executive or military governments, the independence of the judiciary is the first victim.” L.M.Singvi, Freedom on Trial (1991), p.166.

4 By due promotion is meant promotion as Chief Justice of High Court from among puisne Judges or elevation to the Supreme Court and also the appointment as the Chief Justice of India. Though each such instance is a fresh appointment, by convention, the senior most judges are so appointed. This practice leads to a legitimate expectation for such elevation.

5 Supra, Chapter II


pleasure of the Crown. Security of judicial tenure was thus assured for the first time by the Act of Settlement.

Security of tenure has two aspects. Smooth life while one adorns judicial office without any variance of conditions of service to his detriment is the first one. That is, every judge should enjoy an environment of free thinking so as to express his opinion without fear, favour or ill-will. It further includes protection against removal without a sufficient cause and that too only through a just and objective procedure. The former is the negative aspect of the concept while the other is positive. The former promises against ones' being afflicted with ill-experience during the tenure while the latter assures protection against his disgraceful and indecorous exit out of the office for exhibiting his will and expressing his views sans fear as a judge. In other words, both exact importance on par. One without the other may deliver a still born concept of judicial independence.

Across the Atlantic, in the United States, the Constitution itself protects these two aspects of security of judicial tenure. Many modern states have incorporated the concept of security of judicial tenure in their constitutions. The

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8 Section 3 of the Act stipulates that thereafter judges should hold office *qualdive se bene gerbit* instead of *durate bene placito masto*

9 "But equally important in the history of constitutional freedom is the independence of the judiciary from the executive, secured in Britain after a traumatic struggle by the Act of Settlement." Lord Hailsham, "The Independence of the Judicial Process" 7 J.B.C.I. 21 at p. 23 (1978).

10 The Constitution of the United States, Article 3 Section 1 Paragraph 1, "...the Judges both of the Supreme and inferior Courts shall hold their offices during good behaviour, and shall receive for their services a compensation, which shall not be diminished during their continuance in office."
Constitution of India also guarantees and protects security of tenure of Judges of the Supreme Court and High Courts.\textsuperscript{11} It further stipulates that salaries and other privileges of Judge of the Supreme Court and High Courts should not be varied to their disadvantage after their appointment.\textsuperscript{12} Further, by providing for a detailed procedure for removal of Judges, the Constitution extends protection against chances of arbitrary removal.\textsuperscript{13}

The Supreme Court had occasion to pay its attention on the aspects of service conditions of Judges of the higher judiciary, mainly on appointment of judges for temporary periods, transfer of Judges of High Courts and the procedure for removal of Judges of the higher judiciary. How far has the Court been successful in examining those aspects of the Constitution in the light of the concept of judicial independence? Could the Court give a strong footing for independence of judiciary by the construction of those concepts? An examination of these questions would be fruitful in the wake of the recent decisions in these areas.

\textsuperscript{11} Articles 125 and 221.

\textsuperscript{12} Articles 125 (2) Proviso. It reads, “Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pensions shall be varied to his disadvantage after his appointment.”

Article 221 (2) Proviso. “Provided that neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.”

\textsuperscript{13} Articles 124 (4) and (5) and Article 218. See infra, nn. 166-167.
1. APPOINTMENT OF JUDGES TO HIGH COURTS FOR TEMPORARY OR SHORT PERIODS

The Constitution of India provides that a Judge of the Supreme Court may continue in office till he attains 65 years of age\(^\text{14}\) and a Judge of High Court till he attains the age of 62\(^\text{15}\) unless he resigns or is removed from office. In other words, once appointed, the judge of the Supreme Court or High Court should be able to hold office till retirement or removal. Undoubtedly, these provisions are designed to instill confidence and courage in the mind of Judges to discharge their functions independently.

The implication of these provisions is that appointment of Judges for undetermined period is anathematic to security of tenure. Similarly, appointment of Judges for short terms with likelihood of extension or non-extension is also against the principle of security of tenure\(^\text{16}\) and therefore against independence of judiciary.\(^\text{17}\) It is significant to note that at the time of enactment, there was no

\(^{14}\) Articles 124 (2). The relevant portion of Article 124(2) reads, “Every Judge of the Supreme Court shall... hold office until he attains the age of sixty five years.

\(^{15}\) Article 217(1): “Every Judge of a High Court...shall hold office,...until he attains the age of sixty two years.” But Additional Judges of High Courts are to continue in the office only for a period of two years from the date of appointment. See Article 224(1).


\(^{17}\) Joseph Story in his famous Commentaries on the Constitution Law of the United States Vol. II has opined that appointment of Judges for short intervals would adversely affect independence of judiciary, as judges will have to depend heavily upon the appointing authorities. (Ss. 1613-1614) as cited in Chandrapal supra, n. 16 at p. 285. Hamilton, one of the makers of the Constitution of the United States observed that independence of
provision in the Constitution dealing with appointment of temporary judges with a limited term of office. Incorporation of such provision in the Constitution of India was the subject matter of long deliberation in the Constituent Assembly. Finally, it was ruled out on the ground that it was against independence of judiciary.\textsuperscript{18}

Non incorporation of such a provision was thus a deliberate one. It is also significant that while many sections in the Government of India Act 1935 were adopted as such in our Constitution,\textsuperscript{19} the provision for temporary judges\textsuperscript{20} was not included. However, the Constitution in its original form had provided that if due to non-availability of persons, there was a lack of quorum of Judges in the Supreme Court, the Chief Justice of India, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, could request a Judge of the High Court to be an ad hoc Judge of the Supreme Court for a specified period.\textsuperscript{21} Similarly, the Chief Justice of the High Court with the previous consent of the President may request a retired Judge of any High Court to sit and act as the Judge of the High Court for a specific period.\textsuperscript{22} Undoubtedly, these provisions were meant not for regular operations but only to tide over certain exigencies.

\textsuperscript{18} The view that appointment of temporary Judges would not be conducive to the independence of the judiciary was expressed in the Constituent Assembly. See, for instance, speeches of K.M.Munshi, and M.V.Kamath in the Assembly were against the appointment of temporary Judges. C.A.D. Vol. VII. pp. 670, 693.

\textsuperscript{19} For instance, section 200 of the Government of India Act provided for transfer of Judges of High Courts. The Constitution of India has adopted it as Article 222.

\textsuperscript{20} Government of India Act, 1935, Section 101(2) Proviso.

\textsuperscript{21} Article 127. This Article was scarcely invoked.

\textsuperscript{22} Article 224. Presently, Article 224 A.
Finding that the provision dealing with appointment of retired judges to High Court was not sufficient to meet the requirements of disposal of cases, in 1956 Parliament amended Article 224\(^23\) by the Constitution (Seventh Amendment) Act. Thus a new provision was introduced into the Constitution which provided for appointment of Additional Judges who were to serve only for a maximum period of two years. The intent of the amendment is clear. If by the reason of temporary increase in the business of the High Court, or by reason of the arrears of cases a High Court is in requirement of an increased number of judges for a short period,\(^24\) the President may appoint Additional Judges for a period not exceeding two years. The provision is meant to tide over certain emergencies. Such Judges are to be appointed only when two conditions are satisfied. The first and foremost one is that the sitting permanent Judges are not able to dispose of arrears of, or increase in, the pending cases. At the same time such pending cases should not warrant appointment of more permanent Judges. It is therefore clear that there was a correlation between appointment of Additional Judges with the workload pending in a High Court. It implies that the number and term of Additional Judges appointed should be such that by the end of the term of Judges so appointed, the pendency should be eliminated. Therefore it need not be specifically mentioned that the provision should not be invoked when the increase

\(^23\) Article 224 (1) reads thus, "If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court such period not exceeding two years as he may specify."

\(^24\) There may be instances of temporary increase in the pending works of the High Courts for one reason or the other. For instance, litigation in connection with an election or claims filed in connection with winding up of a company. But there is no yardstick to determine what is meant by the term arrears. But the Law Commission of India in its 14\(^{th}\) Report has laid down a criterion to determine the same (at p. 91).
in workload is not of a temporary nature. In other words, Article 224(1) is only a provision that enables the President to appoint judges for meeting short-term requirements. In such a context, invocation of the provision to appoint Judges with tenure of short-term duration with a chance of extension is contrary to judicial independence and the original intention of the makers of the Constitution. For, like a permanent Judge, an Additional Judge is also to be appointed either from the Bar or lower judiciary. So, when the exigency for his appointment ends, he has to return to his erstwhile office.

What is the extent of damage appointment of temporary judges could cause on independence of judiciary? Such an issue came for the consideration of the Court in *Krishan Gopal v. Prakashchandra*. Though no distinction based on constitutional provisions was drawn between permanent and temporary Judges, Justice H.R. Khanna, speaking for a five-member constitution bench, held that 'in the interests of justice' election petitions should be heard by permanent judges.

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25 *Supra* n.18. This practice of appointing temporary Judges for short periods is peculiar to India.

26 The restriction to practise as an Advocate in the High Court in which one was a permanent Judge is incorporated in Article 220 to protect independence of the judiciary as such persons should not have an opportunity to influence the Bench as retired Judge. This provision was incorporated to the Constitution after a long deliberation. However, this restriction is not applicable to an Additional Judge. Thus, if a person served as an Additional Judge in a High Court for two years, after the term, he can resume practice in the same court. But if he is appointed as a puisne Judge, in that court, he cannot resume practice even if he held the office only for a day or two. This is a matter of violation of equality also.

27 *A.I.R* 1974 S.C. 209. That was a petition filed against the decision of the High Court of Madhya Pradesh. The petition was filed before the High Court under Article 80A of the Representation of Peoples Act. The Court posted the matter before a judge appointed under Article 224A of the Constitution. The decision is challenged on the ground that an election petition could not be decided by a judge appointed under Article 224A.

28 *Id.* at p. 216. "It seems indeed desirable that election petition should ordinarily, if possible, be entrusted for trial to a permanent judge of the High Court even though we
This holding indicates that temporary judges do not enjoy the same amount of independence as permanent judges and therefore they may not be able to decide cases in which Government has an interest as impartially as permanent judges.

Tenure of judges acquires added importance when the issue is one of fundamental rights. Fundamental rights are guaranteed against the government and judiciary is considered as the guardian of those rights. So absence of security of tenure lead to violation of fundamental rights. In other words, there is a reasonable nexus between protection of fundamental rights and security of tenure, an essential ingredient of independence of judiciary. In Re Special Courts Bill, 1978, the Court found a reasonable relationship between the tenure of judges who decided cases and the fundamental right under Article 21 of the Constitution. It was held that clause 7 of the Bill, which provided that Additional Judges could decide cases was struck down as violative of Article 21 as they did not enjoy security of tenure.

These two holdings indicate that tenure of judges has an undeniable correlation with their independence. What role Supreme Court can and has played in its determining the scope and parameters of the provision empowering the President to appoint temporary judges? This inquiry is highly relevant and

find that additional or acting judges or those requested under Article 224A of the Constitution to sit and act as judges of the High Court, if assigned for the purpose by the Chief Justice, are legally competent to hear those matters... The election petition filed by the appellant shall now be heard by a permanent judge who may be assigned for the purpose by the learned Chief Justice."

29 A I R 1979 S.C. 478. That was a petition challenging the provisions of the Special Courts Bill 1978 as violative of the Constitution. Clause 7 of the Bill provides that judges of the special courts can be either from sitting or retired judges of High Courts.

30 Id at pp. 517-518.
important in evaluating the creative contribution of the Supreme Court in securing independence of the judiciary. In the Judges Case\textsuperscript{31} much of the arguments was over this provision and its unscrupulous invocation by the government.

Dealing with this aspect the Court held\textsuperscript{32} that appointment of Additional Judges to High Courts should also be in accordance with the procedure envisaged by Article 217(1).\textsuperscript{33} It means that irrespective of whether one is appointed a permanent or temporary judge, the President should consult the Chief Justice of India, the Chief Justice of the High Court concerned and the Governor to satisfy the requirement of Article 217(1) and also in compliance of the procedure in it. The Court held that though the period for which an Additional Judge is to be appointed is to be determined by the executive, subject to a maximum period of two years fixed by the Constitution, such appointments could not be for short periods like three months or six months.\textsuperscript{34} The Court further held that on the expiry of the initial term of a person as an Additional Judge, for his reappointment, the procedure contained in Article 217(1) had again to be followed.\textsuperscript{35} It means that there also consultative procedure with the Chief Justice of India, Chief Justice of the High Court concerned and the Governor of the State has to be repeated.


\textsuperscript{32} \textit{Id. per} Bhagawati J. at p. 241; Gupta J. at pp. 346-347; Desai J. at p. 610; Pathak J. at p. 716 and Venkitaramaiah J. at p. 874. Fazal Ali J. agreed with them (at p. 470).

\textsuperscript{33} For the text of the Article, see, supra, chapter III, n. 8

\textsuperscript{34} Supra, n. 31 \textit{per} Bhagawati J. at p. 247, Gupta J. at p. 347; Tulzapurkar J. at pp. 527-528 and Desai J. at p. 629. Pathak J. \textit{contra}, at p. 716.

\textsuperscript{35} \textit{Id. per} Bhagawati J. at p. 243; Gupta J. at p. 347; Fazal Ah J. at pp. 471,474; Tulzapurkar J. at p. 520, Desai J. at p. 613; Pathak J. at pp. 719-720 and Venkitaramaiah J. at p. 874.
However, the Judges added that there was a right for such Additional Judges to be reconsidered for a further appointment as Additional or permanent Judges. In other words, in such appointments effected during or subsequent to the initial term as Additional Judges, they have a clear precedence over others who were not judges. The Court held so on the ground that there was a long standing practice that most of the persons who were initially appointed Additional Judges were later confirmed as permanent judges on arisal of vacancies though there were a few exceptions. Such a long-standing practice therefore led Additional Judges to believe that they would be confirmed later. Such a long-standing practice, according to the Court has crystallized into a convention. Similarly, such Additional Judges were given extended terms in the wake of continuance of the contingencies mentioned in Article 224(1). That is, there was a legitimate expectation on the part of the Additional Judges to continue as Judges. Some of the Judges observed that there were certain other factors like their experience as judges and non-feasibility to send them back to the Bar or the lower judiciary, which weighed in favour of Additional Judges for their continuance or re-appointment. As a corollary of the legitimate expectation to be re-appointed, Additional Judges have got a right to approach the judiciary for not appointing them if such non-appointment or non-extension as the case may be was

36 *Id. per* Bhagawati J. at p. 241; Gupta J. at p. 348, Tulzapurkar J. at p. 511; Desai J. at p. 626 Pathak J. at p. 718 and Venkitaramiah J. at p. 815. However, Fazal Ali J. held that the temporary Judges had neither such legitimate expectation nor any right to be appointed. (at p. 472).

37 *Id. per* Bhagawati J. at p. 244; Gupta J. at pp. 241, 348; Tulzapurkar J. at p. 511; Desi J. at p. 472; Pathak J. at p. 718 and Venkitaramiah J. at p. 815 Fazal Ali J. *contra* at p. 472.

38 *Id. per* Fazal Ali J. (at p 472).

39 *Id. per* Bhagawati J. (at p. 244) and Venkitaramiah J. (at p. 804).
on extraneous grounds. The Court further held that appointment of Judges to High Courts was not on probation and therefore their performance as Additional Judges should not be a criterion for determining extension of his term as Additional Judges or appointment as permanent judges.

While rendering the judgement on this issue, the Court was faced with certain hard realities. The government, ever since the incorporation of Article 224(1) in the Constitution, was invoking it in an indiscriminate fashion. Since its enactment, this was one of the most misused provisions of our Constitution. From 1956, the year of its enactment, till the date of the decision of the Judges Case, about one fifth of the total vacancies of judges of various High Courts was filled up as Additional Judges. That is, the majority of Judges of various High Courts from the date of the incorporation of the provision was initially appointed as temporary irrespective of whether there were the contingencies mentioned in

[40] Id. Per Bhagawati J. at p.245; Gupta J. at p. 348; Tulzapurkar J. at p. 518; Desai J. at p. 640 and Venkitaramiah J. at pp. 817-818. Justice Bhagawati, Justice Desai and justice Venkitaramiah held so on the ground that Additional Judges have a a right to be considered and a right not to be excluded on extraneous grounds. So they could approach the Court against such a decision. Justice Tulzapurkar reached such a conclusion on a different ground. He held that there was a valid classification between Additional Judges and a fresh appointee. Non-extension of the term of the former or not appointing him as a permanent judge is not 'appointment' in the real sense of the term. While that of the latter is actually appointment. So the former has a right to move the Court against a decision to exclude him. Justice Gupta held that non-extension of the term of an Additional Judge or not appointing him as a permanent judge of the High Court amounts to his termination (at p. 348).

[41] Id. per Bhagawati J. at p. 321; Gupta J. at p.347; Tulzapurkar J. at p. 518; Desai J. at p. 618 and Pathak J. at p.719.

[42] Id. per Bhagawati J. at p. 321; Gupta J. at p.347, Tulzapurkar J. at p.519 and Pathak J. at p. 720.

Article 224(1) and were later confirmed as permanent judges. In other words, Article 224(1) was the “gateway” for the post of puisne judges to High Courts. Additional Judges were dropped or given extension or were regularised exclusively at the whim and caprice of the executive. The decision in the Judges Case has to be analysed in the light of such a practice of appointing judges in a manner counter to judicial independence.

A perusal of the decision proves that while rendering it, the Court has taken the rights of the Additional Judges into consideration as an integral part of the concept of independence of the judiciary. The decision of the Court that in every case of appointment of Judges to High Courts whether permanent or Additional, the procedure in Article 217(1) should be complied with is a welcome one. That demands that the President has to hold consultation with the Chief Justice of India, the Chief Justice of the High Court concerned and the Governor even in the appointment of Additional Judges. The Constitution does not specifically stipulate that to appoint Additional Judges Article 217(1) should be complied with. Such a restriction on the power of the President is solely the creation of the Court. It is a fine incident of judicial innovation to protect

44 Id. per Desai J. at p. 619.
45 Id. per Bhagawati J. at p. 240 and Venkitaramiah J. at p. 801.
46 Instances of non-extension and dropping of Additional Judges even when vacancies of permanent Judges existed are not lacking in the history of Indian judiciary. Such dropping and non-extensions were effected at the whim and caprice of the Prime Minister. In the Judges Case itself, there were petitions against the dropping of Justices S.N. Kumar and O M Vohra Judges of the High Court of Delhi. Seervai has reminded us of the non-extension of Justice Aggarwal of Delhi High Court and Justice Lalith of the High Court of Bombay at the pleasure of the then Prime Minister. Such incidents have led him to think that there was a similarity between them and the dismissal of Sir Edward Coke 360 years back as he was not acceptable to the then King. See, Seervai, Constitutional Law of India, Vol. II (1984) pp. 2295-2297.
independence of the judiciary in the matter of appointment of Judges for short
duration. As a result of the decision, now the President cannot appoint Additional
Judges without following the consultative process under Article 217(1) and to that
extent executive arbitrariness is curbed. For, it rules out the chances of selection
of persons acceptable to and exclusion of persons disliked by the Executive. It
also avoids the possibility of executive arbitrariness in selection and appointment
of a person as Additional Judge when he is not qualified to be appointed as a
puisne Judge of the High Court. Such a holding implies that all the formalities
conceived by Article 217(1) are made applicable to appointments of Additional
Judges also under Article 224(1). As a result of the holding, appointment of
Additional Judges has also been subjected to the restrictions and safeguards to
which the process of appointment of puisne Judges is dependent.

(a) Term of Appointment of Additional Judges

An important issue to which the Court paid its attention was the discretion
of the executive to determine the duration of the term for which Additional Judges
may be appointed. The Constitution provides only the maximum period of two
years for which Additional Judges could be appointed and it does not stipulate a
specific minimum period for such appointments. The implication is that the
President may appoint Additional Judges for any period not exceeding two years,
as he may consider necessary.\footnote{That was an argument raised by the Union of India. See, \textit{supra}, n. 31 at p. 224.} Does the provision empower the President to
appoint Additional Judges even for short periods like three months or six
months?\textsuperscript{48} The Court held that such short term appointments or extensions were bad since it affected judicial independence and that it was not the intendment of Article 224(1).\textsuperscript{49} Justice Bhagawati\textsuperscript{50} observed that such appointments would be bad unless they have correlation with the cases pending in the Court while Justice Gupta, Tulzapurkar and Desai held that such short appointments \textit{per se} were unconstitutional.\textsuperscript{51}

The holding of the Court on this count is an instance of excellent creativity. By the decision, the freedom of the President to unilaterally determine the minimum duration of appointment of Additional Judges stands restrained. Actually, the President is not a competent authority to determine the period of service of such temporary requirement as that depends upon the number, disposability and nature of cases pending and the capacity of the Judge. It is likely that the conclusions of the executive in this regard are based on extraneous considerations. Hence the decision of the Court to deny the President the power to decide the term of appointment is certainly conducive to independence of the judiciary. Thus, while the Constitution limits the maximum period for which Additional Judges are to be appointed, the decision of the Judges Case has provided the criterion for the fixation of the minimum duration for such appointments.

\textsuperscript{48} Terms of Justices O.N. Vohra, S.N. Kumar and S.B. Wad Additional Judges of the High Court of Delhi were to expire on 6.3.1981. They were given extension for three more months. \textit{Supra}, n. 31 at p. 197.

\textsuperscript{49} \textit{Supra}, n. 34.

\textsuperscript{50} \textit{Supra}, n. 31 at p. 247.

\textsuperscript{51} \textit{Supra}, n. 34.
(b) Extension or Regularisation of Additional Judges

Yet another important issue in relation to appointment of Additional Judges is the extension of the term of Additional Judges or their regularization as permanent Judges. In this respect the Court exhibited a very creative outlook in interpreting the constitutional provisions. While deciding this issue, the Court countenanced with a conflict between the power of the President to extend the term of Additional Judges or their regularization as the case may be on the one hand and the expectation of such temporary judges and the independence of the judiciary on the other. The Court rightly analysed the issue on the basis of the long-standing practice of extending or regularising the term of Additional Judges, which has crystallized as a convention. And held that on the basis of the convention, Additional Judges expected that on expiration of their initial term they would be regularized or given a further term as Additional Judges. To give effect to the holding, the Court based its decision for conferring such a right to reappointment on three concepts namely, (a) consultative process under Article 217(1), (b) Legitimate expectation of Additional Judges and (c) their right to judicial review against wrongful dropping.

By the end of the term of an Additional Judge, there may be a question of appointing an Additional or permanent Judge. In such circumstances, the Additional Judge whose term has expired is also eligible to be re-appointed. If the executive has got a freedom to decide whether the sitting Additional Judge is to be appointed or not, its decision is likely to be influenced by the performance of the
Judge during the initial term as the Additional Judge. Referring to Article 217(1) that "Every Judge of a High Court shall be appointed by the President after consultation with . . .," the Court held that in instances where the sitting Additional judges are also eligible to be re-appointed, the procedure envisaged by Article 217(1) should be complied with. The holding of the Court is to be understood and appreciated in the background of its observation that consultation under Article 217(1) was to check executive arbitrariness. As a result of such a holding, the President is restrained from unilaterally deciding whether the Judge whose term has expired is to be dropped or not. In other words, the discretion of the President to decide whether the term of an additional Judge is to be extended or be regularized is effectively circumscribed by the creative reading of the consultative procedure under Article 217(1) to those instances also. The desirable impact of such a creative interpretation on judicial independence cannot be over emphasized.

The second limb of the decision, namely the doctrine of legitimate expectation was incorporated to protect the interests of Additional Judges who took up the office in the background of the convention according to which in the majority of instances they were either re-appointed or regularized. In the absence of such a doctrine, the executive could altogether exclude the names of the persons who have served a term as Additional Judges for further appointment and

52 That is, the executive may decide whether he is to be given extension on the basis of whether he, as an Additional Judge used to cater the interests of the government. If he did not, the government may unilaterally decide not to give an extension to him.
53 Supra, chapter III n. 8.
54 Supra, chapter III n. 27.
thereby circumvent the requirement of consultation. For, consultation under Article 217(1) is only with reference to who is to be appointed from an already prepared list of persons. It does not include the concept of consultation as to who are to be included in the list to be considered for appointment. In other words, the executive can validly comply with the requirement of consultation even after excluding the names of such Additional Judges. It is likely that such a decision of the executive not to consider the name of a Judge for appointment may be influenced by the decisions rendered by him during his tenure as Additional Judge. Therefore, it is clear that to make ‘consultation’ under Article 217(1) as a check on the executive arbitrariness meaningful in instances of extension of Additional Judges, the concept of legitimate expectation becomes highly necessary. It therefore is unavoidable from the point of view of independence of judiciary.

The third limb of the holding of the Court is the right of Additional Judges to approach the judiciary against the breach of their legitimate expectation to be considered for further appointment. Conferment of the right to legitimate expectation without a right to enforce it would not be effective. Therefore, the Court held that if an Additional Judge was not considered for further extension or for regularisation, or if he was dropped on extraneous considerations he has got a right to approach the Court to get his legitimate expectation established.\(^5\) The right to legitimate expectation and the right to approach the judiciary go hand in hand and one without the other is barren.

\(^5\) Supra, n 40.
Incorporation of the requirement of consultation is to restrain the power of the President to appoint Judges. But the concepts of legitimate expectation and the right of Additional Judges to judicial review operate as delimitation on the very process of consultation by the President. Unlike 'consultation' with the judiciary, the concepts of legitimate expectation and the right of Additional Judges for judicial review are not found in the provisions of the Constitution. They are original contributions of the judiciary to give life to consultation and thereby to effectively check the executive arbitrariness in the matter of appointment of Judges, where there are qualified persons who served a term as Additional Judges. These concepts together therefore have an undeniable share in maintaining the security of tenure of temporary Judges and also independence of the judiciary.

Can we say that the holding in the Judges Case in the matter of temporary Judges upholds judicial independence to its fullest extent? Were there other leeways left to the Court to uphold it? It is true that the doctrine of legitimate expectation and the right to approach the Court were the outcome of the creative interpretation of the constitutional provisions by the Court. It is also true that they were introduced by the Court to protect independence of the judiciary. Certainly, they were thus meant for the purpose of securing judicial independence. However, it requires a thorough examination whether the concept helped to reach the desideratum of judicial independence.

An analysis of the doctrine of legitimate expectation reveals that it has two limbs. The first limb insists that Additional Judges have a right to be included in the panel of persons to be considered for appointment. The second limb on the
other hand proscribes the President to deny reappointment to Additional Judges on extraneous grounds. These two limbs of the doctrine are linked by the Court with the requirement that even in a case where Additional Judges are available for reappointment, there should be consultation under Article 217(1) on the ground that consultation alone may be insufficient to protect judicial independence.

It is true that the first limb of the doctrine restricts the discretion of the President to select the persons regarding whom consultation should be held. But such a restriction on the President did not mean that an Additional Judge would necessarily be re-appointed. Even in the wake of such a limitation on the discretion of the President, his power to decide whether an Additional Judge is to be re-appointed or not remains unaffected. It means that the first limb of the doctrine is insufficient to deter the President from deciding not to extend the term of Additional Judges on irrelevant grounds. Such grounds may include the independence of the judge to render decisions unpalatable to the executive. It is in such a context that the second limb of the doctrine, which stipulates that the President cannot deny appointment to Additional Judges on extraneous considerations, becomes relevant. It regulates the powers of the President to determine the eligibility of Judges to be re-appointed. But the pitfall of the decision lies in the inability of the Court in not identifying and demarcating those extraneous grounds. It was just mentioned by the Court that performance of an Additional Judge could not be a determinant of his eligibility to be re-appointed. The doctrine, in other words, leaves very wide discretion of the President to decide whether an Additional Judge is to be re-appointed or not. Further, the doctrine does not deal with the question whether the behaviour and integrity of an
Additional Judge during his judicial tenure is a valid criterion in determining his re-appointment. Non-extension of the term of an Additional Judge on such grounds would detrimentally affect their independence. In other words, even in the wake of the protection judicially incorporated, chances for arbitrary non-extension of judges cannot be totally ruled out. The stigma of such a situation is that such a power of the executive not to effect re-appointment of judges amounts to their removal, for which there are provisions in the Constitution. Those provisions are incorporated into the Constitution to assure security against any encroachment on judicial tenure from any quarters. For a meaningful tenure for Additional Judges, such a protection should be extended to them also. Non-extension on the basis of behaviour or integrity of Additional Judges during the initial judicial tenure by the executive means that they are denied the protection offered to other Judges appointed under Article 217(1) by the procedure for removal under Article 124 (4) and (5). Such a predicament has undesirable effects on judicial independence. Additional Judges, just like puisne Judges, are entitled to enjoy the “tenure on good behaviour” and the procedure for removal under Article 124 should be applicable for them also. Hence the question whether an Additional Judge has misbehaved or not should be determined according to the procedure under Article 124 read with Article 218. It on no account can be left to the discretion of the executive. As the doctrine of legitimate expectation does not rule out an arbitrary exclusion of Additional Judges, it cannot be said to be an effective sword for maintaining security of judicial tenure.

56 Article 124 (4) and (5) and Article 218.
57 For details, see infra, nn. 241-243.
58 Seervai, op. cit. at p 2308.
Further, the doctrine does not prohibit reconsideration of the matters under Article 217(1), which had been considered at the time of initial appointment as Additional Judges. Such reconsideration is not specifically prohibited by the Constitution. However, reconsideration of such matters is not constitutionally contemplated either. For, one is appointed Judge under Article 217(1) only if he satisfies the requirements thereunder. Such a test envisaged by the provision is to be undergone by the Judge only once, as otherwise, it would reduce the initial appointment as one on probation. The doctrine suffers from the defect that it facilitates such reconsideration. Moreover, the doctrine does not explain how there can be a comparison of the qualifications of Additional Judge who is available for reappointment with that of the outsiders in the panel for consideration for appointment who do not have judicial experience. Nor does the doctrine prohibit the President from appointing outsiders overriding Additional Judges on the ground of better qualifications. In other words, the doctrine does not object selection of outsiders even when Additional Judges with experience are available for appointment. But as some of the Judges in the Judges Case opined, dropping of Additional Judges may lead to their return to the bar or lower judiciary as the case may be, causing adverse results to independence of the judiciary. In the interests of judicial independence, when there is a question of selection of Judges from among the Additional Judges and outsiders, the former should be given a preference over the latter in view of their earlier experience at the Bench. Hence dropping of an Additional Judge without cogent reasons and appointing somebody

59 Ibid.
60 Supra, n. 39.
In short, the doctrine leaves independence of the higher judiciary at bay.

The right to approach the judiciary is conferred on Additional Judges against the possible violation of their legitimate expectation. The right is therefore available only if the name of an Additional Judge is not included in the panel of persons to be considered for appointment or if an Additional Judge is denied reappointment on extraneous grounds. Hence non-extension of the term of an Additional Judge ipso facto would not enable him to invoke the right. In short, the scope of the right to enforce the expectation commensurates with the scope of the doctrine of legitimate expectation, which is limited. Apart from that judicial review as a remedy suffers from the systemic lacunae like huge expenditure and time lag, which may render it an inadequate mechanism for protecting so important a feature as independence of the judiciary. Insurmountable expenditure and undue delay in getting justice may deter at least some of the Judges from approaching the Court for establishing their legitimate expectation in cases where it is denied. So even if judicial review is effective in protecting the legitimate expectation of Judges who may approach the Court, it is doubtful whether it is an efficient armoury to protect judicial independence as such. Hence, leaning heavily on judicial review alone for protecting an important postulate of our legal system like judicial independence may not be a wise step. The above discussion makes it clear that the doctrine of legitimate expectation coupled with the right to judicial review does not uphold judicial independence in the desired manner. It is

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61 Supra, n. 31 at p. 816.
62 Seervai, op.cit. at pp. 2273-2274.
therefore necessary to develop the doctrine further. It should be developed to confer a full-fledged right on Additional Judges to be re-appointed. Such a development of the doctrine enables the eligible Additional Judges to be automatically re-appointed and does away with the requirement of further consultation under Article 217(1). Besides, it nurtures a circumstance in which Additional Judges would be able to discharge their judicial functions fearlessly. It creates a climate in which they can behave without any fear of non-extension of tenure. Such a step would undoubtedly be one in the line of securing judicial independence.

If such a proposition is accepted, a question arises. What is to be done if there is an allegation that during his initial tenure an Additional Judge had misbehaved? Is he entitled to be re-appointed? The power to deny extension by the executive on the ground of alleged misbehaviour may lead to the removal of a judge who has not really misbehaved. Such a situation affects independence of the judiciary. Compliance with the constitutionally contemplated procedure for removal of Judges on the other hand upholds independence of the Judges and it

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64 Even in the case of re-appointment or regularisation of an Additional Judge, the process of consultation contemplated by Article 217(1) could be followed without affecting independence of the judiciary. In the reappointment of an Additional Judge, the scope of consultation could be limited to the question whether the emergencies mentioned in Article 224(1) prevail in the High Court warranting appointment of an Additional Judge to the High Court. Similarly, in the regularisation, the only question over which consultation is to be carried out is whether there exists a requirement of permanent Judge in the High Court. In both the cases, the scope of consultation could be limited to the question of requirement of a Judge in the High Court and it does not extend to consultation contemplated in Article 217(1) as that was already done at the time of initial appointment. The advantage of such a scheme is that the requirement of consultation under Article 217(1) stands satisfied without adversely affecting the interests of the Judges and therefore that of the independence of the judiciary.
enables removal of a Judge who is found to have misbehaved. Avoidance of an incompetent Judge, no doubt, is in the public interest. But independence of the judiciary is the highest public interest. Hence removal of Additional Judges should also only be in accordance with the procedure contemplated by Article 124(4) and (5). There may be a circumstance in which there may not be enough time to initiate or complete proceedings under Article 124 against an Additional Judge within his tenure. Even in such a case he should not be denied reappointment by the procedure of consultation since it runs counter to judicial independence. In such a situation, the Additional Judge should be re-appointed and be removed only after a finding that he had misbehaved. Such a course may appear to be roundabout, protracted or absurd, but it is inevitable to protect judicial independence.

Be that as it may. Incorporation of the doctrine of legitimate expectation is certainly a signal to the opening up of a new era. It establishes that the judiciary

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65 Justice Tulzapurkar observed, "Not to have a corrupt Judge or a Judge who has misbehaved is unquestionably in public interest but at the same time preserving judicial independence is of the highest public interest." Id. at p. 520. See also Seervai, op. cit., at p. 2274.

66 Justice Gupta and Justice Tulzapurkar in their minority judgement opined that such a procedure was necessary to uphold judicial independence. Justice Gupta observed, "...the only reasonable course open, which does not undermine independence of the judiciary, was to appoint the Judge for another term having a rational nexus with the volume of arrears pending in the High Court and then proceed with an inquiry into the allegations and remove the Judge if the allegations were found true, in accordance with the procedure laid down in clauses (4) and (5) of Article 124 read with Article 218." (Supra, n. 31 at p. 348.)

Justice Tulzapurkar was more emphatic, "The other alternative, namely, to continue him as an Additional Judge for another term or to make him permanent if a vacancy is available and then take action for his removal under the regular process indicated in Article 124(4) and (5) read with Article 218...may sound absurd but must be held to be inevitable if judicial independence, a cardinal faith of our Constitution, is to be preserved and safeguarded." (at p. 520).
was not willing to leave the issue of reappointment of Additional Judges to the province of executive discretion. The doctrine equated the issue of reappointment Additional Judges with judicial independence. However, an appraisal of the doctrine as evolved by the Court reveals that it requires further elaboration for ensuring independence of the judiciary. The deficiencies in the doctrine discussed above are alive even after the decision in the *S.C. Advocates*, as the issue was not dealt within that case.

The concepts as incorporated or identified by the Court on the power of the President to appoint Additional Judges viz. consultation with the Chief Justice of India, legitimate expectation and the right to judicial review are procedural in nature. Apart from them, the Constitution also contains some substantive limitations on the power of the executive to appoint Additional Judges. The Constitution stipulates that Additional Judges are to be appointed for disposing "temporary increase in business of High Court" or "the pending arrears" of cases. In other words, Additional Judges could be appointed for meeting certain exigencies and not as a rule. Such contingencies operate as limitations on the power of the President to appoint temporary Judges.

A basic question arises here. What is meant by temporary increase in the business of the High Court and pending arrears of cases? Ascertainment of their meaning is very crucial for determining the constitutionality of exercise of the

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68 Article 224(1), *supra*, n. 23.
power by the President. The question whether the increase in or arrears of cases in a court can be considered as one under Article 224(1) depends upon two criteria. Has the number of cases filed or pending in the files of the court increased in such a proportion disabling the existing permanent judges to dispose them of? Secondly, is it likely that by appointing Additional Judges, the increase in the business or arrears could be disposed of? If answers to both the questions are in the affirmative, the situation could be treated as one falling within Article 224(1) warranting appointment of Additional Judges. If, on the other hand, answer to either or both the questions is in the negative, appointment of Additional Judges would not be justified. For, if the answer to the first question is in the negative, appointment of Additional Judges would be redundant. If answer to the latter is in the negative, it implies that the increase in the cases is so unwieldy that it could not be disposed of by appointing Additional Judges and the circumstance calls for appointment of more permanent Judges. However, the Court has not dealt with these issues. A proper construction of these expressions certainly would have been more effective as restraints on the executive in appointing Additional Judges than the procedural limitations.

It is clear from the above discussion that the President would be justified in appointing Additional Judges only if the existing number (not the existing) of permanent judges in a High Court is not sufficient to dispose of the pending cases. In other words, the President should be satisfied that the High Court is not in requirement of permanent judges before appointing Additional Judges. It means two things. Before appointing Additional Judges, existing vacancies of permanent judges should be filled up by the President. It also means that before appointing
Additional Judges, the President should be satisfied that the prevailing circumstances in the High Court do not warrant appointment of permanent judges under Article 216. That provision imposes a duty on the President to periodically review the strength of judges in High Courts and if found necessary to increase the same. The Court held that it would be improper for the President to appoint Additional Judges while the posts of permanent judges remain vacant.

For, vacancy in the post of permanent judge implies that the existing judges are sufficient for disposing the cases pending in the files of the Court. The decision certainly is one rendered in view of the damaging consequences that may follow if the President is left with the power to appoint Additional Judges irrespective of the presence of permanent vacancies.

That leads to a further question as to what is to be done if the President wrongly invokes his power to appoint Additional Judges. Can the Court pass an order quashing appointments of Additional Judges unconstitutional on the ground that such appointments are made while the posts of permanent judges are left unfilled? The Court has not dealt with such an issue. The Court however held that Additional Judges cannot be treated as permanent ones. In the absence of such a judicial control, wrong appointments of Additional Judges by the President would be left unremedied. The Judges Case, to the extent to which it denied effective

70 Article 216 reads, “Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint.”

71 Supra, n. 31 per Bhagawati J. at p. 238, Tulzapurkar J. at p. 530, Desai J. at pp. 626-627 and Venkitaramiah J. at pp. 805-806.

72 Id. per Tulzapurkar J at p. 530, Desai J. at p. 629, Pathak J. at p. 718 and Venkitaramiah J. at p. 810.
remedy in this respect has not been creative in upholding the independence of the judiciary.

The second question is whether the President can appoint Additional Judges if the existing number of permanent judges could not dispose of the increase of cases? Has he got a duty to see whether the High Court needs increase of permanent judges? In such a context, what the President has to do is to review the strength of judges in the High Court and increase the same. Instead of increasing the strength of Judges, can he appoint Additional Judges? The Court has not paid serious attention to the question whether the President could appoint Additional Judges instead of increasing the number of permanent judges after reviewing their strength under Article 216. It is beyond doubt that invocation of Article 224 instead of Article 216 would be violative of the concept of judicial independence. Can there be a writ against the Union directing it to discharge the constitutionally mandated function? Can appointment of Additional Judges in such a context be quashed being violative of the Constitution?

The Court in the Judges Case held that in such a case, a writ of mandamus could not be issued against the Union of India directing it to exercise its powers under Article 216. The result of the holding of the Court is that if the President appoints Additional Judges even when from the prevailing circumstances he could have inferred the requirement of increased number of permanent Judges, nothing

73 Id per Bhagawati J. at p. 246; Tulzapurkar J. at p. 530; Pathak J. at pp. 714-715 and Venkitaramiah J. at p. 804.
74 Id per Bhagawati J. at p. 225; Tulzapurkar J. at p. 530; Desai J. at p. 617 and Pathak J. at p. 707. Justice Venkitaramiah J. contra at p. 916.
could be done through judicial proceedings. It is tantamount to a situation wherein the President is left with an uncontrolled discretion to appoint Additional Judges, as he likes. Appointment of Additional Judges in the place of permanent judges runs counter to the concept of independence of the judiciary and such a freedom on the part of the President is bad. Though the Judges supplied different reasons for not issuing the writ of mandamus, they did not consider the undesirable impact such a decision will have on independence of judiciary. In view of the independence of judiciary, the question whether the judiciary has the power to direct the Union of India to review the strength of the judges is to be answered in the affirmative. So the holding of the Court that mandamus could not be issued against the Union of India to review the number of Judges is wrong.

The holding of the Court is open to objections on other grounds also. In a democratic state, courts enjoy the ultimate authority to restrain the exercise of absolute and arbitrary powers by the administrative authorities. Such authorities are not supposed to exercise their power in an arbitrary or absolute manner nor can they fail to discharge their public duties. Public authorities cannot exercise their discretion in an unreasonable manner. Without judicial supervision, it is

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75 Justice Bhagawati held that fixation of judge strength was purely an executive function and that there were no judicially manageable standards for guiding the discretion of the President in this respect. He further reasoned that there might be many constraints deterring the government from increasing the number of Judges (id. at pp.225-226). Justice Tulzapurkar opined that appointment of Judges was an executive function and it might not be proper for the judiciary to usurp that function (at p 530). Justice Desai observed that non-appointment of judges makes the President answerable to the Parliament and not to the courts (at p. 617), while Justice Pathak reasoned that it was for the President to determine the number of Judges and not for the courts (at p. 718). However, Justice Venkitaramiah was of the view that a writ of mandamus could be issued to the Union for the purpose on the ground that it was a power coupled with a duty and not merely a political function (at pp. 915-916).

likely that there may be excesses by such administrative authorities. That is why the judiciary enjoys ultimate authority to restrain exercise of administrative authorities. It encompasses both the power to check abuse of power and non-performance of public duties by public authorities. It is keeping this in mind that in India jurisdiction to issue writs has been conferred on the Supreme Court and High Courts. The writ jurisdiction of the Supreme Court and High Courts empowers them to exercise judicial supervision over administrative authorities including the executive. The nature of the power under Article 216 to review the strength of permanent Judges of High Court and change their number is a duty cast on the President. If the strength of the permanent judges is not periodically reviewed and required changes effected that is a failure of the government to exercise a constitutional duty. Compliance with such a constitutional or statutory duty, may be required by issuing a writ of mandamus. Though the Court cannot direct the specific manner in which the duty is to be discharged, it can direct the government to exercise its powers under Article 216 to review the strength of permanent Judges of High Court and change their number.


Id. at p. 529.

Articles 32, 226 and 227 of the Constitution of India.

See, supra, n 31 at pp. 915 (per Venkitaramiah J.).

"If it is the constitutional or statutory duty of a Governor to exercise his discretion with respect to a certain matter, he may be required to do so, but, of course, the writ does not lie to direct the manner in which his discretion shall be exercised." American Jurisprudence, 2d Vol 52 paragraph 141 quoted with approval by Venkitaramiah J. (at p. 912.)

Such a restriction means that the Court could not determine the number of judges to be increased. However, there was a view in the Constituent Assembly that the President should determine the number of judges on the advice of the Chief Justice of India or the Supreme Court. See, C.A.D. Vol VIII p. 657.
Judges. Such a direction is in no way beyond the judicially manageable standards. Small wonder that after a decade the holding came for judicial consideration.

In the *S.C. Advocates*, the Court reconsidered its holding in the *Judges Case* that the powers of the President to review the strength of Judges of High Courts was not amenable to the review by the judiciary. The question that was posed before the Court was whether the power of the President to review the strength of permanent judges was amenable to judicial review. The Court held that the function of the President to re-fix the strength of judges of High Courts under Article 216 was amenable to judicial review. The consequence of such a holding is that if the President decides not to review the strength of permanent judges in a High Court or not to increase their strength, mandamus could be issued. As a result of the decision, he may not be able to appoint Additional Judges without reviewing the strength of the permanent judges and increasing the same in necessary cases. Though the Judges did not gear their decision to judicial independence, such a holding is certain to have favourable results on

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84 Supreme Court Advocates-on-Record v. Union of India, (1993) 4 S.C.C. 441.
85 Id. per Justice Verma (for Dayal, Ray, Anand Barucha JJ and for himself) at p. 709; Pandian J. at pp. 584; Kuldip Singh J. at p. 675 and Ahmadi J. at p. 639.
86 Some of the Judges held so on the ground that review and re-fixation of the strength of Judges was necessary to ensure speedy disposal of cases to ‘secure that the operation of the legal system promotes Judges’ which is a directive principle, fundamental in the governance of our country. Non-increase in the number of Judges may also affect the right of the people to have speedy trial, which is a requirement under Article 21. Therefore failure on the part of the President to discharge the function under Article 216 for re-fixing the same would call for issuance of writ of mandamus. (Id. per Verma J. at pp. 708-709). Justice Pandian held that the duty cast on the President under Article 216 was a mandatory obligation failure to perform which will result in negation of rule of law. Accordingly, such non-discharge of such duty will call for issuance of writ (at p. 584) While Justice Ahmadi held that if there was a willful and deliberate failure on the part of the executive to perform its duty under Article 216, a writ to direct the executive to perform its part could be issued (at pp. 638-639).
independence of judiciary as executive would not enjoy uncontrolled discretion to appoint Additional Judges. To that extent the decision upholds judicial independence. The Court further held that in taking a decision as to whether the number of Judges should be increased the opinion of the Chief Justice of India should carry greatest weight. 87 There also the discretion of the President to take the decision was taken away. Now, he has to take a decision in accordance with the opinion of the Chief Justice of India. By such a holding, the power of the President to appoint Additional Judges has been streamlined as he can venture to invoke Article 224 only if the Chief Justice of India opines that the existing conditions do not warrant appointment of permanent judges. In short, the power of the President to appoint Additional Judges under Article 224 was conditioned by the exercise of his power under Article 216.

Will such a constitutional position lead to autocracy of the Chief Justice of India in matters of appointment Additional Judges? The possibility of wielding autocratic power by the Chief Justice of India in appointing Additional Judges is very distant. While tendering opinion for appointing judges under Article 217(1), the Chief Justice of India is not expected to project his personal view. He has to consult his colleagues. If the recommendation of the Chief Justice of India is not acceptable to the President, he can require the former to reconsider the suggestion. All these restraints are applicable in the matter of appointment of Additional Judges.

87 Id per Verma J et al. at p 709. They observed, "In making the review of the Judge-strength in a High Court, the President must attach great weight to the opinion of the Chief Justice of that High Court and the Chief Justice of India and if the Chief Justice of India so recommends, the exercise must be performed without due despatch."
Judges also in view of the holding appointment of Additional Judges should also be in compliance with the procedure envisaged for appointing puisne judges.

As a result of the holdings of the Court in the Judges Case and the S.C. Advocates, the issue of appointment of Additional Judges is more or less settled. Now the President cannot act arbitrarily in the matter. He cannot appoint such temporary judges without filling up the existing vacancies of permanent judges. Nor can he appoint Additional Judges when the existing circumstances warrant increase in the number of permanent judges. In short, his power in this respect has been effectively circumscribed by the creative interpretation of the provisions in view of the concept of judicial independence.

2. TRANSFER OF JUDGES

The Constitution of India contains provision for transferring Judges from one High Court to another High Court. It stipulates that the President may transfer High Court Judges after consultation with the Chief Justice of India. The provision does not elaborate the mode and conditions of exercising that power. Though prima facie it may appear that this provision is innocuous and has no impact on judicial independence, it is yet another area that is bound to have a repercussion on independence of the judiciary. The makers of the Constitution might have presumed that the power being conferred on the high constitutional authority, the President would be exercised with prudence and on rare occasions.

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88 Article 222(1). It reads: “The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court”
But history tells us that this may not always be the case. Transfer of Judges during the period of emergency is an instance where the presumption appears to have been not kept. There were allegations that certain transfers were influenced by political considerations and therefore threatened the very independence of the Judges. Such incidents proved that Article 222(1) has the potential in the hands of the executive even to shake so cardinal a pillar of our Constitution like judicial independence.

Transfer being generally a condition of service of government servants, there cannot normally be a right not to be transferred in their case. But service of High Court Judges is different from that of others. There is no master-servant relation between the government and the Judges of the higher judiciary. They, on the other hand, are on par with the executive and legislature. Hence questions relating to transfer of High Court Judges cannot be considered in the lines of other government servants. Their service enabling them to decide cases without fear or favour also calls for independence. Hence conditions of their service including change of the place of the service should only be of such a nature as not to pose any threat to their power to take independent decisions. Transfer should never be allowed to be used as a weapon to cow down the spirit of independent and impartial Judges. Insistence on such a condition is important as otherwise the executive, with whom lies the power to transfer judges will be able to exercise it

89 During emergency a list of 56 Judges to be transferred was prepared. See, Seervai, op cit. at p. 2264.

90 All India Judges Association v. Union of India, (1993) 4 S.C.C. 288. The Court held, "The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive." (at p. 295).
indiscriminately. And as in the case of non-extension of the term of additional Judges, the possibility of exercising the power to transfer on political grounds and political considerations will be a live threat to independent judges. The fact that the executive is the biggest litigant makes the issue more complex. Is it not then necessary to define and delimit the power of the President to transfer High Court Judges to protect judicial independence? Though the answer to this question should be in the affirmative the safeguards for preventing indiscriminate transfers are not explicitly stated in the constitutional provisions. Hence such delimitation of the executive powers has to be read into the provision of the Constitution. The Supreme Court was faced with this question in certain cases in which transfer of High Court Judges was challenged before it.

*Union of India v. Sankalchand Seth*91 (Seth, for short) was the first case where transfer of High Court Judges was challenged before the Supreme Court. The Court by majority held that the power to transfer High Court Judges was vested with the President and was executive in nature.92 If it is an executive power of the President is it not to be exercised solely in accordance with the

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91 A.I.R. 1977 S.C. 2328. It was an appeal against the decision of the High Court of Gujarat. There, the respondent, the then Chief Justice of Gujarat High Court who had just nine months to retire was transferred to the High Court of Andra Pradesh. He challenged it before the Gujarat High Court on grounds *inter alia*, that the transfer was without his consent which according to him was a condition precedent for transferring a High Court Judge under Article 222(1), that it was contrary to public interest and that it was without effective consultation with the Chief Justice of India. The petition filed by him before the High Court was allowed. The Union of India came in appeal to the Supreme Court

92 *Id. per* Chandrachud J at pp.2339 - 2340; Bhagawathi J 2360 and Untwalia J at p. 2387.
advice of the Council of Ministers? The view of the Court is that it is not. The
Court was of unanimous opinion that the President should not be left free to
exercise the power in an indiscriminate manner. The power should not be used
arbitrarily to toe the Judges to the lines of executive. Nor should it be used as a
penal measure. The Court clarified that Judges should be transferred only if it
serves public interest and that too only after consulting the Chief Justice of
India. However, the Court held that consent of the Judge concerned was not a
precondition for transfer. The decision of the Seth's Case was reiterated in the
Judges Case.

Holding of the Court to import restrictions on the executive power to
transfer judges is to be analysed in the background of the need to preserve judicial

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93 Article 74(1). It reads: “There shall be a Council of Ministers with the Prime Minister
at the head to aid and advice the President who shall, in the exercise of his functions, act
in accordance with such advice: ...” See also Samsher Singh v. Union of India,
94 Id. per Chandrachud J. at pp.2339 -2340
95 Id. per Chandrachud J. at p.2329; Bhagawathi J. p.2352 and Krishna Iyer J. (for Fazal
Ali J. and for himself) at p. 2383
96 Id. Per Chandrachud J. at p. 2339; Bhagawathi J. at p. 2352 ; Krishna Iyer at p. 2383
and Untwalia J. at p. 2388
97 Id. per Chandarachud J. (at p. 2346); Bhagawati J at p. 2366; Krishna Iyer J. at p. 2370
and Untwalia J. at p. 2387.
98 Id. Per Chandrachud J. at P. 2341; Krishna Iyer (for Fazal Ali J. and himself) at p.
2381. But Bhagawathi J. at p. 2362 and Untwalia J. at p. 2393 who constituted the
minority expressed the view that consent of the Judges was a precondition of transfer.
99 1981 Supp. S. C.C. 87. It was held that Judges should not be transferred as a punitive
measure; [per Bhagawathi J. (at p. 334); Gupta J. (at p. 358); Tulzapurkar J. (at. p. 535);
Pathak J. (at p. 736) and Venkitaramaiah J. (at p. 840)], or to toe them to the executive
line ( Bhagawathi J. (at p. 334). The Court unanimously agreed that the power to transfer
Judges should be exercised by the President only in public interest, [Bhagawathi J. (at p.
337), Gupta J. (at. p.358), Fazal Ali J. (at. p. 369); Tulzapurkar J. (at p.535); Desai J. (at
p. 670) and Pathak J. (at p. 735.)] after consultation with the Chief Justice of India
[Bhagawathi J. (at p. 334); Fazal Ali J. (at.p.483), Tulzapurkar J. (at. p. 533); Desai J. (at
p. 659) and Pathak J. (at p. 733)].
independence. Restriction on transfer of Judges undoubtedly protects independence of the judiciary. By such a holding the President is checked from transferring Judges for passing judgement unpalatable to the executive. In such circumstances judges are relieved from the feeling that they are under a threat of transfer if they displease the executive by their decisions. The decision thus avoids a situation enabling the executive to encroach upon the independence of judges to decide cases.

A penal transfer is one effected as punishment. The only constitutionally contemplated punishment for judges of the higher judiciary is their removal according to the procedure under article 124(4) and (5).\textsuperscript{100} Therefore there cannot be a transfer in lieu of such removal. The holding that penal transfers are outside the scope of Article 222(1) is justified on many grounds. If a Judge is one who deserves punishment, his retention in another High Court is as adverse to the image of the judiciary as his retention in the same High Court. Transfer is not therefore a remedy to diseases like corruption or misbehaviour, which calls for penal actions. Transfers of such judges in such instances would only diminish the confidence of the public in the institution. Conferment of power on the executive to transfer Judges as a penal measure may lead to other consequences also. It may encourage the executive to act discriminatively. It may for instance transfer only one judge who misbehaved while it may take steps to remove another from office. Acceptance of such penal transfers may nurture an atmosphere enabling the executive to find fault with Judges whom it dislikes and transfer them.

\textsuperscript{100} Infrq nn. 166-167.
Further, when penal transfers exist, people will be inclined to look at every transferred Judge with suspicion. Viewed from these angles, it is clear that the power of the President to transfer judges as a penal measure is detrimental to judicial independence. Hence the holding of the Court that such transfers are constitutionally anathematic emerges from the need to protect judicial independence.

(a) Public Interest

The activistic role of the Court in this respect extended further to the introduction of the concept of the public interest as a further restriction on the power to transfer of Judges. This would mean that even if transfer is not penal, and even if it is not made due to unpalatable decisions, a transfer is not justified unless it is in the public interest. The President has to be satisfied that a transfer is in accordance with the demands of public interest. In other words, he is prohibited from transferring judges if public interest is indifferent to such a transfer. Incorporation of public interest as a restriction on transfer is a further control on arbitrary or penal transfers.

What is the concept of 'public interest' in relation to transfer of Judges? Does the requirement of 'public interest' effectively check the arbitrary exercise of the power? Does it help maintain judicial independence? The Judges in the Seth's Case and the Judges Case have tried to explain the concept of public interest not through a descriptive definition but through certain illustrations. Transfers can be said to be in public interest, they held, if made to serve national
integration, or to withdraw a judge from the circle of his favourites, or on requirement of a better talent or expert in specific branch of law in a High Court, or on demand of a person who is free from local politics. The concept thus has got varying connotations and may enable the executive to propose transfer of judges on extraneous grounds, which may be characterised as apparently in public interest on these and other grounds.

From the observations of the Judges it is very clear that they did not have a concrete and well-defined idea of public interest. They have only a very vague idea. The concept of public interest as envisaged by them consisted of fragmentary ideas like national integration, requirement of a judge who is free from local politics and so forth. However such a concept may not be able to operate as a shield of judicial independence against executive arbitrariness in different cases of transfers. In other words, even when a transfer is effected in accordance with the concept of public interest as contemplated by the Judges, it may be quite against the spirit of judicial independence. The result of the holding is that a transfer would be constitutionally valid even when it poses a threat to independent judges. To curb this arbitrariness or malafides of the executive, the Court should have developed a concept of public interest in which independence of

101 *Supra* n. 91. per Chandrachud J. at p. 2344 and Untwalia J. at p. 2388.
102 *Id.* at p. 2344. (per Chandrachud J.).
103 *Id.* at p. 2388. (per Untwalia J.).
104 This view projected by Ambedkar in the constituent Assembly was quoted by Tulzapurkar J. with approval in *supra*, n. 99 at p. 537.
105 Justice Desai observes, “The public interest like Public Policy it is an unruly horse” *supra* n. 99 at p. 670. Seervai observes that there is no yard stick by which public interest can be measure. *Seervai op cit* at pp. 2389, 2362.
the judiciary forms essential element. In other words the other elements constituting public interest should be given heed to only in so far as they do not contradict independence of the judiciary. For, as far as judiciary is concerned its own independence is the highest public interest.106

(b) Consultation

In such a context the question arises. How can it be determined that a transfer will be effected only in tune with the requirement of independence of the judiciary? Elucidation of the requirement of consultation with the Chief Justice of India as a restraint on the President gains relevance here. In the Seth's Case107 the Court held that consultation with the Chief Justice of India should not be a formal one. The Chief Justice of India should ascertain whether the Judge has any personal difficulty in being transferred or whether there is any humanitarian ground preventing the transfer.108 The President should supply all relevant data to the Chief Justice of India and the Chief Justice should collect all necessary information form the President.109 The opinion of the Chief Justice of India should be formulated on the basis of the information so made available.110 In other words, the Court held that consultation should be real, substantial and effective based on full and proper materials.111 This holding in Seth's Case was

106 Seervai, op.cit. at p.2395
107 Supra, n.91.
108 Id, per Krishna Iyer at p. 2384.
109 Ibid.
110 Id. at pp. 2347 & 2377-2380
111 Id. per Krishna Iyer at p. 2384
reaffirmed in the Judges Case. These cases elevated the whole process of transfer of Judges to a plane where transfer without meaningful consultation with the Chief Justice of India would be invalid and unconstitutional. The President would no more be able to exercise his power arbitrarily after a mere formal consultation. Such a holding is definitely conducive to judicial independence since the Chief Justice India would alone be able to assess the impact of transfer on the independence of the Judges in particular and on the judiciary in general. But the holding of the Court that consultation with the Chief Justice of India does not mean his concurrence creates a situation that the opinion of the Chief Justice of India was not binding on the President. It means that even after consulting the Chief Justice of India the President would be able to take a decision which goes against the opinion of the Chief Justice of India. Such a holding paves a way for the exercise of the power of the President in his own way and he would be able to select the person to be transferred and the High Court to which he is to be transferred. Conferment of such a power on the executive enabling it to ignore the opinion of Chief Justice of India will not promote judicial independence. The need for transfer, the person to be transferred and the place to which the judges to be transferred are matters known to the head of the judiciary than to the

112 Supra, n. 99.

113 Justice Chandrachud observed, "After, consultation with the Chief Justice of India, it is open to President to arrive at a proper decision of the question whether a judge should be transferred to another High Court because, what the Constitution requires is consultation with the Chief Justice, not his concurrence with the proposed transfer. Supra, n. 91 at p. 2348 Justice Krishna Iyer expressed the view thus, "... consultation is different from consentiency. They may discuss but in a disagree, they may confer but may not concur" (at p. 2368). Justice Untwalia held "The Government, however, ... is not bound to accept and act upon the advice of the Chief Justice. It may differ from him and for cogent reasons may take a contrary view (at p. 2387).
executive. The question whether a transfer is in the interest of judicial independence can be assessed by judiciary and not by executive. Therefore it was inappropriate for the Court to confer the President with the power to brush aside the opinion of the Chief Justice of India.

The view in the Seth's Case and its confirmation in the Judges Case, conferring discretion on the executive to ignore the opinion of the Chief Justice of India in transferring High Court Judges was modified and altered later in the S.C. Advocates Case which created the new law in his respect. The Court held that as in the matter of appointment of judges, transfer also should be done only with the concurrence of the Chief Justice of India. The proposal for transfer, the Court held, was to be initiated by the Chief Justice of India. It therefore makes a substantial change from the holding in the Judges Case where it was held that the proposal for transferring a judge could be initiated either by the President or the Chief Justice of India. The Court thus shifted the emphasis of consultation.

Earlier in State of Assam v. Ranga Mohammed, A.I.R. 1967 S.C 903, where the issue was the transfer of the Judge of the lower judiciary, the Supreme Court had held that the view of the High Court would be binding on the Governor. For a detailed discussion of the case see infra Chapter IV n. 65.

International norms require that the ultimate power to transfer Judges should reside in the Judiciary itself. See the Code of Minimum Standards of the Independence of the Judiciary adopted by the plenary session of the International Bar Association Article 12 reads "The power to transfer a judge form one court to another shall be vested in a judicial authority ...".

The Court reaffirmed that transfer of Judges could only be on the ground of public interest. (Id. at pp. 585, 632, 675 & 700), and the transfers could not be restricted on the basis of consent of Judges (id. at pp. 585, 675 & 700), but totally changed the concept of consultation under Article 222(1).

"The provision requiring exercise of this power by the President only after consultation with the Chief Justice of India, and the absence of the requirement of consultation with any other functionary, is clearly indicative of the determinative nature, not mere primacy, of the Chief Justice of India opinion in this matter." (Id. at pp 699-700)
from the President to the Chief Justice of India. In effect, the procedure was changed from one of “President consulting the Chief Justice of India”, into one of the “Chief Justice of India consulting the President”. The process of consultation was reduced to an opportunity to the President to bring matters to the notice of the Chief Justice of India for a consideration as to whether his view need be altered, the final word being always with the Chief Justice of India and not the President. The whole process of transfer therefore revolves around the Chief Justice of India. The meaning rendered to ‘consultation’ in the S.C. Advocates checked fully the possibility of arbitrary transfer of Judges by the President in two ways. The President cannot transfer Judges contrary to the opinion of the Chief Justice of India. Nor can he refuse to transfer a Judge contrary to the view of the Chief Justice of India. While in the Seth’s Case and the Judges Case the emphasis was on the concept of public interest and the process of consultation was only a procedure for ensuring that transfers should be effected only in public interest, in the S.C. Advocates the emphasis has been shifted to the very process of consultation in the interest of preserving independence of judiciary.

The holding of the Court in the S.C. Advocates undoubtedly is an instance of judicial creation through progressive interpretation of the law. The declaration of law that initiation of the proposal for and the decision of transfer rest with the

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119 Justice J.S. Verma observed “Apart form the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground including, the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safe guard and protection against any arbitrariness or bias, as well as any erosion of independence of judiciary.” (at p. 708).
Chief Justice of India has thus developed the dimensions of transfer jurisprudence and has furthered the cause of judicial independence.

A question may be raised in this context. Is it proper to confer such absolute powers on the Chief Justice of India? Is the Chief Justice of India infallible? Will he also not have, as a human being, his prides and prejudices? So will not conferment of such a power on the Chief Justice of India lead to arbitrary transfer of Judges? Such a possibility cannot be totally ruled out if an absolute power is conferred without some safe guard. Conferment of an absolute power on the Chief Justice of India does not seem to be a solution for executive arbitrariness. However the Court in the S.C. Advocates has taken care to avoid substitution of judicial arbitrariness for the executive ones by laying down safeguards in the following lines:

"In the formation of his opinion, the Chief Justice of India, in the case of transfer of a Judge other than the Chief Justice, is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be significant in that case, as well as the views of at least one other senior Chief Justice of a High Court, or any other person whose views are considered relevant by the Chief Justice of India."

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120 He is also a man with human failings. That was the chief reason for the framers of the Constitution to deny the Chief Justice of India the power to veto the proposal for appointment of judges. See C.A.D Vol. VIII at p. 258.

121 Id. at p. 706 (per J S Verma J, speaking for the Court).
Questions regarding formation of opinion by the Chief Justice of India for transferring Judges again came up before the Court in *Special Reference, 1998*. It was held that before forming an opinion, the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the Judge was to be transferred and Chief Justice of the High Court to which he is sought to be transferred. He should also get the views of one or two Judges of the Supreme Court who are able to provide materials to decide whether the proposed transfer should take place. These views should be considered by the Chief Justice of India and the four senior most Judges of the Supreme Court. These views and the views of those of each of the four Judges should be communicated to the Government of India along with the proposal for transfer. The government is not bound by the opinion unless the opinion is formed in the above said manner. These decisions give a new dimension to the concept of consultation and they try to check arbitrariness of both the President and the Chief Justice of India in transferring judges. As a result of these decisions, consultation under Article 222 is not limited to one between the President and the Chief Justice of India alone. It has been developed as one between the Chief Justice of India and judges of the Supreme Court and High Courts. Just as consultation with the Chief Justice of India is the safeguard to check the arbitrariness on the part of the President, consultation between the Chief Justice of India and other judges operates as a safeguard to check arbitrariness on the part of the Chief Justice of India in effecting transfer of judges. In short, *S.C. Advocates Case* and *Special Reference*, have developed 'consultation' as an instrument for protecting judicial independence. Time alone
can prove how far these restraints will check arbitrariness of the President and the Chief Justice of India.

(c) Judicial Review

Though in these cases, the Court interpreted the powers of the President to transfer Judges under Article 222(1) very restrictively and as conditional, there is no assurance that Judges would be transferred only in compliance with those conditions. The President, for instance, may transfer judges without satisfying himself that it subserved public interest or without consulting the Chief Justice of India. Transfers may also be effected on certain extraneous conditions. In other words, incorporation of public interest and consultation 

_upso facto_ does not guarantee exclusion of arbitrary power of the President. In such a context, examination of transfers by the judiciary acquires high relevance. Though Article 222 does not explicitly mention judicial review of transfers, in the Seth's Case, the Court recognized such a right for the transferred judge to challenge the validity of transfer.  

In the Judges Case also the Court has taken judicial review of transfer for granted. Such an interpretation of the provision by which judicial review was read into the constitutional scheme with a view to securing judicial independence is another instance of creativity in the transfer issue.

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123 In the Seth's Case, the Court had no occasion to hold specifically that Judges had the right to approach the Court. But such a right is implicitly recognized as the Court allowed the petition.

124 In the Judges Case also the Court did not doubt the right of judges to challenge this transfer under Article 222(1). But, Justice Bhagawati (at p.336), Desai, J. (at p. 670), Pathak J. (at p. 738) and Venkitaramiah J. (at p. 836) have particularly mentioned that the power of the President to transfer judges under Article 222(1) is subject to judicial review.
However, in the *S.C. Advocates* the Court took a quite different view of the matter. The Court held that transfers would be judicially reviewed only if they were effected without consulting the Chief Justice of India and in accordance with his recommendations.\(^{125}\) It means that the judiciary would not examine the validity of transfers only on the ground that they were bereft of public interest or that they were effected on certain extraneous considerations. In other words, a transfer effected after consultation with the Chief Justice of India will not be reviewed by the judiciary even if it violated the constitutional norms. It implies that the recommendations of the Chief Justice of India were identified as an alternative to judicial review. The Court seems to have believed that the Chief Justice of India would recommend transfer of Judges only in public interest. Such a holding is based on two grounds. 1) The Chief Justice of India recommends transfers only after consulting other Judges\(^{126}\) and also that in recommending transfers, he would not be influenced by extraneous considerations and 2) that such a recommendation carried with it a judicial element.\(^{127}\) As a result of the decision, all cases of transfers effected in accordance with the recommendation of the Chief Justice of India would be outside the purview of judicial review. This holding was reconsidered by the Court in *K. Ashok Reddy v. Union of India*.\(^{128}\) After analysing the earlier decisions, the Court concluded that the power to

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\(^{125}\) *Supra*, n.116 *per* Verma J. at p. 708.

\(^{126}\) *Id.* at p. 707.

\(^{127}\) *Id.* at p. 708.

\(^{128}\) (1994) 2 S.C.C. 303. This was an appeal by special leave against the dismissal of a writ petition by the High Court of Andhra Pradesh. The petition was filed for declaration that judges were not liable to be transferred from one High Court to another, that transfers were likely to be on extraneous considerations leading to arbitrariness resulting in erosion of independence of the judiciary, and that the *Supreme Court Advocates Case* was in conflict with the decision of *Kesavananda Bharathi’s Case*. 
transfer Judges of High Court was vested with the highest constitutional functionaries of the state and it could be exercised by them only in accordance with the guidelines laid down in *S.C. Advocates*. These factors, according to the Court, operated as sufficient safeguards for ruling out arbitrariness in transferring Judges. The Court therefore held that transfer of judges was a matter in which judicial review had a very exceptional role to play and that too on limited grounds. The Court further restricted the scope of judicial review by holding that when cases regarding transfer of Judges were filed in any other court, the Supreme Court would be called upon to decide the same and that the same could be agitated by the transferred judge. In short, the Court not only affirmed the holding in the *S.C. Advocates* that judicial review be restricted but also limited the jurisdiction to decide the matter to the Supreme Court. In the *Special Reference*, the Court held that judicial review was limited to cases where transfer was recommended or effected without following the procedure of consultation between the Chief Justice of India and other judges. The reason assigned by the Court was that such wide-based decision making helps eliminate the possibility of bias or arbitrariness. As a result of the decisions in *S.C. Advocates*, *Ashok Reddy*, and *Special Reference*, the scope and extent of judicial review in transfers of judges has been substantially restricted. Such a holding is open to objections on many counts.

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129 *Id. at p. 316.*


131 *Supra, n. 122.*

132 *Id. at p. 771.*

133 A former judge of the Supreme Court opined that after Ashok Reddy, the position of High Court judges is not a happy one as even if he thinks that he was wrongly transferred,
These decisions amount to exclusion of judicial review in cases where judges were transferred in accordance with recommendations of the Chief Justice of India. Exclusion of judicial review is open to objection as it now forms part of the basic structure of the Constitution, which cannot be denied by any authority. Moreover, such an exclusion implies that the Court has taken the impartiality and infallibility of the Chief Justice of India for granted as if he would never act arbitrarily in transferring Judges. But it may not always be correct. It is true that before recommending transfers the Chief Justice of India has to consult some of the Judges. But impact of such consultation in the transfer process is yet to be known. Even if such consultation is carried out, the possibility of undue influence by such consultants upon the Chief Justice of India and omission on their part to take note of necessary factors for reaching correct decisions by the Chief Justice of India cannot be totally ruled out. Therefore, recommendations of the Chief Justice of India cannot always be treated as one containing all checks against arbitrary transfers. Further, the opinion of the Court that the recommendation of the Chief Justice of India for transferring Judges contained judicial element is not correct. It, in fact, is a power in his administrative jurisdiction, which is subject to review by the judiciary. Hence, the opinion of the Chief Justice of India cannot be considered as a substitute for judicial review.


135 Feature which forms the basic structure of the Constitution of India cannot be legislative or judicially done away with in view of the limited amendability and supremacy of the Constitution. See, infra, chapter, 6

136 There were a lot of occasions in which decisions of the Chief Justice of various High Courts in the administrative capacity have been challenged before the High Courts and
A study of these cases reveals that in the Seth’s Case and the Judges Case the Court gave predominance to the concept of public interest and judicial review as check on the power of the President to transfer judges. That is clear from the holding of the Court in these cases that to be valid, transfers should have been effected in public interest and to assure that consultation should be effected and that in violation of either of those conditions, judicial review would be available.

In the S.C. Advocates, Ashok Reddy and Special Reference on the other hand, the Court gave pride of place to the process of consultation with the Chief Justice of India. Such a shift is clear from the holding in the S.C. Advocates that public interest is subsumed in the opinion of the Chief Justice of India, that a transfer without consulting the Chief Justice of India alone would be invalid and that judicial review would be available only in cases of transfers without consultation with the Chief Justice of India.

Apart from the interests of the judge so transferred, the question of transfer involves the larger issues of independence of the judiciary, which is a matter of public interest. It therefore indicates that the issue cannot always be left to be agitated by the judge concerned. There may be instances where the judge aggrieved by the arbitrary transfer is not interested in raising the issue before the Court. In such cases also it is necessary that the issue be brought before and settled by the judiciary. It thus indicates the necessity of liberalisation of locus


137 Supra, n. 116 at p.707.

138 Supra, n.119.
though the issue was not raised in the Judges Case, some of the petitions in the case against transfers were filed by persons other than the judges transferred. Thus, the Court took a very liberal and sensible stand holding that the issue of transfer of Judges was one directly linked with independence of judiciary. Such a stand of the Court permitting members of the public to agitate the issue is certainly an innovative interpretation of the constitutional provision conducive to judicial independence. However, in this respect also, in S.C. Advocates and Ashok Reddy, the Court took a very regressive step as it was held that the judges concerned alone could challenge transfers. Such a holding restrains the members of the public from bringing arbitrary transfers to the attention of the judiciary, leaving judicial independence at bay.

(d) Consent- A Valid Norm for Transfer?

Can consent of the judge to be transferred be taken as a reliable and effective criterion for transfer? Will it safeguard independence of the judiciary? Will it affect the power of the President to transfer judges in necessary cases? Incorporation of consent of the judge in cases of transfer was a moot issue from

In that case, four petitions and one special leave petition were filed by Advocates of various High Courts challenging the constitutional validity of transfers of Chief Justices M.M. Ismail and K.B.N. Singh.
the Seth's Case itself. The Court considered its relevance and impact and rejected the same. The Court did so mainly on two grounds. The first ground was that the requirement of consent was absent in Article 222(1) and the Court could not read something into a provision which was absent in it. The Court further reasoned that what Article 222 conferred on the President was a power to transfer judges and if 'consent' of the judge was read into it, power would lose its teeth. These views have been approved and accepted by the Court in the Judges Case and S.C. Advocates. Was the Court justified in dismissing 'consent' of the Judge as anathema?

The reasoning of the Court that absence of the word 'consent' in the constitutional provision prevented it from incorporating it as a condition precedent for transfer is faulty. In its attempt to limit the power of the President to transfer judges, the Court incorporated public interest and judicial review into Article 222(1) as restraints which were verbally absent in the provision. If the Court considered their incorporation as not offensive to rules of statutory interpretation, the same is no less true of the term 'consent' also. Moreover, securing consent of

141 The majority consisted of Chandrachud C J., Krishna Iyer and Fazal Ali JJ. Bhagawati J (at p. 2362) and Untwalia J. (at p. 2387) held that for transferring Judges of High Courts, their consent was a condition precedent.
142 Id. per Krishna Iyer J. for Fazal Ali J. and himself (at p. 2380.).
143 Id. per Chandrachud C J (at p. 2341) and Krishna Iyer J. (at p. 2380) Justice Chandrachud further reasoned that since the power of the President to transfer was not an unlimited one but one subject to limitations like public interest and consultation, there was no requirement of 'consent' as a restraint on the power (at p. 2339).
144 Supra, n. 99 per Fazal Ali J. at p. 487; Tulzapurkar J. at p. 540; per Desai J. at p. 663 and Venkitaramiah J. at pp. 821-822.
145 Supra, n. 116 per Verma et al. at p. 700; per Pandian J. at p. 585 and Kuldip Singh J. at p. 675.
the judge is not novel, as such a practice has "become part of the procedure in the
effective consultative process under Article 222."\textsuperscript{146} Besides, as the State is the
biggest litigant, it would be only fair that its powers to transfer judges are subject
to his consent.

Further, it is true that what Article 222 confers on the President is a power.
But that does not mean that the power should be unlimited. It is only a permissive
power\textsuperscript{147} to be sparingly used.\textsuperscript{148} Restrictions imposed on this power through
judicial interpretation\textsuperscript{149} suffer from certain patent defects. There is a view that
they were incorporated to obviate the necessity of consent.\textsuperscript{150} The Court could
have incorporated consent as a valid condition precedent for transferring judges.
Such a holding would have been more creative in securing judicial independence
also. However it is to be seen that the judge does not withhold his consent without
any valid reasons.

(e) Policy Transfers- Are they constitutional?

A related issue that sprung up in the Judges Case was whether policy
transfers were outside the scope of Article 222(1). Policy transfers are transfers
arising out of a policy framed by the government. In other words, it can be
considered as transfers on the basis of guidelines for selecting judges and places to

\textsuperscript{146} Upendra Baxi, The Indian Supreme Court and Politics (1980) p. 207.
\textsuperscript{148} Supra, n.99 \textit{per} Pathak J. at p. 738.
\textsuperscript{149} Such as public interest and judicial review.
\textsuperscript{150} Seervai, \textit{op. cit.} at p. 2400.
be transferred. Policy transfers enjoy certain advantages over those without a policy. Transfers on policy assure that all transfers are on certain pre-determined criteria. It then forms part of conditions of service. Such a situation eliminates the possibility of executive arbitrariness, as the executive may not be able to unilaterally determine individual transfers. Moreover, when such a policy is laid down all Judges enter the service with the prior knowledge that they would be transferred in accordance with the published criteria.

However, establishment of a policy ipso facto does not rule out the possibility of executive arbitrariness and therefore threat to judicial independence. The President may frame arbitrary or vague policies and improperly implement them. Criteria for selecting judges for transfers, the places to which they are to be transferred may also be open to objection. Hence, it would be dangerous to leave formulation of the policy for transfer or its implementation solely to the executive fiat.

The Court in the Judges Case did not find policy transfers as outside the purview of Article 222 and dealt with it as constitutionally valid. But it was held that even such transfers were to be effected only in compliance with Article 222(1). It was also held that in formulating such a policy of transfers, Chief Justice of India was to be consulted. Thus, on the whole, the Court was not

151 Supra, n. 99 per Fazal Ali J. at pp 418; Tulzapurkar J. at p.541; 425-426; Pathak J. at p. 739 and Venkitaramiah J. at pp 843, 846-847.

152 Id. per Fazal Ali J. at p 434; Tulzapurkar J. at p. 541; Pathak J. at p. 738 and Venkitaramiah J. at p. 849.

153 Id. per Fazal Ali J at p.433; Tulzapurkar J at p. 541; Pathak J. at p. 739 and Venktaramiah J at p 849.
willing to leave framing of policy for transfers as well as its implementation exclusively to the executive decision, presumably because of the fear that they may adversely affect judicial independence. Though the question was given reconsideration by the Court in the S.C. Advocates, it did not gain much relevance in view of the holding that the transfer to be valid should be in accordance with the recommendation of the Chief Justice of India irrespective of whether it is in furtherance of a policy.

Recognition of policy transfers as not contrary to Article 222 and as constitutional is an instance of judicial creativity. Unwillingness of the Court to leave formulation of policy for transfers fully to the executive and the insistence that even such policy transfers should be effected only after a further consultation with the Chief Justice of India also strengthens judicial independence through creative interpretation.

It is clear from the above discussion that the purpose of transfer policy should be smooth administration of justice and independence of the judiciary. However, it is doubtful whether the transfer policy impugned in the Judges Case satisfied the above mentioned conditions. That policy was “to further national integration and to combat parochial tendencies bred by caste, kinship and other local affiliations.” Though impressive, emotive and high sounding national

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154 Supra, n. 122 per Verma J. et. al. at p. 700. See also pp. 700-701.
155 Cf. the observation of Pathak J. “... any policy framed and adopted in this behalf must be tested on the criterion of public interest, and it must be clearly understood that “public interest” means here the interest of the administration of justice.” (at p. 739).
156 See, the letter sent by the then Law Minister to the Chief Ministers quoted in the Judges Case by Justice Bhagawati at pp. 194-195.
integration appears to be, it is an amorphous and irrelevant concept as far as transfer of judges is concerned. For, what judges are supposed to have is a "judicial approach" by holding the scales of justice between and among citizens, the States and the Centre. Concepts like national integration are matters to be achieved at political and administrative levels than through transfer of judges. Therefore, though the holding of the Court that policy transfers were constitutionally valid is correct, the holding that the impugned letter as not unconstitutional is clearly wrong.

Thus, the travel from the Seth's Case through Judges Case to the S.C. Advocates, Ashok Reddy and Special Reference reveals the creative response of the Apex Court in dealing with transfer of judges of High Courts. The Court in those cases was experimenting with different combinations of restrictions on the power of the President to transfer judges with a view to uphold independence of judiciary as envisaged by it. These cases reveal that the Court was successful to some extent in effectively checking the possibility of arbitrariness of the President and the Chief Justice of India. But, how far these measures would uphold judicial independence is yet to be seen.

3. REMOVAL OF JUDGES

The concept of security of tenure of Judges is inextricably interwoven with the procedure for their removal. That is essentially so, because absence of a proper procedure for removal of judges proclaims lack of security of tenure. It is as important as, if not more important than, the conditions of service while
continuing in service. For, absence of a proper procedure for removal of judges undoubtedly paves the way for lack of security of tenure and violates the principles of judicial independence.

The issue of removal has two aspects. The grounds for removal constitute the former and its procedure the latter. Both are so seminal as to claim a place in different Constitutions. Earlier, in England, Judges were removable at the pleasure of the Crown. This means that the grounds and mode of removal of judges were at the pure will of the Crown. Judges were removed for reasons known only to the Crown, which might even include declaration of judicial decisions objectionable or unpalatable to the Crown. There were instances of removal of judges for their independence. At that time tenure of judges was determined by the terms of prerogative appointments. Such appointments adversely affected judicial independence as “judges had to be good King’s men, prepared to act as his confidential advisers.” By 1688, the situation changed and Judges began to be appointed “for good behavior.” They could not be removed at the pleasure of the Executive. The matter was statutorily settled by the Act of

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157 Chief Justice Sir Edward Coke was a victim of such a removal. He was dismissed by the then King James I for assertion of his independence as a Judge. “Bacon drew up a list of decisions of Coke which were objectionable. The King used them as ground for dismissing Coke. He did it by the writ of supersedeas,” Lord Denning, What Next in Law. (1982) at p.10 Pemberton, a Judge during the last quarter of the seventeenth century also was subjected to similar treatment. See De Smith, Constitutional and Administrative Law (1973) p.373.

158 S A De Smith, op.cit. at pp. 372-373.

159 Id. at p.373. See also Alfred F. Havinghurst, “The Judiciary and Politics in the Reign of Charles II” (1950) 66 L.Q.R. at p. 64. He observes, “Judicial office in Common Law courts, since their origin in the twelfth century had been the gift of the King.”
The Act provided that Judges would serve for good behaviour and not at the pleasure of the Crown. It was further stipulated that they should be removed only by an address by both the Houses of Parliament and an order of the Crown. Thus for the first time in the history of judiciary, the grounds as well as the procedure for removal of Judges were brought outside the purview of the subjective satisfaction of the Executive. Following the suit, the Constitution of the United States also declared that judges shall enjoy a tenure during good behaviour. It means that judges are removable only on misbehaviour. Judges are liable to be removed by impeachment through a procedure by the legislature, namely the Congress.

In India, Judges of the higher judiciary are removable only “by an order of the President passed after an address by each House of Parliament supported by a majority of 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.” But unlike the Constitutions of the other nations our Constitution provides that Parliament has the power to pass a law regulating...
the procedure and removal of Judges. Thus in India also removal of judges is possible only through a procedure which simulates impeachment. It is clear that introduction of the concepts of ‘misbehaviour’ and ‘incapacity’ as grounds of removal and the procedure for removal called impeachment modify the tenure of Judges as that on good behaviour. Unlike Judges of the past, those in the modern era enjoy to some extent protection against executive onslaughts. Does such a scheme of removal offer absolute solution to the issue of political attack on judiciary? Does it provide a scheme for removal of judges without damaging judicial independence? In fact impeachment was not a weapon fashioned to dismiss corrupt judges from their office. It originally was a device to make high officials of the Crown who are political offenders responsible to Parliament. But somehow impeachment happened to be applied to judges also.

Impeachment is defined as a “criminal proceeding against a public officer, before a quasi-political court...” It is condemned that ever since its inception in 1386 in England impeachment was “essentially a political (factional) weapon.” In the U.S. also it is considered as a political remedy. The framers of the Constitution of the U.S. were conscious of this fact.

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167 Id. Article 124(5). It reads, “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.” Article 124 (4) and (5) has been made applicable to judges of High Courts by virtue of Article 218.

168 Berger Raol, op. cit. at p 1.

169 Id. at pp 3-4.

170 See Black’s Law Dictionary.


Hamilton, an ace architect of the U.S. Constitution, observed that impeachment

"will seldom fail to agitate the passions of the whole community.... In many cases it will connect itself with the pre-existing factions... and in such cases there will always be the comparative strength of the parties, than by the real demonstrations of innocence or guilty."

Mecaulay at the time of impeachment of Warren Hastings made the following comment,

"... it is certain that no man has the least confidence in this impartiality, when a great public functionary, charged with a great state crime, is brought to their bar. They are all politicians. There is hardly one among them whose vote on an impeachment may not be confidently predicted before a witness has been examined."

Further, the question whether the person against whom impeachment motion is moved has committed any act liable to impeachment is also determined on the basis of policies of political parties which participate in the move. If the opinion of the members of the legislature is formed on the basis of the view of the political parties to which they subscribe "...what then, is an impeachable offence? The only answer is that an impeachable offence is whatever a majority of the House of Representatives considers it to be at a given moment in history.... There are few fixed principles among the handful of precedents."

173 The Federalist Papers 65. (Emphasis supplied).

174 Quoted in J.C. Dougherty, "Inherent Limitations upon Impeachment." 23 Yale Law Journal 60 at p. 69 (1913).

175 116 Cong. Rec. H. 14 3113-3114 as cited in Berger, op. cit. at p. 53 n. 1
control of the legislature, which is a political body. Notwithstanding such a
shortcoming even now it remains the sole method of removal of judges. It means
that in many nations, judges are liable to be removed through a procedure at the
control of legislatures. In other words, impeachment only shifts the procedure
for removal of judges from the executive to the legislature. Is it not then equal to
transfer of a disease from an organ of the body to any other rather than curing it?
It seems that impeachment as a mode of removal of judges may continue to
adversely affect the freedom of Judges to decide cases fearlessly. For,
determination of misbehaviour of Judges depends upon the will of the majority
party in the legislature. Therefore, it is doubtful whether even after the adoption of
the mechanism of impeachment, independence of the judiciary is out of danger.

(a) Proof of Misbehaviour under Article 124 (4)

In such a context, it will be interesting to examine the construction of the
provisions of the Constitution of India relating to removal of judges to assess how
far the Supreme Court succeeded in insulating the judiciary from political caprice
and to uphold judicial independence. The issues of removal of a judge of the
higher judiciary came up before the Supreme Court for the first time in the history
Union of India, (Sub Committee, for short) the question of removal of Justice

\[\text{\textsuperscript{176}}\] See for instance, the Constitution of the United States, Article I sec. 2;
Constitution of Australia, Section 72(ii); and Constitution of India, Article 124 (4).

\[\text{\textsuperscript{177}}\] J N Mallik, "Removal of judges," A J R. 1964 Jour. 42 at pp. 42-43. He observes that
removal by Parliament is antithetic to judicial independence as it may lead to ousting of a
judge who is unwanted.

Ramaswamy, one of the Judges of the Supreme Court itself was examined by the Court. In that case, the Court considered the nature of the procedure for removal of Judges as envisaged by the Constitution. It examined the questions whether removal was within the exclusive domain of Parliament and how misbehaviour or incapacity of a Judge is to be proved.

The Court held that in India, the procedure for removal of Judges of the higher judiciary consisted of two stages. The first one was as contained in Article 124(5) from the initiation of investigation and proof of misbehaviour or incapacity through a judicial process and the second is as contained in Article 124(4) which is political in nature. The latter stage commences only when the guilt of the Judge is proved in accordance with clause (5). The Court held that “there was a judicious blend of both judicial and political process” in the matter of removal of Judges. The Court further held that the judicial procedure should be governed by the law enacted under Article 124(5) and hence the procedure was statutory in nature. The Court clarified that Parliament had no option but to pass the law for removal of Judges.

179 It was alleged that Justice Ramaswamy, while he was the Chief Justice of the High Court of Punjab and Haryana committed financial improprieties and irregularities. Inquiries were ordered against him. He refused to co-operate with the same. Later a motion for his removal was presented in the House for his removal. But before the completion of the proceedings, the then Lok Sabha came to a premature closing. Writ petitions were filed before the Supreme Court pleading that the motion lapsed with the dissolution of the House and so the action for removal of the Judge therefore be dropped.


182 Ibid

183 Id. at p. 731.

184 Id. at p. 744. In accordance with Article 124(5), Parliament enacted the Judges Inquiry Act 1968. It stipulated that if a motion for removal of a Judge of the Supreme
regulating the procedure for removal of Judges. The Court further observed that the scope and ambit of the law enacted under Article 124(5) was wide enough to cover the entire process from the initiation of the motion till the final act of delivery of address as it ensured uniformity and reduced chances for arbitrariness. Such a holding, it was observed, was justified on the ground that it upheld independence of the judiciary. Being statutory in nature, the procedure is subject to judicial review and hence non-compliance with the provisions of the law in the matter is liable to be struck down.

The Court declared that the second part of the process was parliamentary in nature. However, the Court expressed the view that the procedure was not of the ordinary nature governed by the provisions in Article 118, 119 and 122(1) but was of a special nature governed exclusively by Article 124(5) and the law

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185 Id. at pp. 749-750.
186 Id. at p. 751.
187 Id. at pp. 748-749
188 Id. at pp. 744, 746. The Court held, “...the validity of law enacted by the Parliament under clause(5) of Article 124 and the stage up to conclusion of the inquiry in accordance with that law being governed entirely by statute would be open to judicial review...” (at p. 746)
189 Id. at p. 744.
190 Id. at p. 751.
there under. Consequently, the Court declared that unlike the ordinary parliamentary procedure which cannot be called in question on the ground of irregularity, the procedure for removal of Judges was judicially reviewable \(^{191}\)

Examining the second question, the Court observed that the prohibition imposed by Article 121 on Parliament to discuss the conduct of Judges except on a motion of removal indicated that investigation and proof of misbehaviour of a Judge should necessarily be outside Parliament and not within it. \(^{192}\) The prohibition in Article 121 stands lifted and Parliament empowered to discuss and pass a motion for removal of a judge only when his misbehaviour is proved. \(^{193}\)

Further, in our legal system "proof" means one through the judicial process, \(^{194}\) and not through parliamentary one. The Court therefore concluded that Article 124(4), which stipulates for procedure within Parliament was not a complete code in itself for removal of judges. Such a construction of Article 124(4) reducing Article 124(5), which contains the judicial process, to self-abnegation cannot be given. \(^{195}\) The Court further pointed out that as the motion for presenting an address for removal of judges as envisaged by Article 124(4) was on 'proved

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\(^{191}\) The Court held, "Article 124(5) has no comparison with Article 119. Articles 118 and 119 operate in the same field viz. the normal business of the House.... Since Articles 118 and 124(5) operate in different fields,... a law made under Article 124(5) will override the rules made under Article 118 and shall be binding on both the Houses of Parliament. A violation of such a law would constitute illegality and could not be immune from judicial scrutiny under Article 122(1)"

\(^{192}\) Id. at p. 745.

\(^{193}\) Id. at p. 743.

\(^{194}\) Id. at p. 745.

\(^{195}\) Id at pp. 744-745.
misbehaviour or incapacity', the same should be proved elsewhere.\textsuperscript{196} In short the Court held that misbehaviour or incapacity of Judges should be proved by judicial process and not by a political process.\textsuperscript{197} Consequently, the Court held that the judicial procedure contained in Article 124(5) was not an enabling one but mandatory.\textsuperscript{198} Such being the position the Court held that Parliament was not free to strip the judicial process off from the procedure for removal of Judges. By such an interpretation, the Court was able to insulate investigation and proof of misbehaviour of a Judge from the influence of political considerations.

Such a decision is justified on yet another ground. Determination of misbehaviour is not an easy task. Misbehaviour means, conduct inappropriate to the particular role of actor.\textsuperscript{199} Judicial misbehaviour is explained in by Justice Ramaswamy\textsuperscript{200} thus,

\begin{quote}
"Willful abuse of judicial office, willful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude would be misbehaviour. Misconduct implies actuation of some degree of mens rea by the doer. Judicial finding of guilt of grave crime is misconduct. Persistent failure to perform the judicial duties of the judge or willful abuse of the office dolus malus would be misbehaviour. Misbehavior would extend to the conduct of the Judge in or beyond the execution of the judicial office...""
\end{quote}

\textsuperscript{196} Id at p. 743.
\textsuperscript{197} Id. at p. 745.
\textsuperscript{198} Id. at pp. 744-745.
\textsuperscript{199} See, Black’s Law Dictionary.
\textsuperscript{200} KrishnaSwamy v. Union of India, (1992) 4 S C C. 605, 651.
However, it was also held that “Every act or conduct or even error of judgement or negligent acts by higher judiciary per se does not amount to misbehaviour.”

It is clear that the process of evaluating evidence and proving misbehaviour demands sound knowledge of the principles of the law and requires judicial skill rather than political awareness. Members of the legislature may not necessarily be blessed with such essential qualities required of a judge. If removal for misbehaviour is left fully to the legislature, chances for removal of a Judge who has not misbehaved is considerably high as its decision may not be based on proper evaluation of evidence. Such a situation is likely to instill fear in the minds of judges. It is clear that determination of misbehaviour of a Judge by judicial process is very cardinal for eliminating political consideration from the procedure for removal. That may be the reason that in England traditionally though impeachment was the punishment for misdemeanour and high treason imposed by Parliament, misbehaviour was determined by “civil forfeiture proceeding” before a Court. In the U.S also every instance of misconduct is not considered as misbehaviour of the Judge Finding that the constitutionally envisaged impeachment procedure was not an unmixed blessing, there have been demands for improving the same. Thus, conduct of circuit, district and bankruptcy judges would be examined by the Judicial Conference and would be sent for

201 Id. at p. 651.
202 Berger, op. cit. at p. 127.
impeachment only if found necessary. Under the Government of India Act 1935, the executive could remove Judges of the Federal Court only if the Judicial Committee of the Privy Council reported that the judge ought to be removed on grounds of misbehaviour or infirmity of mind or body. These instances indicate that for maintaining judicial independence, the procedure for removal of judges should be under judicial control.

In short, the decision in Sub Committee that removal of a judge should be proved through a judicial process and that the removal procedure under Article 124 was amenable to judicial review are instances of judicial creativity with a view to protect judiciary from the onslaughts of the legislature. By such an interpretation, the Court was able to avoid influence of politics in the removal process and to uphold independence of judiciary.

Is proof of misbehaviour through the judicial procedure envisaged by the Constitution sufficient to remove a Judge? The Court had occasion to dwell upon the issue in Sarojini Ramaswamy v. Union of India. The questions that arose for consideration in that case were whether the accused Judge was entitled to...

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204 The Judicial Councils Reform and Judicial Conduct and Disability Act 1980. For the text of the statute, see U. S. Statutes at Large, (1980) Vol. 94 Part II. 2035 et. seq. In the Sub-Committee, the Court also has discussed the U.S. position (supra, n. 178 at p. 726).


206 Supra, n 178.

207 (1992) 4 S.C.C. 506. In furtherance of the inquiry into the allegations of financial improprieties and irregularities made against Justice Ramaswamy, a report was filed by the Committee constituted under the Judges Inquiry Act 1968. The accused Judge requested for a copy of the report, so as to enable him to seek redress in the court of law if necessary. The present petition was filed by the wife of Justice Ramaswamy to direct the Committee to provide the accused i.e. her husband with a copy of the report.
subject the finding of the Committee which found him guilty, to judicial review, and if he was so entitled at what stage of the proceeding-before or after the adoption of the motion for removal by Parliament-he could resort to such judicial review.

Decisions on these issues depended upon the question as to when misbehaviour under Article 124(4) is 'deemed to be proved.' If it is deemed to be proved by the finding of the Judicial Committee that the Judge was guilty, judicial review should be available against such a finding. If, on the other hand, it is deemed to be proved only after adoption of the motion to that effect in Parliament judicial review would not be available against such a finding immediately after the finding of the Committee. A reading of the Judges Inquiry Act 1968 and the Rules there under proves that a finding of guilt by the Committee would not determine misbehaviour of a Judge. It provides that if the Committee finds him not guilty, the proceedings have to be stopped then and there and Parliament cannot proceed with the matter. Even if the Committee finds him guilty, removal takes place only if Parliament adopts a motion to that effect and the President orders his removal and not before it. But before adopting such a motion, Parliament has to scrutinize the opinions of the majority of the members of the Committee, holding that the Judge was guilty, the opinion

208 Judges Inquiry Act, 1968. Sec. 6 (1).
209 Id S.6(3). It reads, "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 a 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."
of the dissenting member, if any, holding that the Judge was not guilty and the comment of the Judge against whom the motion is proposed is to be adopted. The finding of the Committee therefore is only a recommendation, which may or may not be acted upon by Parliament. Such a scheme and constitutional set up make it clear, the Court held, that misbehaviour was not 'deemed to be proved' by the finding of the Committee that the Judge was guilty and that it is proved only when a motion to that effect is adopted by Parliament. Therefore the Court held that misbehaviour of a Judge is 'deemed to be proved' only after completion of the judicial and parliamentary procedure under Article 124. Consequently, the Court came to the conclusion that the petitioner was entitled for review of the action for his removal only after and not before the completion of the parliamentary procedure.

Does judicial examination of the validity of removal amount to judicial review of parliamentary action? Legislature being the final authority to determine matters within the House, no external authority should be competent to interfere with it. Procedure being a matter within the House, the House has to

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210 Supra, n. 207 at pp. 546-547.
211 Id. at p. 548.
212 Ibid.
213 Id at p. 547.
214 Id at p. 557. See also Sub-Committee, supra, n.178 at p. 748.
215 Id at p. 573.
be its own judge and no review by the judiciary is permissible. If removal of judges under Article 124 is treated as a procedure falling exclusively within the parliamentary procedure judiciary cannot review it. In Sarojini Ramaswamy, the Court held that though removal of a Judge under Article 124 was finalised only after the adoption of the motion in the House, determination of his misbehaviour by the Committee constituted under the Judges Inquiry Act 1968 is a condition precedent for commencement of the parliamentary process culminating in the Presidential order of removal. For, without such a finding, there is no foundation for adopting the motion for presenting an address to the President for removing a judge. This indicates that adoption of the motion is only a parliamentary approval of a finding by a committee outside the Parliament. Such a parliamentary approval ipso facto cannot have the effect of excluding judicial review of a procedure on permissible grounds. Therefore, intervention of the parliamentary process in the matter does not totally exclude judicial review. The Court drew justification for such a

217 Bradlaugh v. Gossett, 12 Q.B. D. 271 (1884). Such a view taken because, most of the transactions in the House are political in nature and are beyond judicially manageable standards. See also, Coleman v. Miller, 307 U.S. 433: 83 L.Ed. 1385.

218 Article 122. It reads, "The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity or procedure."

219 A U.S. Court in Halstead L. Ritter v. U.S. 84 Court of Claims 293, (as cited in supra. n. 207 at p. 663) refused to interfere with a decision of the legislature to remove a judge on the ground that it was solely a parliamentary procedure.

220 Supra, n.207.

221 Id. at p. 561.

222 Id. at p. 559.

223 Id. at p. 561. The Court held, "The clear indication, therefore, is that mere parliamentary approval of an action or even a report by an outside authority when without such approval, the action or report is ineffective by itself, does not have the effect of excluding judicial review on the permissible grounds."
view from the decisions of Re Keshav Singh\textsuperscript{224} and Sub Committee\textsuperscript{225} also. The Court further held that there was no meaning in excluding judicial review at the end of the process of removal of a judge where it is a composite process of which parliamentary process formed a part\textsuperscript{226}. For such a conclusion, the Court drew justification from the view of U.S. Supreme Court in Powell v. Mc Cormack\textsuperscript{227} and Kilburn v. Thomson\textsuperscript{228} that judiciary could not keep away from deciding issues on the ground that they were political in nature. The Court extended the scope of judicial review over such questions\textsuperscript{229} observing that judicial review was the exercise of the inherent power of the Court to determine legality of an action and to award suitable reliefs.\textsuperscript{230} The Court therefore came to a conclusion that its jurisdiction was wide enough to encompass determination of the questions of removal of Judges\textsuperscript{231}. The Court also observed that since misbehaviour of a Judge is 'deemed to be proved' only after completion of the whole process

\textsuperscript{224} A.I.R. 1965 S.C. 745

\textsuperscript{225} (1991) 4 S.C.C. 699.

\textsuperscript{226} Supra, n. 207 at p. 569. It is clear from the holding of the judgement of the Court that it used the expressions parliamentary proceedings and political process interchangeably. Though different, in substance they denote the same thing, viz. the procedure that takes place inside the legislative house. However, the Court, at a later stage (at p. 569) used the more comprehensive expression "political question doctrine" which covers both the above expressions. A political question is one "which Courts will refuse to take cognisance, or to decide, on account of their purely political character, or because their determination would involve an encroachment upon the executive or legislative power." Black's Law Dictionary. (Emphasis added)

\textsuperscript{227} 395 U.S. 486 (1969) 23 L.Ed. 291. That was a petition by a member challenging the decision of the House of Representatives to exclude him from the House and denial of his seniority in the House on certain allegations against him.

\textsuperscript{228} 16 L.Ed. 377. The Court held," Especially it is competent and proper for this Court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and the law..."(at p. 390)

\textsuperscript{229} Supra, n. 207 at pp. 563-564.

\textsuperscript{230} Id. at p. 561.

\textsuperscript{231} Ibid.
contemplated by Article 124 interdiction of judicial review in the process before its completion will help only to protract the procedure for removal of Judges. The Court concluded that only such a view would ensure preservation of the right, interest and dignity of the learned Judge and commensurate with the dignity of all the institutions and functionaries involved in the process.

By the decision in Sub Committee, the Court made it clear that removal of judges was statutory in nature, that it was fully dependent upon judicial procedure involved in it and that Parliament could not take up the motion for removal in the absence of a finding of misbehaviour by a judicial process. Further, Parliament could not strip that judicial procedure contained in Article 124 to wield ultimate control. The Court made it clear that such an interpretation which gave pride of place to the judicial process alone promoted independence of the judiciary. In Sarojini Ramaswamy, the Court went further and held that judicial review extended to parliamentary and political processes also. In other words, the Court brought the entire process for removal of Judges within the scope of judicial review. In this sense, Sarojini Ramaswamy extends the logic of Sub Committee and therefore undoubtedly is its befitting successor. As a result of these decisions,

232 Id. at p. 553.
233 Id. at p. 559.
234 Supra, n. 178 at pp. 740-741
235 Supra, n. 207 at p. 559. The Court held, "In the event of an order of removal being made by the President under Article 124(4), the right of the Judge concerned to seek judicial review on permissible grounds would be for quashing the order of removal made against him on the basis that the finding of 'guilty' made by the Inquiry Committee in its report which matured into 'proved misbehaviour' on adoption of the motion by Parliament suffers from an illegality rendering it void resulting in the extinction of the condition precedent for commencement of the parliamentary process for removal in the absence of which there is no foundation for considering or adopting the motion for
chances for arbitrary removal of Judges by Parliament thus stands considerably reduced. Even the critics of these decisions agree on their creativity. In short, by a creative interpretation of the provisions in Sub committee and Sarojini Ramaswamy, the Court was able to take removal of judges out of the control of the legislature and bring it under the control of judicial review and thereby to uphold independence of the judiciary.

(b) Impeachment- the Only Mode of Punishment?

A question that was mooted abroad was whether impeachment by the legislature was the only mode of removal of judges who have misbehaved. The general view is that it is. In the U.S. impeachment applies not only to high crimes and misdemeanours but also to acts which affect public welfare. Hence, there is a strong view that the only constitutionally permissible method of removal of judges is impeachment. However, in England, it is opined not to be the sole method. There, impeachment was considered as a criminal procedure against misdemeanour and high treason while other instances of misconduct of Judges could be dealt with in accordance with judicial proceeding, which is civil in

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236 For instance, Seervai, *Constitutional Law of India* Vol. III (1996), pp. 2909-2927. He observes, (at p. 2923) "I may add that in the Judicial Accountability Case and Sarojini Ramaswamy's Case, the Judges showed great solicitude that no injury was done to the Judges' dignity, position and reputation."

237 Berger, *op.cit.* at p. 123.


One thing is clear from this. Judges cannot be removed except through a well-defined procedure on settled principles. Such a scheme is very much necessary for maintaining judicial independence. Members of judiciary should not be open to threats of removal from unexpected quarters as such threats may adversely affect judicial independence. Hence, a meaningful concept of judicial independence should be wide enough to include within it safeguard against threats from any quarters—even from the public. Since the procedure for removal of judges of the higher judiciary in India simulate that of the other countries, these issues are live in India also. In *Ravichandra Iyyar v. Justice A.M. Bhattacharjea*, the Court had to deal with such an issue. In that case, the Court held that our Constitution permitted removal of judges only when a motion was carried out with the requisite majority in both the Houses of Parliament recommending such removal by the President. It means that the Constitution of India does not permit any action by any agency other than the initiation of the action under Article 124(4). The Constitution does not permit any forum other than the one contemplated to investigate or inquire into or discuss the conduct of a Judge or the performance of his duties and on/off court behaviour except as per the procedure provided under Article 124(4) and (5) of the Constitution.

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240 *Id.* at pp. 127 *et seq.*

241 (1995) 5 S.C.C. 457. That was a petition filed by a lawyer of the High Court of Bombay alleging that the Chief Justice of the High Court received huge royalty from a publisher abroad for his two books. The petition was to order the Central Bureau of Investigation to enquire into it and if found correct to direct the Speaker to initiate action against the Judge under Article 124(4).

242 *Id.* at p. 482. The Court held, "Our Constitution permits removal of the Judge only when the motion was carried out with requisite majority of both Houses of Parliament recommending to the President for removal. In other words, the Constitution does not permit any other action by any agency other than the initiation of the action under Article 124(4) by Parliament....discussion of the conduct of a Judge or any evaluation or
The Court has reached such a conclusion on the ground that while there was an express provision regarding the subject in the Constitution, others not so mentioned are impliedly excluded. By the holding the Court has effectively curtailed the scope of potential threats to Judges from various quarters like scandalizing of Judges by litigants, advocates or other members of the public.

Will such a restraint amount to curtailment of freedom of speech and expression guaranteed under Article 19(1) (a)? The Court observed that advocates have the freedom of opinion under Article 19(1)(a) to criticize and condemn a Judge and exercise of such an invaluable right in public interest should not be gagged. However the Court held that exercise of such a right to criticise judicial conduct “must be measured, strictly rational, sober and proceed from the highest motives without being coloured by partisan spirit or pressure tactics or intimidatory attitude.” The Court further held that exercise of the right in violation of the above rule would call for punishment. By the holding the Court harmoniously construed the freedom of speech and expression on the one hand and independence of the judiciary on the other and gave pride of place to judicial independence over the right of expression. Such a view is justified, as judicial independence is more important than the other.

Expressio Unius Exclusio Alterius is a principle accepted in constitutional interpretation. It means that express mention of one person or thing is exclusion of another. See Berger, op. cit. at pp. 137-141.

Supra, n.241 at p. 478.

Ibid

Ibid.
lead to a situation in which even an honest and sincere judge may at times be embarrassed due to scandalizing and demoralizing discussion about his conduct.\textsuperscript{247}

While holding that removal procedure envisaged by Article 124(4) is the sole procedure for terminating the judges of the higher judiciary, the Court held that the same can be invoked only against impeachable behaviour and not against “minor offences and abrasive conduct” of Judges.\textsuperscript{248} It is clear that the Court identified a wide gap between mere misconduct on the one hand and impeachable misbehaviour on the other. The Court observed,\textsuperscript{249}

"Yet every action or omission by the judicial officer in performance of his duties...may not be misbehaviour indictable by impeachment. But...may produce deleterious effect on the integrity and impartiality of the Judge. Every misbehaviour in juxtaposition to good behaviour, as a conditional tautology, will not support impeachment but a misbehaviour which is not a good behaviour may be improper conduct not befitting to the standard expected of a Judge.”

In other words, there is a “yawning gap between proved misbehaviour and bad conduct inconsistent with the high office” of a Judge.\textsuperscript{250} The Court held that in such instances where the conduct does not warrant removal, the Judge was to be kept under supervision and control in a manner without affecting judicial

\textsuperscript{247} See also observation of Justice A.S. Anand in Chetak Constructions Ltd. v. Om Prakash, A.I.R. 1998 S.C. 1855 that such scandalizing of judges affects judicial independence.

\textsuperscript{248} Supra, n. 241 at p. 471.

\textsuperscript{249} Id. at p. 475.

\textsuperscript{250} Id. at p. 482.
independence. Analyzing the issue at a theoretical level, the Court held that where misconduct did not amount to misbehaviour, the remedy lay in self-regulation by the judiciary. The Court agreed with the juristic view\textsuperscript{251} that control of the fate of Judges by bureaucrats was unwise and therefore it would be prudent to have self-regulation\textsuperscript{252}. It was held that if complaints relating to the conduct of a Judge of a High Court is made by the Bar Association, the Chief Justice of the High Court should verify its truth from independent sources by an enquiry. He should consult the Chief Justice of India wherever necessary and once the matter has gained the attention of the Chief Justice of India, the Bar Association should suspend all actions to enable him to dispose of the matter. The Chief Justice of India may “tender such advice either directly or may initiate such action, as is deemed necessary or warranted under given facts and circumstances.”\textsuperscript{253} If the complaint relates to the Chief Justice of the High Court, the matter should be directly sent to the Chief Justice of India.\textsuperscript{254} Such a course, according to the Court, facilitated nipping in the bud the conduct of the Judge leading to loss of public confidence in the Courts and to sustain public respect for the judiciary. Independence of the judiciary and the stream of public justice, the Court held, would thus remain pure and unsullied.\textsuperscript{255}

\textsuperscript{252} Id. at pp. 480-481. See also Harry T. Edwards, “Regulating Judicial Misconduct and Divining ‘Good Behaviour’ for Federal Judges,” 87 Mich. L.R. 765 at pp. 778-785.
\textsuperscript{253} Id. at p. 481.
\textsuperscript{254} Ibid.
\textsuperscript{255} Ibid.
The Court highlighted the role of the Chief Justice of India for regulating the conduct of Judges in cases where their conduct does not amount to misbehaviour on certain specific grounds. The Chief Justice of India is known as the head of the judiciary. In matters of appointment and transfer of judges of the higher judiciary, the executive can act only according to his recommendation. Likewise, for registering a criminal case against a Judge prior consent and approval of the Chief Justice of India should be obtained. All these indicate that though first among equals, the Chief Justice of India has been conferred with a special status. Therefore, the Court concluded that cases of judicial misconduct not amounting to 'misbehaviour' could be dealt with by the Chief Justice of India. The Court held, “the yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating Judge/Chief Justice of a High Court could be disciplined by self-regulation through in-house procedure. This in-house procedure would fill in the constitutional gap and would yield salutary effect.”

The decision in Ravichandra Iyver is remarkable for two reasons from the point of independence of judiciary. Firstly, it categorizes judicial misconduct as impeachable and non-impeachable and limits removal to the former. By such a holding, the Court avoids chances of threats of removal for minor misconduct, which warrants merely a reproof, warning or a minor punishment as removal in such cases would be unfair and contrary to the principles of independence of the judiciary.

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256 S.C.Advocates v. Union of India, (1993) 4 S.C.C. 441. For a detailed discussion of the case, see, supra, chapter III.


258 Supra, n. 241 at p 482.
judiciary. Secondly, the decision brings such minor misconduct of judges under the control of the Chief Justice of India. By bringing such instances of misconduct fully under the control of the judiciary, likelihood of other authorities being a storehouse of threat to the freethinking of Judges was avoided and judicial independence upheld. However, it is yet to be seen how far the Chief Justice of India could effectively regulate the conduct of judges and what punishment could be imposed upon them.

The decisions in *Sub-Committee, Sarojini Ramaswamy* and *Ravichandra Iyyer* constitute a triune in the matter of removal of Judges of the higher judiciary. They can be considered as supplementary and complementary to each other. Each decision is fitted into the others in such a manner as to lay down an objective and just procedure for punishing Judges. *Sub-Committee* and *Sarojini Ramaswamy* lay down the law for cases of serious misbehaviour warranting removal of Judges while *Ravichandra Iyyer* deals with instances of misconduct which do not call their removal. These cases bear testimony to the observation of the Court in *Sub Committee* that the provisions for removal of judges should be interpreted with a view to achieve judicial independence.259 They also reveal as to what extent judiciary can be creative in interpreting the provisions dealing with the removal of judges with a view to secure independence of the judiciary.

259 *Supra*, n. 178. It was observed, “In interpreting the constitutional provisions in this area the Court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. Rule of law is a basic feature of the Constitution which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure. Independence of the judiciary is an essential attribute of rule of law.” (at p. 719).