CHAPTER V

INDEPENDENCE OF THE LOWER JUDICIARY

The Constitution of India envisages a system of judiciary with a three-tier arrangement. The union judiciary consists of the Supreme Court and the State judiciary consists of the High Courts and the subordinate courts. By the expression 'subordinate courts', the Constitution means the judiciary consisting of courts below the High Court. It includes District Courts and other civil and criminal courts. The provisions in the Constitution relating to subordinate courts deal with appointment, promotion and posting of judges of those courts and also with control of such courts by the High Court. The distinguishing mark of the provisions in contradistinction with those dealing with the higher judiciary is that subordinate judiciary is brought fully and directly under the administrative control of High Court.

1 See, Constitution of India, Articles 124 to 147.
2 Id. Articles 217 to 232.
3 Id. Part VI Chapter VI.
4 The expression 'subordinate' in relation to courts is criticized as being one contrary to the notion of independence. "Indeed, the expression subordinate judiciary, all too often used by the appellate justices and embodied in the Constitution, violates the very notion of independent judiciary." Baxi, Courage, Craft and Contention (1985), p. 25. It may be recalled that neither the Supreme Court nor High Court is under the administrative control of any other authority. See also Law Commission of India 118th Report (1986), p. 12.
5 Article 235, see, infra, n. 8. The Supreme Court being the highest court, is not under the control of any other authority. High Courts also are not under the supervisory control of the Supreme Court. See, Chief Justice, High Court, Madhya Pradesh v. Mohan Kumar, 1994 Supp. (2) S.C.C. 602.
Appointment, posting and promotion of district judges are to be effected by the Governor in consultation with the High Court. Appointment of persons other than district judges is made by the Governor in accordance with the rules framed by him after consulting the State Public Service Commission and the High Court. The High Court is vested with the power of control over district and other subordinate courts. Though the Governor is the authority to appoint Judges of the subordinate judiciary, it is evident that he does not enjoy a free hand in the matter. The consultative process envisaged in the matter checks the possibility of executive arbitrariness.

Just like every provision dealing with the higher judiciary, those dealing with the subordinate judiciary were enacted for securing independence of the institution. On many occasions the Supreme Court had to deal with these provisions. What has been the attitude of the Supreme Court in construing these

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6 Article 233. It reads, "Appointment of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State."

7 Article 234. It reads, "Appointment of persons other than district judges to the judicial service of State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State."

8 Article 235. "The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

9 See the view of Dr. B.R. Ambedkar in the Constituent Assembly. He said: "...the object of these provisions is two fold: first of all, to make provision for the appointment of district judges and subordinate judges and their qualifications. The second object is to place the whole of the civil judiciary under the control of the High Court." C.A.D. Vol. IX pp. 1570-1571.
provisions? Had these provisions been interpreted in the light of independence of the judiciary? It will be of interest to examine these aspects.

1. APPOINTMENT OF DISTRICT JUDGES

Appointment of judges is an executive function. The Governor, when he effects appointments, can be assumed to act on the aid and advice of the Council of Ministers. Unless bridled, such executive power is likely to run riot due to political influence. Therefore, is it not necessary to render a construction to the provision whereby the power of the Governor to appoint District Judges is effectively restrained? The question was given a serious consideration by the Supreme Court in *Chandra Mohan v. State of U.P.* The Court observed that under Article 233 the Governor had to exercise his power after consultation with High Court and held that the requirement of such a consultation would be breached if it was effected with a different body or if no consultation was effected at all. Consultation with a committee consisting of a few judges of the High Court was not a valid one. The Court insisted that the body to be consulted


11 Article 163 (1). It runs thus, "There shall be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his function except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. See also infra, n. 13.

12 A.I.R. 1966 S.C. 1987. Under the provisions of the U.P. Higher Judicial Services Rules framed under Article 309 certain persons were selected district judges by a committee consisting of two Judges of the High Court. The Court approved the selection. The petition and later the appeal were filed on the grounds *inter alia*, that the selection was not in consultation with the High Court as envisaged by Article 233 and hence was bad.

13 The Court said, "We are assuming for the purpose of these appeals that the "Governor" under Article 233 shall act on the advice of the Ministers. So, the "Governor" used in the judgement means Governor acting on the advice of the Ministers." *Id.* at p. 1990 (per Subba Rao J.)
under Article 233 could be none other than the High Court. The reason was very well explained by the Court in the following words,\(^\text{14}\)

"The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him."

The Court thus clarified that the power of the Governor to appoint district judges was conditional upon consultation with High Court and violation of the condition would make the appointment unconstitutional. (Chandra Mohan) restricted the scope of the power of the executive by holding that the Governor could not appoint judges solely in accordance with the aid and advice of the Council of Ministers or in consultation with some judges of the High Court. In other words, by a creative interpretation of the provision, the Court had read down the mandate of Article 163 (1) to the provision for consultation under Article 233.

What is the impact and influence of the view of the High Court, when consulted, on the Governor in appointing district judges? Is Governor bound by the view of the High Court? Or has he got an option after considering the views of the High Court to take a different view? In Chandra Mouleswar v. Patna High

\(^{14}\) Ibid.
Court, it was held that though consultation with the High Court as mandatory, the view of the High Court was not binding on the Governor notwithstanding the fact that High Court was better posited to know the relative merits of the candidates. In other words, it is not unconstitutional for the Governor to take a decision contrary to the opinion expressed by the High Court. The view that the ultimate authority to appoint district judges was the Governor was accepted later in Panduranga Rao v. State of A.P. and Mani Subrat Jain v. State of Haryana. However, in Panduranga Rao the Court observed that though it was not obligatory for the government to appoint persons as according to the recommendations of the High Court, it could convey the reasons for not appointing the persons so recommended. The implication of the holding is that the recommendations of High Court were not binding on the government. The Court, however, struck a different note in this respect in Hari Dutt v. State of

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15 A.I.R. 1970 S.C. 370. The petitioner was officiating as Additional District Judge. The High Court issued an order declaring some of the respondents senior to him. He challenges the order under Article 32.

16 Referring to the scope of consultation in Article 233, the Court said, "The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court... The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept what advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits and demerits of persons among whom the choice of promotion is to be limited." (Id. at pp. 374-375).

17 A.I.R. 1975 S.C. 1922. That was an appeal by Special Leave against the decision of the High Court of Andhra Pradesh. The government appointed six district judges of which only two were the recommendees of the High Court. Appointment of the persons who were not recommended and non-appointment of the appellant were challenged in this appeal.

18 A.I.R. 1977 S.C. 276. The appellants who were direct recruits asked for mandamus directing the respondents to appoint them as Additional District and Sessions Judge. The State government was not interested in posting them. The High Courts dismissed the petitions on the ground that the initial appointments were to be effected by the State government. They came in appeal by special leave.

19 Supra, n. 17 at p. 1924.
Himachal Pradesh\textsuperscript{20} and stressed on the importance of the opinion of High Court in selection of district judges. It was observed that High Court was the proper authority to determine as to the person to be so promoted. The Court observed,\textsuperscript{21}

"Article 233 confers power on the Governor of the State to appoint persons either by direct recruitment or by promotion from amongst those in the judicial service as District Judges but this power is hedged in with the condition that it can be exercised by the Governor in consultation with the High Court. In order to make this consultation meaningful and purposive the Governor has to consult High Court in respect of appointment of each person as District Judge which includes an Additional District Judge and the opinions expressed by the High Court must be given full weight. Article 235 invests control over subordinate courts including the officers manning subordinate courts as well as the ministerial staff attached to such courts in the High Court. Therefore, when promotion is to be given to the post of District Judge from amongst those belonging to subordinate judicial service, the High Court unquestionably will be competent to decide whether a person is fit for promotion and consistent with its decision to recommend or not to recommend such person. The Governor who would be acting on the advice of the Minister would hardly be in a position to have intimate knowledge about the quality and qualification of such person for promotion."

\textsuperscript{20} A.I.R. 1980 S.C. 1426. Appointments of certain persons as district judges by promotion on the basis of seniority were effected. The challenge of the petitioner was that as in the case of initial appointment of persons, appointment by promotion to the posts of district judges should also be on the basis of merit. The Court held that such appointments could either be on seniority or merit as decided by High Court.

\textsuperscript{21} Id. at p. 1430.
Evidently, the Court in this case was reading the provision for consultation for appointing district judges in the light of the power conferred on High Courts to control the subordinate judiciary. The Court extended considerable emphasis and force to the opinion of the High Court in view of the opportunity it has to supervise, watch and control the members of the subordinate judiciary under Article 235 and therefore to assess the quality of the persons in the judicial service, which opportunity is not available to the Governor. The Court thus read the power of the Governor under Article 233 to appoint district judges in the light of the controlling power of the High Court under Article 235. Obviously, such a creative interpretation of Article 233 was made to rescue the subordinate judiciary from the controls and onslaughts of the executive. Such a construction of the provision is undoubtedly an instance of innovative interpretation of the Constitution. It can be considered as a significant step of the judiciary to materialise the ideal of separation of powers as envisaged by the makers of the Constitution. In each successive decision the Court was giving meaningful content to consultation with High Court with a view to secure independence of judiciary.

Clarifying and further explaining the position, the Court in *M.M. Gupta v. State of Jammu and Kashmir,* held that as a matter of rule, for appointing judges, the Governor should accept the recommendations of the High Court. If the

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22 See Constitution of India, Article 50. For the text of the Article, see infra, n. 124.

23 A.I.R. 1982 S.C. 1579. That was a writ petition filed against the decision of the State government to appoint certain persons as district judges in accordance with the recommendations of the sub-committee of the cabinet ignoring the recommendations of the High Court under the provisions of Constitution of Jammu and Kashmir which corresponds to Article 233 of the Constitution of India.
Governor finds "good and weighty reasons" for rejecting them, the same should be communicated to the High Court. The Court feared that ignoring the recommendations of the High Court might lead to erosion of judicial independence. The Court held,

"...persons who are interested in being appointed District Judge whether directly or by promotion, will try to lobby with the executive and curry favour with the Government for getting these appointments and there is every possibility of the independence of such persons so appointed being undermined with the consequence that the course of justice will suffer."

What is the remedy if the Governor did not communicate the reasons for not accepting the recommendations of the High Court? The answer to this question is found in State of Kerala v. A. Lakshmikutty. The question raised in that case was whether High Court could issue a writ of mandamus for appointing district judges. The Court held that the government could reject the recommendations of the High Court only after communicating its difficulties in accepting them. It was further held that on receiving such intimation from the government, the High Court had an obligation to express its views after considering such facts and circumstances. The Court went a step ahead and held that if the government was not communicating its views to the High Court, a writ of mandamus could be issued to the government to place before the Court its

24 Id. at p. 1593
25 Ibid.
26 A.I.R. 1987 S.C. 331. This case arose against the decision of the government of Kerala not to implement the recommendations of the High Court for appointing district judges on
difficulties in implementing the recommendations of the High Court. The Court was of the view that it was the High Court and not the government which should adjudge the suitability of the candidate and therefore also the cycle of rotation for the purpose of reservation.

As a result of the above decisions, the scope and extent of the concept of ‘consultation’ under Article 233(1) has become very clear. Now, Governor cannot appoint district judges without consulting High Court. The recommendations of the High Court are not binding on the Governor. Nevertheless, he cannot brush aside the opinion of High Court, as it knows the merits and qualifications of the candidates better than the executive does. In other words, consultation under Article 233 with the High Court cannot be reduced to an empty formality. It is clear that in these cases the Court rightly construed the significance of consultation with High Court. The reasons for the decision in Hari Dutt was the fact that the High Court was more competent than the executive to select the fit person as district judge. In M. M. Gupta, the decision was based on the need to prevent a situation of the power of the executive leading to nepotism, favouritism and shaking the very foundations of judicial independence. The decision in Lakshmikutty, could be seen as the first step

the ground that if appointments were effected on its basis, reservation could not be implemented.

27 Id. at p. 346
28 Id. at p. 348
29 Chandra Mohan, supra, n.12.
30 Chandra Mouleswar, supra, n. 15.
31 M.M Gupta, supra, n. 23.
32 Chanda Mouleswar, supra, n 15.
towards judicial review of the decision of the government in the matter of appointment of district judges in so far as the Court declared that government was under an obligation to state the reason why the recommendations of the High Court regarding appointment of district judges could not be implemented. All these decisions could be considered as indices to the view of the Court that in the matter of appointing district judges influence of the executive should be reduced to a minimum so as to protect judicial independence. The Court was exhibiting high creativity in emphasizing the importance of the recommendations of the High Court and construing the constitutional provisions accordingly.

(a) Scope of the Executive Power

What is the scope of the executive power under Article 233? Does it include the power to effect removal of district judges? The provision specifically mentions that the same extends to 'appointments, posting and promotion' of district judges. In *State of Assam v. Kuseswar*, the Court held that the power of the Governor under Article 233 encompassed both direct appointment of as well as promotion to be district judges. That is, in the case of appointment of district judges either from the Bar or from the lower judiciary, appointment could be effected by the Governor. Such a view was taken by the Court on a literal construction of the provision which provides for "appointment of persons to be

33 *Supra*, n. 6.

34 A.I.R. 1970 S.C. 1616. That was an appeal against the quo warranto issued by the High Court declaring a district judge as not entitled to hold that office. The original petition was filed by the respondents who were convicted by the district judge whose appointment was held void.

35 *Id.* at p. 1618.
and posting and promotion of district judges" and on reading it in the light of Article 235, which vests High Courts with complete control over the judges subordinate to district judges. In *High Court v. State of Haryana* the question whether the power of the Governor under Article 233 extends to confirmation of district judges arose for consideration of the Supreme Court. The Court rendered a restrictive interpretation to the power of the Governor to appoint district judges and held that appointment was complete with the actual placement of a person and that there remained nothing to be done thereafter. Confirmation on completion of probation is neither fresh appointment nor its completion and hence not under the control of the executive. By denying the executive the power to confirm district judges, the Court closed any possibility of leaving their tenure at the pleasure of the government. Therefore, the holding can be considered as an instance in which the Court has been creative in interpreting the scope of the executive power in Article 233 with a view to secure independence of judiciary. Likewise, it was held that the provision did not confer power on the Governor to transfer district judges and that the power was exclusively with the High Court of the State. In *State of Orissa v. Sudhansu*, the Court held that though persons to be appointed

36 A.I.R. 1975 S.C. 613. A district judge was serving on probation. An inquiry was ordered against him in which he was exonerated. But the government wanted to extend the probation to which High Court dissented. The High Court ordered his confirmation. The government denied confirmation and reverted him. The judge challenged the decision of the government before the High Court. High Court held that confirmation was part of the act of appointment and hence with the Governor. That is challenged in this appeal by special leave.


39 A.I.R. 1968 S.C. 647. That case arose out of the conflict between the High Court and the Government. Some district judges were appointed law secretaries, legal remembrancers and members of tax tribunal. The High Court took a policy decision to recall such persons to judicial work. The Government did not agree with it. Hence some
as law officers or legal remembrancers are to be determined by the government, sparing of services of district judges for such posts could only be with the consent of the High Court and High Court could fix the term of such appointments to executive posts. The High Court was also competent to recall them from the executive posts at anytime it thinks fit and proper and post them as district judges.

2. APPOINTMENT OF OTHER JUDGES OF SUBORDINATE COURTS

Appointment of judges other than district judges is regulated by Article 234. In this matter also the Governor does not wield an exclusive power. Such appointments are to be effected by the Governor only in accordance with the Rules framed by him after consultation with the High Court and the State Public Service Commission. In such a context, certain questions may arise. What is the scope of such consultation for framing Rules? Is the Governor bound by the views of the two consultants? If he is, with whose view is he bound in case of a conflict of views between the two consultants? These questions have not been posed before the Supreme Court. But such issues may arise in the future. Usually, a judge of the High Court would be a member in the committee for selection of judges under Article 234. When selection of judges is by a committee in which a

districts remained without district judges. A lawyer filed a petition to direct the Government to allow them to join as district judges. This is an appeal against it.

40 Id. at p. 652.
41 Supra, n. 7.
42 Such a question of primacy of conflicting opinions of consultants with reference to appointment of Judges to the higher judiciary was posed before the Court in both the Judges Case and S.C. Advocates. For a discussion, see supra, chapter III.
High Court judge is a member, has his opinion got weightage over that of other members? Such an issue was discussed by the Court in Ashok Kumar v. State of Haryana. The Court held that in the matter of selecting judges to the subordinate judiciary, the opinion given by the Judge of the High Court who is a member of the selection committee should normally be accepted, for he knows the character and quality of the candidates. His opinion should be rejected only for strong and cogent reasons recorded by the Chairman and members of the Public Service Commission. The Court further observed that a sitting judge and not a retired judge of the High Court should be the expert member of the Committee. Later in Durgacharan Mishra v. State of Orissa, the Court held that the Judge of the High Court who is a member of the selection committee was the competent person to advice as to the special qualities required for judicial appointments. It may be in regard of the range of subjects of viva voce, standard of questions to be put to the candidates and the acceptance of the answers given thereof. By these decisions, the Court emphasized that in the matter of selection of judges subordinate to district judges also the power of the executive was not unchecked. The creative element of these decisions is that the Court brought the process of selection under the control of the High Court by reading in the restrictions other

43 (1985) 4 S.C.C. 417. Appeal by special leave from the decision of High Court of Punjab and Haryana which quashed and set aside selection of persons to the Haryana Civil Services (Executive) and Allied Services by the Haryana Public Service Commission.

44 Id. at pp. 456-457. Such a view has been appreciated by jurists. See for example, Sharifful Hassan, “Supreme Court and Appointments to Judicial Service: A Need for Judicial Rethinking,” 34 J I L I. 125 (1992).

45 (1987) 4 S.C.C. 646. Petition under Article 32 challenging the validity of the list of Munsiffs prepared by the Public Service Commission. The name of the petitioner was excluded on the ground that he did not secure minimum marks for the viva voce as determined by the Commission for which there were no provisions in the Rules.

46 Id. at p. 653.
than those found in the provision in Article 234 in relation to selection of judges other than district judges. In short, the role of High Courts was not limited to one of a consultant in rule making. It extended to actual selection process also. Conferment of primacy to the opinion of the judicial member over that of members of the Public Service Commission in the selection of judges highlights the vital role of High Court in this respect. The holding that rejection of the opinion of the judicial member of the committee should be only for recorded reasons carries with it the idea that unreasonable or prejudiced executive decisions are likely to be struck down.

A comparative study of the provisions dealing with appointment of judges to the higher judiciary on the one hand and the lower judiciary on the other and the response of the Supreme Court to the issues in them reveal some similarities and much contrasts. Appointment of judges to the higher judiciary is effected by the President while that of the subordinate courts is by the State executive namely the Governor. While appointing judges of the Supreme Court, the President has to consult the Chief Justice of India, and other judges as he deems fit. Judges of the High Courts are to be appointed by President after consulting the Chief Justice of India, the Chief Justice of the High Court concerned and the Governor. But judges of the subordinate judiciary are to be appointed by the Governor only after consulting High Court. A comparative study of the approach of the Supreme Court to the issues involved in relation to appointment of judges reveals that in dealing with the issues relating to the subordinate judiciary, the Court entertained mature views at an early stage itself while at the earlier stages, the Court had a very conservative view in construing the provisions relating to appointment of
judges of the higher judiciary. The Court had provided content to the concept of consultation in appointing judges to the subordinate judiciary in a manner fitting to the context as early as 1966 in Chandra Mohan as explained in Hari Dutt in 1980 in which it was opined that as a rule the view of the High Court should be accepted in appointing judges of the subordinate courts since the High Court is more qualified to determine whether a person is fit to be appointed as a judge of the subordinate court. The view that the judiciary is more competent than the executive to determine who is fit to be a judge should have effective application in relation to appointment of judges to the higher judiciary. But in the Judges Case, the Court had extended a very literal meaning to the provisions relating to appointment of judges of the Supreme Court and High Courts leading to conferment of arbitrary powers to the executive. In short, the Court showed enviable creativity in construing the provisions relating to appointment of judges to the subordinate judiciary at very early stage.

2. CONDITIONS OF SERVICE OF JUDGES OF THE LOWER JUDICIARY

Conditions of service of judges of the subordinate judiciary form another important aspect that has correlation with judicial independence. The Constitution does not contain any specific provision for them. The conditions of service are prescribed by the subordinate service rules made by the respective States. However, the Constitution provides that judges of the subordinate judiciary are under the control of the High Court. What is the scope and extent of the powers so conferred on High Court? The Supreme Court had occasion to examine the

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47 Article 235, supra, n.8.
scope and extent of this power on many occasions. Could the Supreme Court deal with the issue in a manner conducive to independence of judiciary?

In State of West Bengal v Nripendra Bagchi, the Court held that what is vested with the High Court under Article 235 was control over the subordinate judiciary and that "control is useless if it is not accompanied by disciplinary powers." The Court concluded that the power therefore included disciplinary jurisdiction also. Further, it would not be possible for the High Court to turn to the government for every instance of disciplinary action. In other words, the term 'control' in Article 235 denotes not only the day to day working of the subordinate judiciary but also the disciplinary jurisdiction over the presiding judge. The Court made such a decision consciously to protect independence of the subordinate judiciary as it was observed that Article 235 was enacted with a view to securing independence of the judiciary. Leaving of disciplinary power to the Executive may destroy the very judicial independence. Hence it was not agreeable for the Court to construe the provision in a narrow manner excluding the disciplinary jurisdiction. It is clear from the decision that the Court gave a wide perspective to the concept of 'control' keeping in view the need to protect judicial independence.

48 A.I.R. 1966 S.C. 447. The Government conducted a disciplinary inquiry against the respondent who was a district and session judge and dismissed him from the service without consulting the High Court. The High Court quashed the inquiry as well as the order of dismissal. The State filed an appeal against the order of the High Court.

49 Id. at p. 454.

50 Id. at p. 453.

51 Id. at p. 454.

52 "Nothing is more likely to sap the independence of the magistrate than the knowledge that his career depends upon the favour of a minister." Islington Committee Report, para. 337 at p. 701 as quoted by the Supreme Court in id. at p. 452.
In *State of Haryana v. Inderprakash*, relating to termination of service of a District Judge, the Court held that though the executive was the authority to dismiss judges, such termination should be done only on the advice of the High Court. In other words, though as appointing authority, the power of termination is vested in the Governor, that power can be exercised under Article 233 only subject to the recommendations of the High Court, since the power of control vested on the High Court includes disciplinary jurisdiction. The scope of Article 233 was thus construed in the light of article 235 of the Constitution. The Court reiterated its view that the power of the High Court under Article 235 would be meaningless unless it encompassed disciplinary powers. The Court explained the scope of disciplinary jurisdiction. It was observed that disciplinary jurisdiction did not mean merely the jurisdiction to award punishment for misconduct. It embraced the power to determine whether the record of the servant was satisfactory or not, so as to entitle him to continue in service till he attains the age of superannuating.

53 A I.R. 1976 S.C. 1841. The High Court opined that the respondent was incompetent to continue as a District Judge and recommended his reversion as a Chief Judicial Magistrate. Disregarding this recommendation, the Government ordered his retirement. The High Court struck down the order of the government. The State came in appeal.

54 The Court held, "The control vested in the High Court is that if the High Court is of the opinion that a particular Judicial Officer is not fit to be retained in service the High Court will communicate that to the Governor because, the Governor is the authority to dismiss..... In such cases, it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State, consequences will be unfortunate. It is in public interest that the State will accept the recommendations of the High Court. The vesting of complete control over the Subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State. 'The Government will act on the recommendation of the High Court. That is the broad basis of Article 235.'" *Id* at p. 1845. See also *Baldev Raj*, infra, n.56 at pp. 2496-2497.

55 *Id* at p. 1844.
In conformity with these decisions, the Court in *Baldev Raj v. Punjab and Haryana High Court*,\(^{56}\) relating to a case of a subordinate judge held that the control of the High Court under Article 235 was exclusive and so in a disciplinary matter of the subordinate judiciary the Governor could not ignore the recommendations of the High Court and take a contrary stand in consultation with the Public Service Commission. As a result of these decisions, in the matter of termination of service, the executive power of the Governor under Articles 233 and 234 have been read down and made subject to the administrative control of the High Court under Article 235. In *Chief Justice, Andhra Pradesh v. Dixitulu*,\(^{57}\) a constitutional bench of the Supreme Court had occasion to examine the scope of the power of the High Court under Article 235. Observing that the power was all comprehensive, the Court held,

"Article 235 is the pivot round which the entire scheme of the chapter revolves... The position crystallized ... is that the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation."

\(^{56}\) A.I.R. 1976 S.C. 2490. The appellant was servicing as a Subordinate Judge. The High Court recommended after due enquiry that his service should be terminated. But the Governor sought the view of the Public Service Commission which opined otherwise. So the judge was exonerated and retained in service. Though the High Court required the Governor to review the decision, he did no do it. The High Court therefore refused to pass posting order for the appellant. The petition filed by the judge before the High Court for posting and payment of salary was dismissed. The judge moved the Supreme Court in appeal.

\(^{57}\) A.I.R. 1979 S.C. 193. The respondents in the appeal were compulsorily retired by the High Court in two different cases. They approached the Administrative Tribunal which has got jurisdiction by virtue of Article 371-D. The Tribunal quashed the respective orders of the High Court. The High Court approached the Supreme Court against the order on the ground *inter alia* that in the context of the basic and fundamental scheme of the Constitution, servants of High Court and subordinate judiciary were outside its scope.
The question in that case was whether judicial officers of the subordinate judiciary could be considered as in civil service and governed by the Administrative Tribunals under Article 371-D of the Constitution. Looking into the legislative history of Article 371-D, the Court observed that it was enacted with a view to cater certain objects having no nexus with independence of judiciary, which is vouchsafed by Article 235. Judicial independence was not a criterion for enacting Article 371-D. In such a context, if subordinate judiciary was brought under Article 371-D, the control vested in the High Court over it would be eroded. The Court held that in view of the special provision in Article 235 for Judges of the lower judiciary, they would not be considered as in "civil service" under Article 371-D and therefore their service matters could not be determined by Administrative Tribunals which settle disputes of civil servants. Such an interpretation of the provisions with a view to achieve judicial independence is an instance where the Supreme Court has been highly creative. Such an interpretation is justified on yet another reason also. Article 371-D is a general provision dealing with conditions of service of civil servants while Article 235 is a special one for controlling judges of the subordinate judiciary. Though judges could be generally called as those in civil service, since there is a special provision regulating their service in Article 235, a general provision in Article 371-D will not be applicable to them. For, it is accepted that in case of conflict between general and special provisions, the general one should give way to the

58 *Id.* at p. 207.
59 *Id.* at p. 208.
special one. By such an interpretation, judges of the subordinate judiciary were taken out from the jurisdiction of the Administrative Tribunals.

Recently, in *All India Judges Association v. Union of India*, while extending the age of superannuation of judges of the subordinate judiciary from 55 to 60, the Court held that all such judges were not entitled for such an extension. It was held that at the age of 58, the High Court should assess and evaluate the performance of judges and they would be entitled for superannuation at the age of 60 only if so recommended by the High Court. By the decision, the Court extended the scope of Article 235 to the assessment of the performance of judges to determine their age of retirement.

Does the concept 'control' under Article 235 include the power to promote a judge of the subordinate judiciary? The Constitution vests the Governor with the power to promote a judge to be a district judge. However, it does not specifically mention anything about the promotion of other judges. In *State of Assam v. Kuseswar*, the question of promotion of a subordinate judge was dealt with by the Court. The Court held that the power to promote a judge subordinate to the district judge was vested with the High Court and it was to be exercised in accordance with Article 235. It was held that the State government could not

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60 *Specialia Generalibus Derogant* which means special words derogate from general ones. However the Court did not specifically apply the maxim in this case.

61 (1992) 1 S.C.C. 119. Petition under Article 32 for reliefs through directions for setting up of All India Judicial Service and for bringing about uniform conditions of service for members of the subordinate judiciary throughout the country.


63 A.I.R. 1970 S.C. 1616. The Civil Courts Act, 1967 was amended by the State to change the nomenclature of subordinate judge as Assistant District Judge. It was alleged that the amendment was for divesting the High Court with the power to promote sub judges and to vest it with the Governor.
amend the regulating statute whereby High Court is divested of its power to control under Article 235 and the government is conferred with the power under Article 233 since such a course impairs independence of judiciary.64

Who has got the power to transfer a Judge of the subordinate judiciary, the High Court or the Governor? That question came up before the Supreme Court in State of Assam v. Ranga Mohammad.65 The answer to that question depends upon determination of the issue under which Article the instance of transfer comes. Is the power to transfer one included in the control exercised by the High Court under Article 235? Or does it fall within the power relating to 'appointment of persons to be, and the posting and promotion' of district judges under Article 233, by the Governor? The Court held that under Article 233 the word 'posting' read in the light of accompanying words, 'appointment' and 'promotion', meant only position or job to which one is appointed and 'not to station one at a place'. Therefore it did not carry with it the meaning of the word 'transfer'.66 The Court further reasoned that transfer operates at a stage later to appointment and promotion. Moreover, the High Court knows the capacity for work of individuals and the requirements of a particular station. The Court observed that "however, well meaning a Minister may be he can never possess the same intimate

65 A.I.R. 1967 S.C. 903. The State Government issued a notification appointing some District Judges by promotion and some other by transfers. The notification was challenged in this case by the respondent as unconstitutional on the ground that transfers were to be effected by the High Court. The High Court held that transfers could be effected by High Court. The State came in appeal under Article 132 on the ground that the power to transfer district judges lies with it.
66 Id. at p. 906.
knowledge of the working of the judiciary as a whole and of the individual Judges, as the High Court. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves.\(^6^7\) Therefore the Court held that the High Court is better suited to make transfers and hence the power resides in the High Court.

Here also, the Court made a comparative analysis of Articles 233 and 235 for determining the scope and extent of the powers of the High Court. Article 233 was restrictively interpreted and the scope of Article 235 was widened so as to confer High Courts the power to transfer the District Judges. The Court arrived at such a conclusion because the High Court would be in a position to take an impartial decision in the matter and such impartiality is the minimum requirement to ensure judicial independence. If the place of work of Judges is likely to change according to the whim and fancies, or depending on whether the judges toe the line of the executive, independence of the judicial officers will undoubtedly be affected adversely.\(^6^8\) The holding of the Court certainly reflects the judicial policy to uphold judicial independence.

\(^6^7\) *Id.* at 907.

\(^6^8\) A comparison of this decision with that of *S P Gupta v. Union of India*, 1981(Supp.) S.C.C. 87 makes it clear that the Court in that case held a very regressive view as it held that the power to transfer Judges of High Courts ultimately resided in the Executive. See *supra*, chapter 3.
In *State of U.P. v Banuk Deopathi Tripathi*⁶⁹ a different question came up for consideration. Does the power of the High Court to control the subordinate judiciary include the power to make Rules so as to exercise its control under Article 235 effectively? A constitutional bench of the Supreme Court held that though the power to frame Rules is conferred on the High Court under Article 225, that was not the sole repository of rule-making power. Article 235 vests power to control on the entire body of judges of the High Court,⁷⁰ but the High Court could prescribe the manner in which the power under Article 235 was to be exercised. For, a power to do a thing carries with it the power to regulate the manner in which it may be done. Moreover, the power under Article 235 comprises of numerous matters demanding considerations of minutest details.⁷¹ If the whole High Court is required to consider every one of them, exercise of the control becomes delayed and confused. So, it will be effective only if a committee was conferred with an authority under Article 235.⁷² Therefore, the Court held that the "seeds of the jurisdiction to frame rules regulating the manner in which the control over subordinate Courts is to be exercised are to be found in the very nature of the power. The High Court has therefore the power under Article 235 itself to frame rules for regulating the manner in which the thing may

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⁶⁹ (1978) 2 S.C.C. 102. The respondent joined the service as Munsiff and later promoted as a district judge. On request from the government, the High Court proposed his compulsory retirement. The decision was taken by an Administrative Committee constituted in accordance with the rules framed by the High Court recommended the retirement of the appellant. The decision was challenged by him in the High Court on the ground that the decision should have been taken by the High Court and not by an Administrative Committee constituted by the court.

⁷⁰ *Id.* at p. 110.


⁷² *Supra*, n. 69 at p. 113.
be done. If the High Court is not having the power to decide the mode of exercising its control under Article 235, the very power conferred by the provision would be made nugatory. A power to do something envisages the power to do it effectively. The holding of the Court establishes the supremacy of the High Court. However, the Court cautioned that such rule making should not be exercised in derogation of or to dilute the powers constitutionally conferred on the High Court.

In B.S. Yadav v. State of Haryana a slightly different question arose for consideration. The question was whether under Article 235, High Court has the power to frame rules for regulating the conditions of service of the subordinate Courts. Analysing the provision the Court held that the plane reading of Articles 235 and 309 reveals that the power to make rules for the subordinate judiciary

73 Id. at p. 110.
74 Id. at pp. 110-111.
75 A.I.R. 1981 S.C. 561. That was a writ petition filed under Article 32 questioning the fixation of seniority of Judges by direct recruitment and promotion _inter-se_ in the Punjab and Haryana superior judicial service under the rules framed by the Governor under Article 309. The Rules thus framed were amended time and again without consulting the High Court.
76 In Baruk Tripathi, the question was whether High Court has the power to frame rules for the purpose of exercising the power vested on it under Article 235. The question, here, on the other hand, is whether Article 235 confers on High Court the power to frame rules for regulating the conditions of service of judges of the subordinate courts.
77 Supra, n. 8.
78 Article 309 reads: "Subject to the provisions this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State

Provided that it shall be competent for the President or such other person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such other person as he may direct in the case of services and posts in connection with the affairs of a State, to make rules regulating the recruitment, and the conditions of service of persons appointed to such posts until provision in that behalf is made by or under an Act of the appropriate Legislature under
is vested in the Governor and not in the High Court. The second part of Article 235 provides that the power of the High Court to control the subordinate Courts would be subject to the law in that behalf. Such a power cannot be subject to the law laid down by the High Court itself. If the Constitution makers intended to confer High Court with a rule-making power, (which is legislative in nature) they could have specifically conferred the same on the High Court. Further, Article 309 clarifies that it is the Governor who has the power to make rules, and such an executive power is not violative of the controlling jurisdiction of the High Court under Article 235. However, the power conferred on the Governor by Article 309 is not absolute. It provides that the power under Article 309 can be exercised 'subject to the provisions of the Constitution'. Therefore, the Court made the point clear that the legislative or rule-making power could not be exercised by the Governor in such a manner as to impair the power of the High Court under Article 235. Therefore, the Court held that application of the rules so made to each individual case should reside in the High Court and not in the Governor or the legislature. It means determination of seniority of Judges inter se and decisions as to whether Judges have successfully completed probation in accordance with this Article, and any rules so made shall have effect subject to the provisions of any such Act.

79 Supra, n. 75 at p. 576.
80 Id. at p. 577.
81 Id. at pp. 578-579. The Court held, "The opening words of Article 309 'Subject to the provisions of this Constitution' do not exclude the provision contained in the first part of Article 235. It follows that though the legislature or the Governor has the power to regulate seniority of judicial officers by laying down rules of general application, that power cannot be exercised in a manner which will lead to interference with the control vested in the High Court by the first part of Article 235. In a word, the application of law governing seniority must be left to the High Court. ... though rules of recruitment can provide for a period of probation, the question whether a particular judicial officer has satisfactorily completed his probation or not is a matter which is exclusively in the domain of the High Court to decide."
Rules so framed are matters to be decided by the High Court.\textsuperscript{82} The holding indicates that the rule making power cannot be exercised by the Governor in such a way as to destroy the control of the High Court under Article 235. Therefore the Court held that in future the Governor might amend the Rules relating to the service of judges of the subordinate courts only in consultation with the High Court. The Court observed\textsuperscript{83}

"Nothing will be lost thereby and there is so much to gain: Goodwill, expert advice and the benefit of the experience of a body which has to administer the Rules since the control over the Subordinate Courts is vested in it by Article 235."

In \textit{B.S. Yadav} the Court was trying to effect a nice balance between powers of the High Court under Article 235 relating to control of subordinate courts and the rule-making power of the Executive under Article 309. The Court recognised the legislative power in such a manner as not to adversely affect the control of the High Court. In rendering such a construction, the Court has taken into account the damage that would happen to judicial independence by such impairment of control of the High Court. In other words, the power to frame rules and to implement them were not left free to the Executive. Instead they were made subject to judicial approval by insisting on the process of consultation before the promulgation of the rules and by vesting the complete power of application of the rules in the High Court itself by a creative interpretation of the constitutional

\textsuperscript{82} \textit{Id.} at pp 578-579.
\textsuperscript{83} \textit{Id.} at p. 587. However, in \textit{State of Jammu & Kashmir v. A.R.Zakki}, 1993 Supp.(1) S.C.C 548, where the legislature failed to comply with the suggestion of the High Court to amend the J.K. Civil Service (Judicial) Rules to avail the reservation for its employees in the judicial service, the Court held that that writ of mandamus could not be issued against the legislature to enact law. (at p.554).
provisions. Thus the possibility of executive arbitrariness excluded and independence of the subordinate judiciary protected.

Similarly in *State of Assam v. S.N. Sen* the Court held that under Article 235, High Court alone had the power to promote judges of the subordinate judiciary other than District Judges. It implies that the power to confirm such promotions also resides in the High Court. In this case, the Court gave content to Article 235 in such a way as to exclude intervention of the Executive in the service affairs of the subordinate judiciary.

The Court examined the scope and extent of the power of the High Court to control subordinate judiciary under Article 235 in *Chief Justice, Andhra Pradesh v. Dixitulu*. The Court enumerated the instances of the power of High Court to control the subordinate Courts. The Court identified disciplinary jurisdiction and complete control over subordinate courts, power to suspend a member with view to disciplinary enquiry, transfer, promote and confirm persons subordinate to District Judges, transfer of District Judges, recall of District Judges posted on ex-cadre posts or on deputation, award of selection grade to members of the judicial service including District Judges, confirmation of District Judges, and premature and compulsory retirement of District and other Judges as part and

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85 Id. at p 1030. In that the respondent was appointed Munsiff and later promoted as Additional Sub Judge in a temporary post. He was subsequently confirmed in it by the High Court. The Accountant General however objected it as the post was temporary. He filed the petition for getting him confirmed. The High Court allowed the petition. Hence the appeal.

parcel of the power of the High Court to control subordinate judiciary under Article 235.87

Is the control of the High Court limited to the power over the judicial officers or does it extend to control over ministerial staff of subordinate judiciary? The Court in Lakshmikant Dhal v. State of Orissa88 held that in view of the decision in S.P. Sampath Kumar v. Union of India89, Article 235 extends over the ministerial staff of the subordinate judiciary also. It was therefore held that the Administrative Tribunal could not have jurisdiction over the ministerial staff of the of the District Courts as it would affect the power of the High Court under Article 235 to control subordinate judiciary.90

In T. Lakshmi Narasimhachari v. High Court, Andhra Pradesh,91 an interesting question arose for consideration of the Supreme Court. In its attempt to harmonise the power of High Court under Article 235 with A.P.Civil Services

87 Id. at pp. 201-202. Recently, in High Court of Punjab and Haryana v. Iswar Chand Jain, A.I.R. 1999 S.C. 1677, the Court held that inspection of subordinate courts also formed part of the power of the High Court to control subordinate courts under Article 235.

88 (Supp.) S.C.C. 504. The appellants were selected for appointment of ministerial posts in the courts of district judges. The selection was vacated. It was challenged before the Administrative Tribunal, which dismissed the petitions on merit. The order of the Tribunal is challenged in appeal.

89 (1987) 1 S.C.C. 124. The Government agreed that the Administrative Tribunal constituted under the Administrative Tribunal Act 1985 would not have jurisdiction over the members and employees of the subordinate judiciary.

90 Supra, n.88 at pp. 504-505.

91 (1996) 5 S.C.C. 90. The appellant was a judge in the subordinate judiciary. There was an allegation that he forced a litigant to have illicit relationship with him. Charges were framed and after an inquiry by the district judge his removal from the service was ordered. Removal was effected by the High Court without referring the matter to the Governor. He appealed to the Governor who set the order aside. That was overruled by the High Court. Hence he came in appeal.
(Classification, Control & Appeal) Rules 1936 which provided that appeal against
the recommendation for dismissing a judge of the lower judiciary by the High
Court would lie to the Governor. The Court held that in such a case, if an appeal
was made by the dismissed Judge to the Governor, he had to forward the appeal to
the High Court for its reconsideration. However, the Court further held that the
Governor was bound by the decision of the High Court in such a case also. The
Court held that only such a course would help avoiding erosion of control vested
in the High Court under Article 235. Such a procedure would also satisfy the
requirement of appeal and reconsideration as contained in Article 235.

Can High Court delegate the power under Article 235 to another authority?
Every power envisages within its ambit the power to delegate it. An analysis of
cases dealing with this aspect brings out that the Supreme Court recognized such a
power with the High Court only to the extent of not damaging independence of the
judiciary. The issue was discussed for the first time in Samsher Singh v. State of
Punjab. The Court held that the power conferred on the High Court under
Article 235 was so important in upholding the dignity and independence of the
subordinate judiciary, that the High Court cannot abdicate that power to an
executive authority. While quashing the termination of the appellant on the basis
of an inquiry conducted by the executive, the Court held that the subordinate

92 Id. at p. 98.
93 Id. at pp. 98-99.
94 A.I.R. 1974 S.C. 2192. The appellants were terminated as members of the Punjab
Civil Service (Judicial Branch) during probation. The termination was challenged by
them on the ground inter alia that there was no proper inquiry. In the case of one of the
appellants, the High Court required the Government to get it conducted by the Director of
Vigilance.
judiciary was not only under the control of the High Court but also under its care and custody. Hence inquiry should have been conducted by the High Court through a district judge. And transfer of that power to an authority under the executive was in disregard of Article 235. However, the Court recognized delegation of the power to control without marring independence of subordinate judiciary in State of U.P. v. Batuk Deo Tripathi and High Court of Judicature, Bombay v. Shirish Kumar Ranga Rao Patil. Such a construction of the power under Article 235 bears testimony to the creative interpretation of the Supreme Court for achieving judicial independence.

A survey of the landmark cases dealing with the subordinate judiciary highlights certain important features. Every decision, right from the earliest ones, stands testimony to the anxious effort of the Supreme Court to keep the subordinate judiciary free from the influence of the executive. The Supreme Court opposed every attempt of the respective State Governments to bring the subordinate judiciary under its wings. As freedom from executive control is its cardinal feature, it is evident from these cases that the Apex Court was championing the cause of judicial independence. Restrictive interpretation of the scope of the executive power under Article 233 in cases like Chandra mohan and Chandra Mouleswar and cases exploring the extent of control of High Court

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95 Id. at p. 2207.
96 Supra, n. 69.
97 (1997) 6 S.C.C. 339. That was an appeal by special leave against the quashing of the removal of the respondent as the Civil Judge on proof of corruption on the ground that his dismissal was recommended by a Committee of Judges and not by the High Court. Allowing the appeal, the Supreme Court held that High Courts could delegate the powers conferred by Article 235.
under Article 235 bear testimony to this fact. The consistent holdings to reduce the power of the executive to appoint and dismiss judges of the subordinate judiciary and the residue of the powers including the disciplinary jurisdiction on the High Court is indicative of this attitude. Conferment of such a wide and undefined power to High Court was justified by the Supreme Court in the following words:

"For the first time, in the country's history, appeared in the Constitution of India the concept of control over subordinate courts to vest in the High Courts. The quality of exclusive control of the High Court does not appear to be whittled by the constitutional device of all orders being issued in the name of the Governor as the head of State administration. When, therefore, the High Court exercising disciplinary control over the subordinate judiciary finds, after a proper enquiry, that a certain officer is guilty... and, therefore, recommends to the Governor his removal or dismissal, it is difficult to conceive how and under what circumstances such a recommendation should be rejected by the Governor acting with the aid and advice of the council of ministers.... It is in this context that this court has more than once observed that the recommendations of the High Court in respect of judicial officers should always be accepted by the Governor. This is the inner significance of the constitutional provisions relating to the subordinate judiciary. Whenever in an extra ordinary case, rare in itself, the Governor fails, for certain reasons, that he is unable to accept the High Court's recommendations, these reasons will be communicated to the High Court to enable it to reconsider the matter. It is, however inconceivable that, without reference to the High Court, the Governor would pass an order which had not been

98 The only exception to this trend, perhaps, could be found in Baradakanta Misra v. Orissa High Court, A.I.R.1976 S.C.1899, where the Court agreed that the power to reduce the rank of a Judge was with the Executive. However, the Court held that the same could be effected by the executive only on the recommendation of the High Court...

earlier recommended by the High Court. That will be contrary to the contemplation in the Constitution and should not take place.”

Such a view was given further impetus when Article 235 has been considered by the Supreme Court as a measure for self-introspection by the judiciary against corruption in it.100

4. CONTROL OF HIGH COURTS VIS-À-VIS INDEPENDENCE OF JUDICIARY

The above discussion reveals that very wide jurisdiction was conferred on High Courts over the subordinate courts for securing their independence. However, independence of judiciary requires check on curtailment of judicial freedom even from the colleagues of Judges as well as from the higher judiciary.101 So a carte blanche to the High Court in the guise of power to control the subordinate judiciary would violate the spirit of judicial independence. It is true that such a power is vested with the High Court to divest the executive of any control over the subordinate judiciary. Conferment of wide powers in the higher judiciary may have the effect of avoiding control of executive over judiciary, but the question still remains whether such a measure protects in full measure independence of judiciary. For, construction of the provision in such a way as to

100 High Court of Judicature at Bombay v Shrish Kumar Ranga Rao Patil, (1997) 6 S.C.C 339. Justice K Ramaswamy for the Court held in an inimitable style thus, “The lymph nodes (cancer cells) of corruption constantly keep creeping into the vital veins of the judiciary and the need to stem it out by judicial surgery lies on the judiciary itself by its self imposed or corrective measures or disciplinary action under the doctrine of control enshrined in Articles 235, 124 (6) of the Constitution. It would therefore, be necessary that there should be constant vigil by the High Court concerned on its subordinate judiciary and self-introspection.” (at p. 358).

101 For the concept, see, supra, chapter 2.
confer unrestrained power to the High Court is likely to mar the very concept of judicial independence. There are at least a few instances where the highest judicial forum of the State went wrong while exercising its power under Article 235. What remedy has the Supreme Court to offer against such aspersions on the judicial independence by the High Court? Is there any way out from such attacks on judicial independence from within the judiciary?

*High Court, Calcutta v. Amal Kumar* ¹⁰² is an interesting instance. The Supreme Court held that the power of the High Court to control under Article 235 was a complete one which contains in it the discretion to pass over a Judge by others to the higher cadre even without initiating any disciplinary action against him. The holding amounted to acquiescence of the power with the High Court that without initiating a disciplinary action against a Judge, his due promotion could be indefinitely witheld. The result of such a holding is that even when there is no disciplinary action pending against a servant, he would not be entitled to take up action against the High Court before any other authority for denial of promotion. The decision is open to objection as nowadays due promotion of Judges forms part of legitimate expectation and breach of that expectation without due process is certainly violative of their independence. Therefore the holding that control of High Court under Article 235 includes both disciplinary and non-

¹⁰² A.I.R. 1962 S.C. 1704. In this case, the High Court without promoting the respondent, a Munsiff promoted his juniors as subordinate Judges. He made representation to the Governor. The High Court took the stand that no disciplinary proceedings were pending against the respondent and that his promotion was under its consideration. Contented that promotion of his juniors superseding his claim was violative of his rights, he filed a suit in the civil court for his promotion and salary which was allowed. The matter was taken in appeal by the High Court.
disciplinary (administrative) jurisdiction without any restraint is directed against the interest of judicial independence.

However in *Tejpal v. State of U.P.*[^103] the Court rendered a very constructive interpretation to the power to control vested in High Courts by Article 235 and checked exercise of the power in a perfunctory manner. The question that came up for consideration was whether the decision of the government to compulsorily retire a judge could be subsequently ratified by the High Court. It was held that it was for the High Court on the basis of assessment of performance and other aspect germane, to reach the conclusion whether a judicial officer is to be terminated as the power is vested in it. The Court agreed that in view of *Batuk Deo Tripathi*,[^104] the decision could be taken by the Administrative Committee of the Court. But, High Court’s ratifying the decision of the government to terminate a judge is wrong, as the initiative for removal should always come from the High Court.[^105] Such a decision insists that the decision to remove a judge should always be taken by the High Court and what remains with the executive is only complying with its recommendation. Such a view is protective of the independence of judicial officers of the subordinate courts. In *Reena*[^106]

[^103]: A.I.R. 1986 S.C. 1814. The appellant was serving as the district and session judge. The government decided that the appellant be prematurely retired. The Administrative Judge of the High Court agreed with the proposal and the Governor passed an order accordingly. Later the Administrative Committee of the High Court gave its approval to the recommendation of the Administrative Judge. A writ petition was filed in the High Court challenging the order of premature retirement *inter alia* on the grounds that the order was without the recommendation of the High Court and hence violated Article 235 and that it was violative Articles 14, 16 and 311 (2) of the Constitution. That was dismissed. He came in appeal.

[^104]: Supra, n. 69.

[^105]: Supra, n. 103 at pp. 1820-1821.
Tiwari v. State of M.P.\textsuperscript{106} services of the appellants who were officiating civil judges were found not satisfactory by the High Court and hence it was recommended that they were not to be confirmed. The Apex Court in appeal held that from the facts and records of the case, non-confirmation of the appellants as civil judges by the High Court was not justified.\textsuperscript{107} The Supreme Court held that the High Court exceeded the limits of its jurisdiction in a manner adversely affecting judicial independence. Hence the Court reversed the order and directed the government to reinstate them.

\textit{Iswar Chand Jain v. High Court of Punjab and Haryana}\textsuperscript{108} is another instance in which the exercise of control of the subordinate courts by the High Court under Article 235 was found by the Court as contrary to the spirit of independence of the judiciary. Trying to streamline the power of the High Court, the Supreme Court held that the power of the High Court under Article 235 to control subordinate judiciary was administrative in nature which was open to judicial review. The Court discouraged the exercise of the power by the High Court in an indiscriminate style, and observed: \textsuperscript{109}

\begin{quote}
\textquote{While exercising that control it is under a constitutional obligation to guide and protect judicial officers. If complaints are entertained}
\end{quote}

\textsuperscript{106} 1988 (Supp.) S.C.C. 213. In this case the appellants who were officiating Civil Judges were found as not satisfactory by the High Court it therefore recommended that they were not to be confirmed.

\textsuperscript{107} \textit{Id.} at p. 218.

\textsuperscript{108} (1988) 3 S.C.C. 370. Here the appellant was an Additional District Judge. On allegations from the Bar Associations and some litigant there was a vigilance enquiry against him. On its basis completion of probation was left undeclared leading to his termination. Earlier the High Court had given him an entry of satisfaction, which was later altered by it. But no material was placed before the Supreme Court for such alteration.

\textsuperscript{109} \textit{Id.} at pp. 381-382. (Emphasis supplied).
on trifling matters relating to judicial orders... it would be difficult for him to discharge his duties in an honest and independent manner.... If High Court encourages anonymous complaints to hold the field the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is therefore imperative that the High Court should also take steps to protect its honest officers....

It is clear from the decisions discussed above that the intention of the Court was to check arbitrariness of the High Courts in controlling the subordinate courts. The Court made this point clear in *R.C. Sood v High Court of Rajasthan*. In this case, the Supreme Court had an opportunity to deal with an instance in which the High Court invoked its power to control under Article 235 in an arbitrary manner. The Court observed that fairness and absence of arbitrariness was all the more important in any administrative act of the judiciary and that the power to control the subordinate courts under Article 235 should be exercised in a manner conducive to its independence from the executive.

Does the supervisory jurisdiction of the High Court extend to criticising Judges of the subordinate judiciary and to punishing them for their mistakes and

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110 The petitioner was a district judge. Before that he was the Registrar of the High Court. He was placed under suspension on the ground that as Registrar, he was responsible for some patent mistakes crept into the notification inviting application to certain posts in the Rajasthan Higher Judicial Service. The Supreme Court observed that even after careful scrutiny there was no evidence to prove that the mistake was committed intentional to benefit any one in whom he had some interest.

111 Supra, n. 110 at p. 716.
errors though intolerable? In Kashi Nath Roy v. State of Bihar\textsuperscript{13} the Court expressed the view that it does not. The Court quashed an order of the High Court that the petitioner, a judicial officer should not, for certain mistakes committed by him in rendering a judicial decision be allowed to deal with criminal matters. According to the Court correction of intolerable errors of subordinate judiciary by the superior courts should be “in a manner befitting, maintaining the dignity of the court and independence of the judiciary, convey its message in its judgement to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mallow but clear, and result orienting, but rarely as a rebuke”\textsuperscript{114} The directive force of the principle behind the decision is very clear. It operates as a warning to the High Court that the power under Article 235 should not be exercised so as to damage independence of the judiciary. By such an interpretation of Article 235, the Supreme Court has excluded exercise of judicial powers of the judges of the subordinate judiciary from the purview of control under Article 235.\textsuperscript{115} The decision therefore undoubtedly is one which upholds independence of the subordinate judiciary.

The above discussion reveals that the status of the lower judiciary is different from that of the higher judiciary. Unlike the latter, the former is placed

\textsuperscript{113} (1996) 4 S.C.C. 539. In this case the petitioner was a judicial officer in the Superior Judicial Service. Application for bail was allowed by him which on appeal was rejected by the High Court. While deciding the appeal the judge of the High Court ordered that the petitioner should not thereafter sit on the criminal side. Hence he file the petition under Article 32 of the Constitution. While deciding the case the Supreme Court referred to Article 235.

\textsuperscript{114} Ibid p. 541.

\textsuperscript{115} The cause of independence of judiciary was given further stimulus by the Supreme Court in Madan Mohan Choudhuri v. State of Bihar, A.I.R 1999 S.C. 1018 in which it
fully under the control of either the executive or the High Court. From the
construction of the provisions in the Constitution dealing with the subordinate
judiciary one finds a balance drawn by the Supreme Court between the power of
the executive and that of the High Court. The facts in these cases establish beyond
doubt that judiciary itself may in certain contexts, pose a serious threat to judicial
independence and that eternal judicial vigilance is the only remedy against the
same. These instances point out that exercise of administrative power even by
the judiciary cannot be considered as a reliable mechanism ensuring judicial
independence. It is clear that judicial review is the only dependable device for the
protection of independence of judiciary. A study of the cases in the area
establishes that the Supreme Court was very conscious of the necessity to protect
independence of the lower judiciary from both the executive and High Court and
the role of the judicial review in maintaining it.

However, a major criticism that can be levelled against the Supreme Court
is its holdings\textsuperscript{116} that it is the Governor and not the High Court who is competent
to dismiss, terminate or otherwise remove or reduce in rank judges of the
subordinate judiciary. It appears that such a conclusion is reached by the Court by
reading Articles 233, 234 in the light of Article 311\textsuperscript{117} which provides that no
public servant shall be dismissed from service by an authority subordinate to one


\textsuperscript{117} Article 311(1) reads "No person who is member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a
who appointed him and that since the Governor is the authority to appoint judges of the subordinate judiciary, he alone should terminate them. Does Article 311 operate as a bar for vesting the power to dismiss judges of the subordinate courts in the High Court? Article 311(1) does not mean that the appointing authority and the authority for terminating a servant should be one and the same. It just means that the terminating authority should not be subordinate to the appointing authority. It does not bar termination of an officer by an authority equal or higher to the one who appointed him. High Court could not be considered as an authority subordinate to the Governor. Hence, removal of a judge by High Court does not violate Article 311. Further, Article 311 is a general provision applicable to all civil servants including judicial officers while Articles 233 and 235 are special ones enacted for judicial officers specifically for protecting independence of the judiciary. In case of a conflict between a general and special provision governing the same subject matter, the general one should give way for the special one. Therefore, the Court would not have been wrong if the power to terminate and dismiss judges of the subordinate judiciary was conferred on the High Court. Such a construction enjoys the advantage that it is conducive to independence of judiciary. Though the rigour of these decisions has been considerably reduced by the holding that such termination should be effected only

State shall be dismissed or removed by an authority subordinate to that by which he was appointed. (Emphasis supplied)

118 "Article 311 (1) does not mean that the removal must be by the very same authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank or grade. Article 311(1) contemplates subordination in respect of rank and not subordination in respect of powers and duties." Seervai, Constitutional Law of India Vol. III (1996), pp. 3017-3018.

119 Specilia Generalibus Derogant.
on recommendation of the High Court, by a more creative interpretation of the provisions, the Court could have totally avoided intervention of the executive in the matter of termination of judges of the subordinate judiciary with a view to uphold judicial independence.

Can the judicial office be an emblem of immunity for each and every act of the person who holds it? Or can a judicial officer be arrested and dealt with by the police offices as every other citizen? Answers to both these questions are in the negative. In Delhi Judicial Service Association v. Union of India, the Supreme Court took note of these aspects. The Court observed that arrest and prosecution of the Judges pose a very serious quibble. Judges, as every other person should be available for prosecution and punishment for the offences committed by them. But a free hand of the police officers in dealing with them may pose a serious threat to their independence as Judges, as the police personnel may exercise their discretion and authority indiscriminately. In short, arrest and prosecution of judges without thwarting independence of the judiciary is a conundrum. How can the offending Judge be brought to book and punished without damaging independence of the judiciary? The Court laid down the following guidelines.

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120 Baldev Raj, supra, n. 56.

121 A.I.R. 1991 S.C. 2178. That was a writ petition under Article 32. The facts leading to the petition were horrendous. A Chief Judicial Magistrate was arrested and handcuffed. The police tied him with a rope and exhibited him in that condition before the public. He was sent for medical examination on the allegation that he had consumed liquor and violated the prohibition law. The Inspector of Police who arrested him photographed him and published the photograph in newspapers.
Before arrest the District Judge or High Court should be intimated. If immediate arrest is called for by the facts and circumstances, a technical or formal arrest may be effected. The factum of arrest should immediately be communicated to the District Judge or the Chief Justice of the High Court. The Judge so arrested should not be taken to the police station without the order or direction of the District and Sessions Judge. Immediate facilities be provided to the judicial officer for communication with his family members, legal advisers and judicial officers including the District Judge. No statement of the Judge be recorded, punchnama drawn up or medical tests conducted except in the presence of his legal adviser or another judicial officers of equal/higher rank. No handcuffing of the judge be made. But if it was necessary the same should immediately be intimated to the District Judge and the Chief Justice of the High Court. The burden to the necessity of handcuffing would be with the police officer. If the same was found to be unjustified, the police officer would be guilty of misconduct and would be personally liable for compensation. The Court made it clear that these guidelines are not exhaustive but contain only the minimum safeguard to be observed in case of arrest of a judicial officer.

Thus decisions dealing with the provisions relating to the subordinate judiciary form a saga of creativity for protecting judicial independence. The prime concern of the Court in these cases was checking of intrusion by the execution into the freedom and independence of judges of the subordinate courts irrespective of whether such intrusion was arbitrary in nature. By a creative

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122 Id. at pp.2212-2213.
123 Id. at p.2213.
interpretation of Article 233, the Court extended a restrictive content to the power of the executive. Through successive decisions the Court provided a meaningful content to 'consultation' in it as a result of which the thrust of the power to appoint district judges was shifted from the executive to the High Court. Likewise, by interpreting Article 234 the Court was able to bring selection of judges other than district judges under the control of the High Court by holding that the opinion of the judge of the High Court who is the expert member of the interview board will be determinative. While dealing with the conditions of service of judges of the subordinate courts, the Court by innovative construction of Article 235, managed to introduce more concepts into the parameters of the provision and to make it all comprehensive and self-sufficient. Analysing the relationship between Article 233 and 235, the Court brought almost all of the incidents of service under the purview of control and supervision of the High Court. In short, by providing flesh and blood to the provisions dealing with the subordinate courts, the Court was able to effect a divorce between the executive and the judiciary which is a declared constitutional goal and was virtually transferring the entire control of the subordinate judiciary to the High Court.

However, the Court did not permit High Court to wield arbitrary power over the subordinate courts in the guise of its power to control and supervise them. The decisions prove that in cases which the administrative power of the High Court under Article 235 ran mad, the Supreme Court put effective checks upon it through judicial review. To conclude, in every respect decisions dealing with

124 See, Constitution of India, Article 50. It reads, "The State shall take steps to separate the judiciary from the executive in the public services of the State."
subordinate judiciary exemplify another instance of high judicial creativity designed to achieve independence of judiciary and to prepare a healthy climate for judges to work without fear or favour.