CHAPTER – VII
JUDICIAL INDEPENDENCE IN INDIA

7.1 Introduction

The Constitution of India of 1950 - one of the longest ever framed for an independent State. The Constitution of India is a unique legal document, which sets out the framework and the principal functions of the organs of the Government within the State and declares the principles by which those organs must operate. Unlike most of the other constitutions, the Constitution of India does not merely set out the political structure of the country; its objectives are far more comprehensive i.e., it has not only established a Sovereign Socialist Secular Democratic Republic; it has also laid the foundation for building an egalitarian society and a welfare State.

The Constitution of India is not to be construed as a mere law, or simply as a statute. The Constitution is the ‘supreme’ and ‘fundamental law’ of the land and it is the ‘fountainhead’ of all the statutes. Every organ in the State must act in accordance with it as the Constitution occupies primary place. The Indian Constitution is a ‘controlled Constitution’ par excellence. All institutions, including the Parliament, are merely creatures of the Constitution and none of them is its master.

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4 The words Socialist Secular are substituted by the Constitution (Forty-second Amendment) Act, 1976.
India is a federal State\textsuperscript{9} with a strong Central Government\textsuperscript{10} and a unitary court structure running through its fabric.\textsuperscript{11} The judiciary finds pride of place in the Indian Constitution.\textsuperscript{12} The existence of a fearless and independent judiciary is founded in the constitutional structure in India.\textsuperscript{13} As V.R. Krishna Iyer J. stated in Shamsher Singh v. State of Punjab,\textsuperscript{14} “…fearless justice is a prominent creed of our Constitution and the independence of the judiciary is the fighting faith of our document.”

The present chapter will focus on Constitutional provisions relating to judicial independence in India and judicial pronouncement on these issues and most importantly, it will critically evaluate the provisions relating to the National Judicial Appointments Commission.

\section*{7.2 Justice - As a Constitutional Value}

The preamble of the Indian Constitution proclaims the objectives to be achieved by its enactment and implementation. The foremost objective declared by the preamble is ‘justice- social, economic and political.’\textsuperscript{15} The very concept of a system of justice, involves impartiality whether of allocation of resources (distributive justice) or justice in deciding disputes which consists of decision-making by the courts.\textsuperscript{16} The main organs of justice in the Constitution are the courts\textsuperscript{17} and expansion of the sphere of judicial review.

\textsuperscript{9} For a discussion of federalism in India, see Alice Jacob, “Centre-State Governmental Relations in the Indian Federal System,” \textit{JILI} 10 (4) 1968, pp.583-636.
\textsuperscript{10} For example - Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit (Article 2); Formation of new States and Alteration of areas, Boundaries or names of Existing States (Article 3); Appointment of Governors to the States (Article 153); Legislative Powers under Articles 247-254; The Central Government power to dissolve State Legislative Assemblies (Article 356), (But, see \textit{S.R. Bommai v. Union of India}, AIR 1994 SC 1918, holding that the power to dissolve State Assemblies is subject to judicial review.); and Article 365- Effect of failure to comply with, or to give effect to, directions given by the Union.
\textsuperscript{14} AIR 1974 SC 2192.
\textsuperscript{17} \textit{Ibid}, p.190.
is another reason for the increase in importance of the role of judiciary.\(^{18}\) The judiciary, therefore, becomes an outstanding and prominent wing of the Constitutional system for fulfilling the mandate of the Constitution.\(^{19}\) The Constitutional task assigned to the judiciary is in no way less than other functionaries. Indeed, as Arijit Pasayat J. has said, “…it is the role of the judiciary in carrying out the Constitutional message and it is its responsibility to keep a vigilant watch over the functioning of democracy in accordance with the dictates and commands of the Constitution by checking excessive authority of other Constitutional functionaries beyond the ken of the Constitution. In that sense, the judiciary has to act as sentinel on the \textit{qui vive}.”\(^{20}\) So, judges are no longer mere dispute-adjudicating agents; they have a Constitutional agenda for transforming the social order and be a sentinel on the \textit{qui vive}.\(^{21}\)

### 7.3 Separation of Powers: A Constitutional Necessity

The doctrine of separation of powers contemplates the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary.\(^{22}\) The separation of power has to be viewed through the prism of constitutionalism and for upholding goals of justice in its full magnitude.\(^{23}\) The Indian Constitution did not recognize the ‘doctrine of separation of powers’ in its absolute rigidity.\(^{24}\) The governance of the Indian Republic, in the totality of administration, is vested in the trinity of great departments of the Constitution.\(^{25}\) However the functions of the different parts of the


\(^{24}\) The Executive is a part of the Legislature. It is responsible to the Legislature for its actions and also it derives its authority from the Legislature. India, since it is a Parliamentary form of Government, therefore it is based upon intimate contact and close co-ordination among the legislative and executive wings; \textit{State of West Bengal v. Committee for Protection of Democratic Rights}, (2010) 3 SCC 571: AIR 2010 SC 1476; \textit{Union of India v. Madras Bar Association}, (2010) 11 SCC 1.

branches of government had been sufficiently differentiated in the Constitution. In modern governance, a strict separation is neither possible nor desirable. The Indian system is a striking balance between strict separation of powers and fusion of all powers. They are the executive, legislature and the judiciary. As the former Speaker of the Lok Sabha Sri. Somnath Chatterjee describes, “The doctrine of separation of powers, which provides for checks and balances amongst the organs of the State, is one of the most characteristic features of our Constitutional scheme.”

In Kesavananda Bharati v. State of Kerala it was held that separation of powers was a part of the basic feature of the Constitution which the Constituent Authority was not competent to abrogate. Later, it was reiterated in a large number of judgments that the separation of powers is one of the basic features of the Constitution. The object of separation of powers is to secure efficiency, transparency and accountability of the functionaries.

30 AIR 1973 SC 1461.
31 Basic feature doctrine expounded in Kesavananda Bharati v. State of Kerala, postulates that the constituent on power of the Parliament does not enable to amend the essential features of the Constitution, which are supremacy of the Constitution, Republican and Democratic form of government, Secular form of the Constitution, separation of powers, judicial review, federal character of the Constitution, independent judiciary etc. Some judgements deal with the following as basic features:- Elections free and fair (Kihota Hollohan v. Zachillhu, AIR 1993 SC 412; (1992) Supp (2) SCC 651, paras.18, 46 and 104); The principle of equality, not every feature of equality, but (the quintessence of equal justice), (Raghunathrao Ganpatrao v. Union of India, AIR 1993 SC 1267); Rule of law (Indra Sawhney v. Union of India, AIR 1993 SC 477); Fundamental Rights; fundamental rights is part of basic structure (Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299; S.P. Sampath Kumar v. Union of India, AIR 1987 SC 386; (1987) 1 SCC 124; Waman Rao v. Union of India, AIR 1981 SC 271; Bhim Singhji v. Union of India, AIR 1981 SC 234; Ram Jethmalani v. Union of India, (2011) 8 SCC 1).
7.4 Judicial Independence: A Basic Feature of the Indian Constitution

Rule of law runs through every provision of the Indian Constitution.\textsuperscript{35} In fact, it is the very basis of the Indian Constitution.\textsuperscript{36} There are various provisions in the Constitution which establish and protect the independence of the judiciary as a basic feature in its sweep and as an inherent element of the Rule of Law.\textsuperscript{37} As M.C. Chagla J. has said “…the independence of the judiciary is thus vital to the rule of law, which is itself vital to the maintenance of democracy.”\textsuperscript{38} Even the noted jurist, Mr. Nani A. Palkivala emphasised the importance of judicial independence thus:

“An independent judiciary is the very heart of a Republic. The foundation of a democracy, the source of its perennial vitality, the condition for its growth, and the hope for its welfare- all lie in that great institution, an independent judiciary.”\textsuperscript{39}

The independence of the judiciary, according to the Supreme Court, is a noble concept which inspires the Constitutional scheme and is the foundation on which the edifice of the Indian democratic polity rests.\textsuperscript{40} In \textit{Supreme Court Advocates on Record Association v. Union of India},\textsuperscript{41} the Supreme Court said that, “[t]he 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. The independence of the judiciary is an essential attribute of the Rule of Law.”\textsuperscript{42}

The formal political structure of the Indian Republic is federal; its judicial structure is unitary. Both Union and State laws are interpreted in a single court system;

\textsuperscript{35} \textit{K.T. Plantations (P) Ltd. v. State of Karnataka}, (2011) 9 SCC 1, paras.211-216.
\textsuperscript{39} Nani A. Palkivala. “The Supreme Court’s Judgement in the Judge’s Case,” \textit{JBCI} 9(2)1982, p.203.
\textsuperscript{40} \textit{S. P. Gupta v. Union of India and anr}, 1981 (Supp) SCC 87, para.27.
\textsuperscript{41} AIR 1994 SC 268.
there is no division of judicial business between the Central and State governments.\textsuperscript{43} The Indian Constitution establishes not only an integrated judicial system,\textsuperscript{44} with plenitude of powers at the highest level, in order to meet the ends of justice in all matters, but also provides conditions for their independent and impartial exercise.\textsuperscript{45}

The directive\textsuperscript{46} under Article 50 of the Constitution of India, enjoins upon the State to take steps to separate the judiciary from the executive in the public services of the State. Article 50 has been described by Granville Austin as ‘the conscience of the Constitution’.\textsuperscript{47} A reference may be made to Article 50 of the Constitution, with the intent to immunize the judiciary from any form of executive control or interference.\textsuperscript{48}

7.5 Powers and Jurisdiction of the Constitutional Courts

The power of constitutional adjudication in India is dispersed, shared between the Supreme Court of India, and the High Courts of each State.\textsuperscript{49} Subordinate courts are not empowered to decide Constitutional cases. Articles 32 and 226 give writ jurisdiction to the Supreme Court and the High Courts.\textsuperscript{50} Under Article 13, in a clear and unequivocal fashion Supreme Court of India has power to test the legislative competence of Constitution.\textsuperscript{51} The Union Judiciary, consisting of the Supreme Court of India has perhaps wider jurisdiction than the highest court of any other federation. In addition to being the final court of appeal, in all Constitutional matters,\textsuperscript{52} it is also the final court of appeal in several important civil and criminal matters decided by the State High Courts.\textsuperscript{53} Original jurisdiction has also been conferred upon the Supreme Court to the exclusion of

\textsuperscript{43} George H. Gadbois, Jr., supra note 11, p.221.
\textsuperscript{46} Article, 37, has laid down the scope of these principles. It provides that the provisions contained in this Part shall not be enforceable by any court, but the principles therein laid are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.
\textsuperscript{48} Dr. Justice Arijit Pasayat, supra note 20, p.43.
\textsuperscript{49} \textit{Tirupathi Balaji Developers Pvt. Ltd. v. State of Bihar}, (2004) 5 SCC 1; India has not followed the Kelsenian ‘continental model’ of institutional design, where the power of constitutional judicial review is centralized in one constitutional court.
\textsuperscript{50} Justice G.M. Lodha, “Harakari by Indian Judiciary: Whether True?,” \textit{JBCI} 9(2) 1982, pp.315-316.
\textsuperscript{52} Article 132.
\textsuperscript{53} Articles 133 and 134.
any other court in disputes arising between the Union Government and one or more States in matters involving ‘any question (whether of law or fact) on which the existence or extent of a legal right depends.’\textsuperscript{54} The Supreme Court also has original jurisdiction in the matter of enforcement of fundamental rights so that a citizen or other person whose fundamental right has been affected can approach the Supreme Court for redress. The Constitution expressly provides that ‘the right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by fundamental rights’ part\textsuperscript{55} is guaranteed.\textsuperscript{56} and above these specific powers conferred on the Supreme Court it has an almost unlimited discretionary jurisdiction to ‘grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.’\textsuperscript{57} The Supreme Court has exercised this jurisdiction to the fullest measure intervening even in decisions of quasi-judicial tribunals where the Supreme Court felt that ‘justice had not been done or that the authority of the tribunal had been abused.’\textsuperscript{58} It is also clothed with an advisory jurisdiction which may be involved ‘if at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it’\textsuperscript{59} and along with these powers Article 141 categorically lay down that ‘the law declared by the Supreme Court, shall be the law of the land and would be binding on all courts within the territory of India.’ All courts in India are bound to follow the decision of the Supreme Court.\textsuperscript{60} Under Article 142(1), in the exercise of its jurisdiction, the Supreme Court is entitled to pass any decree, or make any order, as is necessary for doing ‘complete justice’ in any cause or

\textsuperscript{54} Article 131. See also Article 71 (1) All doubts and disputes arising out of or in connection with the election of a President or Vice- President shall be inquired into and decided by the Supreme Court whose decision shall be final. (Article 71 has been successively subs. by the Constitution (Thirty-ninth Amendment) Act, 1975, s. 2 (w.e.f. 10-8-1975) and the Constitution (Forty-fourth Amendment) Act, 1978, s. 10, to read as above (w.e.f. 20-6-1979).
\textsuperscript{55} Part III, the Constitution of India.
\textsuperscript{56} Article 32.
\textsuperscript{57} Article 136.
\textsuperscript{59} Article 143.
matter pending before it. It has been held that these words are of the widest amplitude and empower the Supreme Court to make any order as may be necessary for ensuring complete justice in a case before it. In order to make the Supreme Court dominant, all authorities, civil and judicial in the territory of India were directed to act in aid of the Supreme Court; this has been made clear by Article 144 of the Constitution. The office bearers in the higher judiciary, namely, the servants and officers of the Supreme Court and High Courts are given separate treatment respectively under Articles 146 and 229, with respect to the matters relating to their service. A dissenting judge shall have the liberty of pronouncing a separate judgement though the decision of the majority shall be the judgement of the court. 145 (5) lays down the democratic principle of majority rule in the decision making within the court. It ensures freedom of decision making to every judge.

7.6 Constitutional Text on Judicial Independence

Having regard to the importance and significance attached to the function performed by the judiciary, the Constitution has consciously provided for separation of judiciary from the executive. Not only this, the Constitution discloses a distinct bias in favour of the independence of the judiciary. It is in furtherance of this objective that several provisions relating to the appointment, transfer and removal of judges, financial autonomy, etc., at whatever level they may be, have been enacted. A brief reference to the said provisions would now be in order:

7.6.1 Appointment of Judges to Higher Judiciary

Appointment of judges to the higher judiciary assumes utmost importance in the context of independence of the judiciary. As Harold J. Laski has observed “Judicial

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independence is the first requisite of judicial purity; it is the primary consideration to be satisfied in the making of selective criteria.” 67 The selection of proper judges is of fundamental importance to the progress of the nation, and the selection of judges has necessarily to be made with the utmost care. 68

7.6.1.1 Constitutional Provisions on Appointment of Judges

The Constitution of India established the bare process for appointments to the Supreme Court and the High Courts. 69 In respect of judges of the Supreme Court of India, Article 124(2) provides:

“Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:
Provided that in the case of appointment of a Judge other than the chief Justice, the Chief Justice of India shall always be consulted.”

In respect of judges of the High Courts, Article 217(1) provides:

“Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.”

The Constitution of India has provided that the President of India is to appoint judges of the Supreme Court and the High Courts after consultation with Chief Justice of India, and with such other judges and authorities mentioned in Articles 124(2) and 217(1). The pool of eligible candidates for judicial selection is partly determined by the Constitution. 70 The Constitution does not speak about standards of integrity, propriety,

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70 Article 124(3) A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and-
(a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
(c) is, in the opinion of the President, a distinguished jurist.
Article 217 (2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-
(a) has for at least ten years held a judicial office in the territory of India; or
competence, independence, etc. as qualifications essential for judicial selection. Apparently, they are taken for granted and left to the selectors to assess them by whatever means available to them.\footnote{N.R. Madhava Menon, “A way to judicial independence,” available at http://www.thehindu.com/todays-paper/p-opinion/a-way-to-judicial-independence/article7897768.ece, visited on 20.11.2015.}

The Supreme Court of India came into being on 26\textsuperscript{th} January, 1950, when India’s new Constitution came into force.\footnote{Article 374(1) of the new Constitution provided that the judges of the Federal Court holding office immediately before the commencement of the Constitution would automatically become judges of the Supreme Court. This provision also applied to the post of Chief Justice. See, Second Schedule, Part D, Para.9 (3)(a), Constitution of India.} Harilal Kania J. was appointed as Chief Justice of India.\footnote{But Kania’s J. appointment as Chief Justice took place despite the fact that Prime Minister Nehru, in a private letter to the Home Minister, had expressed doubts about whether Kania should become Chief Justice of the Supreme Court. Letter dated 23\textsuperscript{rd} January 1950. Granville Austin, \textit{Supra} note 69, pp.125-126; Kania’s appointment as Chief Justice of India was significant for two reasons: (a) he was the first Indian Chief Justice of India and (b) he was appointed to the post as the most senior puisne judge on the Court on the eve of the resignation of the outgoing Chief Justice of India. Abhinav Chandrachud, \textit{The Informal Constitution}, 1\textsuperscript{st} ed., (New Delhi: Oxford University Press, 2014), p.74.} During the first decade, the principle that the most senior judge should become Chief Justice of India crystallized into an informal norm or constitutional convention. When Harilal Kania J. passed away in November 1951, bringing a premature end to his term, it was rumoured that the Union Government was contemplating appointing somebody other than the next most senior justice on the court (Patanjali Sastri J.) to the post of Chief Justice.\footnote{In fact, the Home Minister, K.N. Katju, asked the Attorney General of India, M.C. Setalvad, whether he was interested in taking Kania’s place as Chief Justice of India, referring to a custom prevalent in England where the Attorney General replaces the Lord Chief Justice. Setalvad reminded the Home Minister that he had already surpassed the retirement age. Motilal C. Setalvad, \textit{My Life: Law and Other Things}, (London: Sweet and Maxwell, 1970), p.185. Apparently, Setalvad suggested to the Home Minister that M.C. Chagla, the Chief Justice of the Bombay High Court, be considered for the post. M.C. Chagla, \textit{Roses in December: An Autobiography}, (Bombay: Bharatiya Vidya Bhavan, 1974), p.171. It is said that the government then intended to appoint a junior Supreme Court justice, possibly B.K. Mukherjea, to the post of Chief Justice.} But all the judges who were in the Court at the time threatened to resign if Patanjali Sastri J. was not appointed Chief Justice and if the norm of seniority was not followed. Accordingly, the post of Chief Justice of India next went to Patanjali Sastri J., the most senior judge on the Supreme Court. In that decade, six Chief Justices served on the Supreme Court, and each was the most senior puisne judge on the Court on the eve of his appointment as Chief Justice of India. The sixth Chief Justice B.P.
Sinha later wrote that it was an ‘unwritten law’ that the ‘Chief Justiceship would go to the senior-most judge of the Supreme Court.’

In September 1958, the Law Commission of India submitted its 14th Report to the Government, which highlighted certain problems in the manner in which judges were being selected and appointed to the Supreme Court. First, the Law Commission noted that judges were being appointed to the Supreme Court of India on communal and regional grounds. It was hinted that such considerations were perhaps prevalent because of the exercise of executive influence in the appointment process. The Law Commission severely criticized that prior discussion between the Minister and the Chief Justice may lead to bargaining, resulting in compromises. The Law Commission also observed that the Chief Justice of India should get to serve tenure of at least five to seven years as continuity in the office of the Chief Justice of India was essential in the interests of judicial administration:

“The Chief Justice’s importance in the scheme of judicial administration outlined in our Constitution cannot be over-emphasized… In the quick succession to the office at present in vogue, a Chief Justice who has succeeded in familiarizing himself with his many tasks becomes liable to retire before he can have time to put into force the principles and policies which he considers beneficial.”

Most importantly, however, the Law Commission criticized the observance of the ‘seniority norm’ in the Supreme Court of India. It was suggested, both for the Supreme Court and for the High Courts, that the Chief Justices should be selected by keeping in mind the special needs of the office. The Chief Justice of India could be picked amongst ‘Chief Justices of the High Courts,’ ‘puisne judges of High Courts of outstanding merit,’

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76 M.C. Setalvad, was the Chairman, while M.C. Changla (Chief Justice of the Bombay High Court), K.N. Wanchoo (Chief Justice of the Rajasthan High Court, and later, Chief Justice of India), and S.M. Sikri (Advocate General of Punjab, and later, Chief Justice of India) were some of its members.
77 “It is widely felt that communal and regional considerations have prevailed in making the selection of the judges. The idea seems to have gained ground that the component States of India should have, as it were, representation on the Court. Though we call ourselves a secular State, ideas of communal representation which were viciously planted in our body politic by the British, have entirely lost their influence. What perhaps is still more to be regretted is the general impression that now and again executive influence exerted from the highest quarters has been responsible for some appointments to the Bench.” Law Commission of India, *Fourteenth Report: Reform of Judicial Administration*, Vol.1, (New Delhi: Ministry of Law, Government of India, 1958), p.34, para.6.
78 K.S.Hegde, *supra* note 5, p.34.
79 *Supra* note 77, pp.38-39, para.17.
and ‘distinguished senior members of the Bar.’ Unlike in the appointment of judges to the Supreme Court, the Law Commission suggested that for the High Courts, Article 217 of the Constitution ought to be amended to incorporate the concurrence of the Chief Justice of India to the appointment. This recommendation was made so that, in future, no appointment could be made without the concurrence of the Chief Justice of India.

From the time the Constitution came into force in January 1950, though the executive technically had the power to appoint Supreme Court and High Court judges, and the Constitution only required the President of India to consult judges of the Supreme Court and High Courts as he deemed necessary, in practice, appointments were almost always made with the consent of the Chief Justice of India.

7.6.1.2 Supersession of Judges - I

The prescribed mode of appointments worked well, but only during the first decade after 1950. However, things changed with the Supreme Court’s literal interpretation of the property clause of our Constitution beginning with decisions in the 1960s, which were years of conflict between Parliament and the superior judiciary. The day after the Kesavananda Bharati v. State of Kerala judgement, it was announced on

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81 Ibid, para.82.
82 B.P. Sinha C.J. wrote that he could ‘personally testify to the fact’ that the several Home Ministers who served on the cabinet between independence and 1964 consistently followed the policy of respecting the views of the Chief Justice of India in the matter of appointment and transfer of judges. B.P. Sinha, supra note 75, p.98; in his autobiography, Gajendragadkar J. wrote that the government would ‘attach…decisive importance’ to the opinion of the Chief Justice of India and that this was a ‘valid and basically sound’ convention. P.B. Gajendragadkar, To the Best of My Memory, (Bombay: Bharatiya Vidya Bhavan, 1983), pp.164-165.
83 Although the Supreme Court started out as a ‘technocratic court’ in the 1950s, conflicts soon began to emerge between the executive and the judiciary, particularly in the area of property rights. Under Article 31, as it originally stood in the 1950 Constitution, no person could be deprived of his property save by authority of law, and no property could be taken without payment of ‘compensation.’ In a series of decisions, vehemently contested by the Government of India, the Supreme Court said that ‘compensation’ meant ‘full compensation’ – as the American courts had said: ‘compensation’ meant ‘a just equivalent’ for the property taken. This almost set a naught the Government’s avowed policy of abolishing the old zamindars because the country just could not afford to pay the zamindars the full worth of vast lands taken over as a measure of agrarian reform. S.P. Sathe, Judicial Activism in India, (New Delhi: Oxford University Press, 2002), p.4.
84 Between 1950 and 1970, four confrontations took place between the executive and the judiciary, and with each confrontation the Supreme Court grew increasingly estranged from the executive. In Sri Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458, and in Sajan Singh v. Rajasthan, AIR 1965 SC 845, cases the Supreme Court give the judgment in favour of the government. But in I.C. Golak Nath v. State of Panjab, AIR 1967 SC 1643, the Supreme Court ruled by narrow majority of six to five: while reserving for the Court the power to investigate the legality of Constitutional amendments on the one hand, the Court denied the petitioners in the case any relief on the other. The fourth confrontation
All India Radio that the next Chief Justice of India would be A.N. Ray J. - the fourth most senior puisne judge on the Supreme Court at the time, a judge who was not in the line of succession according to the seniority norm. The three judges who had been superseded- J.M. Shelat, K.S. Hegde JJ., and A.N. Grover J. - had repeatedly held against the government’s position in many of the key confrontational cases. All three resigned. The supersession of Justices created a national outrage. It is important to mention that at various times, the government thought of appointing Chief justice of India outside the Supreme Court in 1969, 1970, 1971. But appointment of A.N. Ray J. as the new Chief Justice was kept a guarded secret till the afternoon of the 25th April, 1973, a day before Chief Justice Sikri’s retirement. The circumstance is not without significance.

Adverse reaction to the supersession from the legal community was immediate and vociferous. The day after the supersession, M.C. Chagla, former Chief Justice of the Bombay High Court, V.M. Turkunde, former Chief Justice, J.C. Shah, former Chief justice of the Gujarat High Court, K.T. Desai, and Mr. Nani A. Palkhivala sent a statement to the government saying that the supersession was ‘a manifest attempt to undermine the [Supreme] Court’s independence.’ Each of the members of the Law Commission accused the government of misinterpreting its 14th Report; and insisted


6 The members of the Bar throughout India, almost unanimously, boycotted all courts and tribunals on the 3rd May, 1973 by and large; all Bar Associations also passed resolutions condemning the supersession of the three senior-most puisne judges of the Supreme Court and the appointment of a comparatively junior judge as the Chief Justice of India. They considered the new appointment as a serious blow to the independence of the judiciary. Kuldip Nayar (ed.), Supersession of Judges, (New Delhi: Indian Book Company, 1973), pp. 9-41.


89 Granville Austin, supra note 69, p.285.
that the government must use Law Commission report honestly.\textsuperscript{90} K.S. Hegde J. criticized supersession stating that, “The procedure adopted in appointing the new Chief Justice was wholly alien to our democratic set-up and there is hardly any doubt that the appointment was politically motivated.”\textsuperscript{91} M.C. Setalvad criticized the supersession and stated that the “Policy of the governments has the effect of shaking the very foundations of our democratic republic the Constitution of which reflects in a number of its provisions the spirit and the letter of justice and the rule of law.”\textsuperscript{92} Mr. Jayaprakash Narayan criticized the supersession stating that- “The highest judicial institution of this country cannot but become a creature of the government of the day.”\textsuperscript{93}

Mr. H.R. Gokhale, the Law Minister of the Union defended the supersession arguing that “…to appoint a Chief Justice, the consultation with the Chief Justice is not obligatory.”\textsuperscript{94} And the ‘driving force behind the supersession,’ and it’s most vocal proponent, Mr. S. Mohan Kumaramangalam, the Union Minister, justified the government’s position. Relying on the Law Commission’s 14\textsuperscript{th} Report, which had criticized the seniority norm, he argued that it was necessary to examine the ‘social philosophy’ of judges, their ‘outlook on life’ and their ‘conception of social needs.’\textsuperscript{95} Former Chief Justice Sikri criticized that the words ‘social philosophy’ does not exist in the oath of a judge. Judges should go by the social philosophy laid down in the Preamble and the rights and principles of the Constitution, he said.\textsuperscript{96} Nani A Palkhivala has critically observed about supersession in following words:

“The government expressly proclaimed that it wanted “committed” judges-committed to the ideology of the ruling party. That began an era of a judiciary made to measure. The government looked out for pliant judges\textsuperscript{97} …once the judiciary becomes subservient to the executive and to the ruling party’s philosophy, no enumeration of fundamental rights in the Constitution can be of

\textsuperscript{90} J.M. Shetal, \textit{supra} note 87, p.43.
\textsuperscript{91} K.S. Hegde, \textit{supra} note 88, p.50.
\textsuperscript{96} Granville Austin, \textit{supra} note 69, p.286.
any avail to the citizen, because the Courts of Justice would then be replaced by the Government’s Courts…”

The critics were, by and large, some ex-judges and lawyers. Their contentions were that: A.N. Ray J. had been wrongly appointed the Chief Justice superseding the claims of three of his senior brother judges; constitutional requirements in regard to consultations before the appointment of the Chief Justice were not fulfilled, hence the appointment is unconstitutional; the old unbroken convention of selecting the senior-most judge of the Supreme Court as the Chief Justice of India, is broken; no new convention to supersede the claim of the senior most judge has been established; the Government expects the Chief Justice to follow the political philosophy of the ruling party; the supersession is a step leading to enslavement and tyranny; the concept of the rule of law is being endangered; the appointment is political; and the independence of the judiciary is undermined.

To understand the importance of the appointment of the Chief Justice of India, the constitutional position needs to be examined in the light of the appointment of an acting Chief Justice. In respect of the appointment of acting Chief Justice, Article 126 provides:

“When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other judges of the Court as the President may appoint for the purpose.”

The President may appoint any one of the other judges of the Supreme Court as acting Chief Justice. As acting appointment in case of a vacancy, precedes and presupposes a subsequent permanent one, till the President makes his choice for a permanent appointment. It means that the appointment may be made in two stages: an immediate arrangement that is temporary followed by a long-term arrangement that is permanent. The fact of splitting up of the appointment in two phases, therefore, implies that for making the permanent choice the President has to bestow his anxious thought: and in order to make a proper selection he may require more time during which the office

100 Ibid.
shall not remain vacant, because, the Constitution does not conceive of the Supreme Court without its Chief Justice. 101 This necessitates a close scrutiny of Article 124(1) with regard to the constitution of the Supreme Court:

There shall be a Supreme Court of India consisting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven 102 other judges.

To put it differently:
1) A Chief Justice and
2) Other judges constitute the Supreme Court.

Thus, the constitution of the Supreme Court is not complete unless the office of the Chief Justice is filled and remains always filled. How can it be argued then, that the senior most judge alone should be considered for the appointment to the office of the Chief Justice of India, when in fact, the Constitution does not nominate him even to the post of an acting Chief Justice? The very fact that the Article providing for the appointment of an acting Chief Justice is introduced in the Constitution rules out the possibility of the senior most judge alone being considered eligible for the post of the (permanent) Chief Justice. Had the senior most judge been alone considered eligible for appointment as Chief Justice. The adoption of Article 126, providing for the appointment of an acting Chief Justice, was redundant. Because, the moment a vacancy occurs in the office of the Chief Justice, the senior-most judge could straightway be appointed as the Chief Justice of India; thereby obviating the necessity of creating the office of the acting Chief Justice.103 The framers of the Constitution not only did not recognize the right of the senior-most judge to succeed to the office of the (permanent) Chief Justice but did not consider him fit, ipso facto to occupy the office of even an acting Chief Justice. In fact the Constitution directs the senior-most judge to take his turn on par with the other judges of the Supreme Court for every such a temporary appointment.104 That seniority is no factor of any importance is also supported by Article 223. This Article headed

\[\text{101 } \text{Ibid.}\]
\[\text{102 } \text{The number of judges was raised to 17 by the Supreme Court (Number of Judges) Amendment Act, 1977. The number of judges has been raised to 25 by Act 22 of 1986 and to 31 in 2009. H.K. Saharay, supra note 47, p.550.}\]
\[\text{103 A.R. Antulay, supra note 99, p.4.}\]
\[\text{104 Ibid, p.5.}\]
‘Appointment of acting Chief Justice’ of the High Court, corresponds to Article 126. This Article reads:

When the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other judges of the Court, as the President may appoint for the purpose.

Neither has, therefore, the point of seniority any significance in the matter of the appointment to the office of the Chief Justice or acting Chief Justice of the High Court nor in the matter of such appointments to the Supreme Court. Indeed seniority is not at all rated by the Constitution as a qualification for promotion; appointments to these high offices are not at all considered as a matter of course promotion. Article 224(2) confirms this position further, if any such confirmation is needed: ‘When any judge of a High Court other than the Chief Justice…is appointed to act as Chief Justice, the President may appoint a duly qualified person to act as a judge of that Court until the permanent judge has resumed his duties.’

7.6.1.3 The Emergency: Punitive Transfers and Supersession - II

In response to the decisions of several High Courts in favour of the petitioners who challenged their detentions, during the emergency in 1975, the government transferred 16 High Court judges. A list of 56 judges who had either been transferred, or who were proposed to be transferred, was prepared by the government, and then leaked in order to rattle the judiciary. The government claimed that the transfers were in the national interest-in 1955; the State Reorganisation Commission had recommended that one-third the judges of each High Court be appointed from outside the State in order to foster interaction amongst communities and to promote national integration. One such
judge, Sankalchand Himatlal Sheth J., transferred from the Gujarat to the Andhra Pradesh High Court on 27th May 1976, challenged his transfer before the Supreme Court in *Union of India v. Sankalchand Himatlal Sheth*.110 By a majority of four to one, the Court held in favour of the government.

In *ADM Jabalpur v. Shivakant Shukla*,111 H.R. Khanna J., in his dissenting opinion held that ‘the State did not have the power to deprive a person of his life or liberty without the authority of law.’ H.R. Khanna J. paid the price.112 When A.N. Ray J. retired on 29th January 1977, H.R. Khanna J., the next most senior judge on the Court, was superseded.113 The government appointed M.H.Beg J., next in the line of seniority. H.R. Khanna J. resigned.

The two supersessions of the Supreme Court judges in 1973 and 1976 and the actions of government in the appointments, confirmations and transfer of High court judges had a powerful impact on the minds of judges and lawyers in the country.114 H.R. Khanna J. describes it thus. “Supersession of judges – was bound to generate fear complex or hopes of reward and thus undermine the independence of the judiciary.”115

**7.6.1.4 The 80th Report of Law Commission of India - 1979**

The Law Commission of India, on 10th August 1979, under the Chairmanship of S.N. Shankar J., submitted a report to the government on the ‘Appointment of Judges’; in its Report, the Law Commission recommended that judges of the Supreme Court of India should be of the highest calibre. Importantly, the Chief Justice of India consult the three most senior judges on the Court before making any recommendations to the President for the appointment of Supreme Court judges and the seniority norm must be observed in the matter of appointing the Chief Justice of India. The Law Commission also recommended

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111 AIR 1976 SC 1207. By a majority the Court held that the writ of habeas corpus would not be available to arbitrarily arrested and detained individuals during the Emergency.
113 The government sought to justify the supersession on the ground that had he been appointed Chief Justice, Khanna would have served a very short term in office- five months and five days, of which 70 days would fall within the court vacation, so it was effectively only three months and nine days or a total of about 99 days in office- an insufficient tenure for a Chief Justice of India- while Beg, on the other hand, would serve 13 months in office.
that the seniority norm could be departed from, but only if the majority of all the judges on the Supreme Court of India so agreed\textsuperscript{116} and no one should be appointed a judge of the Supreme Court unless he has severed affiliations with political parties for at least 7 (seven) years and the Law Commission says a person should be appointed as a judge if he has distinguished himself for his independence, dispassionate approach and freedom from political prejudice, bias or leaning.\textsuperscript{117}

With this background of interference in judicial appointments by the executive during the emergency, the Supreme Court was called upon to safeguard the independence of the judiciary from undesirable appointments and arbitrary transfers by the executive. This, it did, in three cases – \textit{S.P. Gupta v. Union of India},\textsuperscript{118} \textit{Supreme Court Advocates on Record Association v. Union of India}\textsuperscript{119} and \textit{In re Presidential Reference},\textsuperscript{120} known for convenience as the First, Second and Third Judges Cases.

\textbf{7.6.1.5 The First Judges Case}

A circular addressed by the Union Law Minister, Mr. Shiv Shankar, to the Governor of Punjab and the Chief Ministers of the other States (except the North-Eastern States), a copy of which was sent to the Chief Justice of each State, outlined the government’s new judges’ transfer policy.\textsuperscript{121} Writ petitions were filed by lawyers in Bombay, Delhi, Madras, Allahabad, and Patna, on behalf of the judiciary, challenging the government’s policy.\textsuperscript{122} In \textit{S.P. Gupta v. Union of India},\textsuperscript{123} the Supreme Court by a


\textsuperscript{117}\textit{Ibid}, pp.30-45, paras.2.2 to 2.5.

\textsuperscript{118}(1982) 2 SCR 365, it was occupied 956 pages in the Supreme Court Reports- and qualified as the longest decision ever written by the Supreme Court of India. H.M. Seervai, \textit{supra} note 108, p.2707.

\textsuperscript{119}\textit{AIR 1994 SC 268}. The four most junior judges on the bench (Dayal, Ray, Anand, and Bharucha) voted along with J.S.Verma, who wrote the majority opinion. Pandian and Kuldip Singh wrote concurring opinions, while Ahmadi and Punchi, two future Chief Justices of India, wrote dissenting opinions.

\textsuperscript{120}\textit{AIR 1999 SC 1}. Normally, an advisory opinion under Article 143 does not have to be binding, but the Attorney General made a statement before the Court that government would abide by the opinion of the court.

\textsuperscript{121}The letter requested that consent be sought from additional judges and from persons who were going to be appointed additional judges of the High Courts- consent to be appointed or transferred to another High Courts. The letter outlined the goal of the government’s new transfer policy, a goal which was ostensibly in keeping with the recommendation of the State Reorganisation Commission several decades ago.

\textsuperscript{122}A Bench of seven judges was constituted to hear the case. Again, the Chief Justice of India was not on the Bench. Instead, the Bench was composed of the six most senior judges on the Court at the time (Bhagwati, Gupta, Fazal Ali, Tulzapurkar, Desai, and Pathak), the Seventh was a junior judge (Venkataramiah) on the Court.
majority verdict dismissed all the petitions and no relief was given in any case. P.N. Bhagawati J. on judicial independence observed as under:

“…the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values…”124

In answering the questions presented by the case, the Court deliberated upon six questions, broadly speaking: (a) whether transfers could only be made in the ‘public interest,’ and whether ‘public interest’ included what has been termed in this study as ‘misconduct-punitive’ transfers, that is, transfers designed to punish a judge for misconduct, as distinguished from courage, (b) whether the opinion of the Chief Justice of India was to be given ‘primacy’ amongst the opinions of other constitutional functionaries (that is, the Chief Justice of a High Court, and the Governor of a State) by the President, while making an appointment to the High Court (this question arose because S.N. Kumar J. at the Delhi High Court was dropped despite the opinion of the Chief Justice of India), (c) whether the President was bound by the advice of the Chief Justice of India on the question of judicial appointments, that is, whether ‘consultation’ amounted to ‘concurrence,’ (d) whether short-term extensions for additional judges were permissible, (e) whether an additional judge had the right to be considered for confirmation as a permanent judge, and (f) whether at the stage of appointment of an additional judge for a further term, the judge had to go through the test of ‘suitability.’

By a majority of five to two,125 the Court answered the second question in the negative, that is, that the Chief Justice’s opinion was not to be given ‘primacy’ by the President of India. In making appointments to High Courts, the President of India is required to consult three constitutional functionaries: (a) the Chief Justice of India, (b) the Chief Justice of a High Court, and (c) the Governor of the State. At times, differences of opinion could arise among these functionaries, and in such cases the question was: whose opinion should the President accept? Five judges held that the opinion of the Chief Justice did not trump the opinions of the other two functionaries-

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123 (1982) 2 SCR 365, it was occupied 956 pages in the Supreme Court Reports- and qualified as the longest decision ever written by the Supreme Court of India. H.M. Seervai, supra note 108, p.2707.
125 Gupta J. and Tulzapurkar J. dissented.
that it was up to the President to decide what to do if any of the three constitutional functionaries disagreed.

The Court unanimously answered the third question in the negative. Accordingly, it was held that the President of India was not bound by the advice of the Chief Justice of India, and that ‘consultation’ did not amount to ‘concurrence’. This was perhaps the most heavily criticized aspect of the decision. However, Desai J. held that the opinion of the Chief Justice was to be given ‘great weight’.  

It can be seen that the First Judge’s case did not entail any questions about appointing judges to the Supreme Court of India. The case only concerned the confirmation and extension of additional High Court judges, and the transfer of judges and Chief Justices of High Courts.

Further, while appointing judges, Bhagwati J. advocated that ‘no power should be vested in a single individual howsoever high and great he may be and howsoever honest and well meaning.’ Accordingly, Bhagwati J. advocated the establishment of a ‘collegium’- holding that the Chief Justice of India should consult ‘wider interest’. However, he did not specify who was to be a part of the collegium.

The Supreme Court held that the ultimate power of appointment resided with the Central Government and that was in accordance with the Constitutional practices prevailing in other democratic countries like the UK, Canada and New Zealand. The majority of the Court speaking through Bhagwati J. said:

“This is, of course, not an ideal system of appointment of Judges, but the reason why the power of appointment of Judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people who are consumers of Justice. The power of appointment of Judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any accountability to the people and even if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment.”

On the whole, the First Judges’ Case was seen as striking a blow to judicial independence, largely on account of the fact that the opinion of the Chief Justice of India would not be binding on the President, that is, that ‘consultation’ did not amount to ‘concurrence’. Although this case only dealt with High Court judges and High Court

\[127\] Ibid, p.548.
\[128\] Ibid.
Chief Justices, the decision would have important consequences for the matter in which even Supreme Court judges would be appointed.\(^\text{130}\) The majority in the *First Judges Case* thus gave a literal meaning to the word ‘consultation’ in Articles 124(2) and 217(1) in relation to all consultees and final decision in the matter was left in the hands of the Central executive.\(^\text{131}\) The words used in the Article 124(2) make it quite clear that in sub-clause (2), the consultation process is discretionary for the words are ‘may deem it necessary.’ Whereas the consultation provided in the proviso is obligatory, for the words as ‘shall always be consulted.’ In fact, Article 124(2) recognizes the pre- eminent position of the Chief Justice of India by consultation! The word ‘consultation’ merely indicates that the President is not bound to follow the recommendation of these persons.\(^\text{132}\)

Mr. Nani A. Palkhivala has criticized the *First Judges’ Case* as ‘the Chief justice of India was made a party to one of the petitions, in treating the Chief Justice of India as a litigant in the case was clearly wrong.’\(^\text{133}\) Mr. Fali S. Nariman also has criticized to the effect that “The decision in the *First Judges Case* proved to be a disaster for judicial independence.”\(^\text{134}\) The majority in the *First Judges Case* was that of mechanical jurisprudence. It was not the approach to the spirit of the Constitution. This approach was opposed to the judicial decisions which had already construed the meaning of consultation under Article 233 in *Shamsher Singh*.\(^\text{135}\) It was also opposed to the whole trend of constitutional interpretation by the Supreme Court on such vital provisions of the Constitution which embody constitutional values.\(^\text{136}\)

**7.6.1.6 The 121\(^{st}\) Report of the Law Commission of India - 1987**

After the *First Judges’ Case*, certain appointments were made by the executive, over-ruuling the advice of the Chief justice of India. Naturally, this state of affairs developed its own backlash.\(^\text{137}\) In its 121st Report, the Law Commission noted that over the last four decades, mounting dissatisfaction had been voiced over the method and

\(^{130}\) Abhinav Chandrachud, *supra* note 73, p.111. 
\(^{133}\) Nani A. Palkhivala, *supra* note 39, p.205. 
\(^{135}\) AIR 1974 SC 2192. 
strategy of selection and the selectees to man the superior judiciary \(^\text{138}\) and it gives a graphic account of how the executive was able to have its way in the appointment of judges in the Supreme Court and High Courts and how helpless the Chief Justices of India were during the seventies and eighties. They were unable to secure timely appointments of most deserving candidates.\(^\text{139}\) The Law Commission noted that ‘Everyone is agreed that the present scheme or model or mechanism for recruitment to a superior judiciary has failed to deliver the goods.’ It is important to note that this Report was prepared after the decision of the \textit{First Judges’ Case}. This was with reference to the “executive primacy theory” in the appointment of judges propounded in the \textit{First Judges’ Case}. In view of this, the Law Commission recommended a new broad-based model called a National Judicial Service Commission.\(^\text{140}\)

\section*{7.6.1.7 Arrears Committee Report - 1990}

While dealing with the procedure in existence at that time for the appointment of judges, the Arrears Committee was rather scathing in its observations to the effect that there had been cases where there was agreement between the Chief Justice of India, the Chief Justice of the concerned High Court and the Governor of the State but the Union Law Minister either chose not to make the appointment or inordinately delayed the appointment. It was observed that sometimes the Union Law Minister adopted a ‘pick and choose’ policy to appoint judges or to disturb the order in which the recommendations were made. There had been political interference in this regard and undesirable influence of extra-constitutional authorities in the appointment of judges. The appointment process therefore was undermined leaving the executive to appoint judges not on excellence but on influence.\(^\text{141}\)


\(^{140}\) The Law Commission was envisaged as a multi-member body headed by the Chief Justice of India whose ‘pre-eminent position should not be diluted at all’, his predecessor in office, three senior-most judges of the Supreme Court, three Chief Justices of the High Courts in order of their seniority, the Law Minister, the Attorney-General for India and an outstanding law academic. Thus, an 11 (eleven) member body was proposed by the Law Commission of India for the selection and appointment of judges of the Supreme Court and the High Courts. To give effect to the recommendation, it was proposed to suitably amend the Constitution. \textit{Supra} note 138, paras.7.10, 7.15, and 7.1.

After 1989, the uncertain political era began in India. In 1989 a minority government has formed in Centre. Mr. Vir Sanghvi called this the ‘inauguration of an era of uncertainty.’\(^{142}\) The tussle between the executive and the judiciary began taking place increasingly at the High Court level.\(^{143}\) It no longer seemed to take place at the federal level; the weak Central executive could no longer afford to tinker with the judiciary. However, stronger State governments tried to interfere with judicial appointments.\(^{144}\)

In the meantime, the judiciary was suffering from a crisis of credibility. A day before retiring from the Supreme Court, the outgoing Chief Justice of India, E.S. Venkataramiah, told a prominent news reporter, Kuldip Nayar, that the ‘judiciary in India has deteriorated in its standards because such judges are appointed, as are willing to be “influenced” by lavish parties and whiskey bottles.’\(^{145}\) Allegations of corruption were also beginning to emerge against sitting Supreme Court judges, these show that the judiciary was facing a crisis of credibility.\(^{146}\)

### 7.6.1.8 The Constitution (Sixty-seventh Amendment) Bill, 1990

On the basis of the 121\(^{\text{st}}\) Report of the Law Commission, the Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced, recommending the setting up of a National Judicial Commission for appointment and transfer of judges to higher judiciary. The Statement of Objects and Reasons for the Amendment Act acknowledged that ‘there was criticism of the existing system of appointment of judges (where the executive had the primacy) and that this needed change, hence the need for an Amendment Act.’ But the Constitutional Amendment Bill lapsed due to the dissolution of the Lok Sabha.

### 7.6.1.9 The Second Judges Case

After the First Judges’ case, the judges’ transfer policy was applied by the executive in an arbitrary manner. The transfer policy required that a High Court Chief
Justice shall come from the outside the state, but the policy was selectively applied and tussles between the executive and the judiciary over judicial appointments to the High Courts did take place and formed an important backdrop to the Second Judges’ Case.

In Subash Sharma v. Union of India, the Supreme Court criticized the developing practice of a State sending up names for appointment to the High Court directly to the Central Government instead of sending the same to the Chief Justice of the High Court concerned. According to the Court, “This is a distortion of the Constitutional scheme which is wholly impermissible.” The Supreme Court desired reconsideration by a larger Bench the law laid down in the First Judges’ Case per majority. Against this backdrop, in 1993, a bench of nine judges of the Supreme Court of India decided the Second Judges Case.

In the Second Judges’ Case, Supreme Court Advocates on Record Association v. Union of India, the Supreme Court considered whether the Chief Justice of India had ‘primacy’ with respect to judicial appointments and transfers. It was held that the opinion of the Chief Justice of India would bind the President, that is, consultation means ‘concurrence.’ Hence, the majority decision in the First Judges’ Case was overruled.

Through this judgment, the Supreme Court prescribed a new procedure for appointing judges; for appointments to the Supreme Court, the Chief Justice of India would have to consult (a) the two most senior judges of the Supreme Court and (b) the most senior judge of the Supreme Court, whose opinion was ‘likely to be significant in adjudging the suitability of the candidates,’ either because the judge hailed from the

147 AIR 1991 SC 631.
150 The number nine here is significant. Union of India v. Sankal Chand Himatlal Sheth case decided by a bench of five judges, and S.P. Gupta v. Union of India case was decided by a bench of seven judges. Now, these nine judges of the Supreme Court were not bound by either of the Court’s two decisions in the Judges cases, on account of the norm that a bench of a larger strength can overrule previous decisions, even by a slimmer majority. See Chintan Chandrachud, “The Supreme Court of India’s Practice of Referring Cases to Larger Benches: A Need For Review,” SCC (J) (1) 2010, pp.37-48.
151 AIR 1994 SC 268. The four most junior judges on the Bench (Dayal, Ray, Anand, and Bharucha) voted along with J.S.Verma, who wrote the majority opinion. Pandian and Kuldip Singh wrote concurring opinions, while Ahmad and Punchi, two future Chief Justices of India, wrote dissenting opinions.
152 AIR 1994 SC 268, p.437 (per Verma J.)
same High Court as the candidate, or ‘otherwise.’ For appointments to a High Court, the Chief Justice of India would have to seek (a) the views of his colleagues on the Supreme Court ‘likely to be conversant with the affairs of the concerned High Court,’ (b) the opinion of the Chief Justice of the High Court (formed after ascertaining the views of at least the two most senior judges on that High Court)- an opinion entitled to the ‘greatest weight,’ (c) the opinion of the ‘other functionaries,’ that is, the Governor of the State, acting on the aid and advice of his Council of Ministers- an opinion entitled to ‘due weight,’ and (d) if the Chief Justice of India so wished, the opinion of one or more senior judges of that High court whose opinions were ‘likely to be significant’ in the formation of the opinion of the Chief Justice of India. All opinions were to be expressed in writing to avoid ambiguity.

However, the Court found that if the Chief Justice of India and the Chief Justice of a High Court disagreed in their opinions as to the suitability of a candidate for appointment to the High Court, then the President of India would have the option of refusing to accept the opinion of the Chief Justice of India. In other words, the opinion of the Chief Justice of India would not ‘trump’ or have ‘primacy’ over the opinion of the Chief Justice of a High Court, and when there was a disagreement between the two Chief Justices, the opinion of the Chief Justice of India would not bind the President- that is, in that limited circumstance, consultation would not amount to ‘concurrence.’ Going a step further, it was held that if the President did not consider a candidate recommended by the Chief Justice of India suitable for the appointment, on account of the candidate’s ‘antecedents and personal character,’ the President could ask the Chief Justice of India to reconsider his recommendation in favour of that candidate. If the Chief Justice of India and the senior judges consulted agreed that the appointment should be made anyway, then the President would be bound to make the appointment, as a matter of ‘healthy convention’. Interestingly, the Court also enumerated certain additional grounds upon which the President could refuse to make an appointment- for example, if the tenure of the judge was likely to be ‘unduly short’; if the candidate had

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153 Ibid, p.436 (per Verma J.)
154 Ibid.
155 Ibid, p.438 (per Verma J.)
156 Ibid.
‘doubtful antecedents,’ or if his health and fitness were in question. And the process of appointing judges was to be initiated by the Chief Justice of India while appointing judges to the Supreme Court, and by the Chief Justice of a High Court while appointing judges to a High Court.

J.S. Verma J., in his majority opinion, wrote that the seniority of a High Court judge both on his own High Court and on an all-India basis ought to be considered while making appointments to the Supreme Court and that seniority should not be departed from unless there were exceptional reasons for doing so. Senior judges, he wrote, had the ‘legitimate expectation’ of being appointed to the Supreme Court, and deference to this expectation meant compliance with the constitutional rule of non-arbitrariness. In addition to seniority, the majority also advocated taking into account other criteria like regional representation and merit.

The majority in the Second Judges’ Case advocated the application of the seniority norm not merely in the matter of promoting judges to the post of Chief Justice of a court, but also in appointing judges to the Supreme Court of India. Ahmadi J., however, disagreed with the majority. He held that the seniority norm ought to be deviated from while appointing judges to the Supreme Court in order to achieve a more representative court. Applying only the seniority norm in appointing judges to the Supreme Court would disturb the representative character of the Court.

For the first time in India’s constitutional history, against the backdrop of a weak central government, the Supreme Court of India asserted its ‘primacy’ over the executive, and its power to control its own composition.

7.6.1.10 The Third Judges Case

The ‘wider consultation’ that the Supreme Court called for in the In re Presidential Reference, was perhaps an indication of the Court’s distrust of its own

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157 Ibid.
158 Ibid, p.437 (per Verma J.)
159 Ibid.
160 Ibid, p.389 (per Ahmadi J.)
161 Against the history of court packing during the Indira Gandhi and Rajiv Gandhi years. Abhinav Chandrachud, supra note 73, p.124.
162 AIR 1999 SC 1. Normally, an advisory opinion under Article 143 does not have to be binding, but the Attorney General made a statement before the Court that government would abide by the opinion of the court.
members; the Court seemed to hold that the fewer the members of the judiciary who
made judicial appointments, the greater the chances of arbitrariness and error. The fear
of judicial arbitrariness, in the context of the Court’s rising power and the executive’s
‘tottering’ at the centre, was perhaps the motive force of the Court’s decision in the
Third Judges’ Case.\\footnote{164}

At around the same time, there was also dissatisfaction in the Bar as to how
judges were being appointed to the Supreme Court of India. The old system of executive
interference had now been replaced by ‘politicking’ among judges. The Chief Justice of
India, M.M. Punchhi J., recommended three names for appointment to the Supreme
Court of India.\\footnote{165} In making these recommendations, Punchhi J. had only consulted two
most senior judges on the Court: S.C. Agrawal J. and G.N. Ray J., but no other judges.
His predecessor, J.S. Verma J., had claimed that he would consult five judges and
members of the Bar, before making such recommendations.\\footnote{166} With this background,
the President requested the Supreme Court of India for an advisory opinion on the nature
of the ‘consultation’ that was required to take place between the Chief Justice of India
and his colleagues. Therefore, the President appeared to have made this reference
seeking an advisory opinion from the Supreme Court in order to circumvent Punchhi J.
recommendation,\\footnote{167} perhaps heeding the words of Fali S. Nariman, ‘simply to avoid a
possibly ugly situation from developing.’ He called it ‘one of the most futile Presidential
References ever filed by the Government of India.’\\footnote{168} However, the Court seized this
opportunity to shed some light on its decision in the Second Judges’ Case.

\\footnote{163} The Court’s most visible assertions of political power came in the famous Vineet Narain v. Union of
India, (1996) 2 SCC 199. ‘Jain diaries’ case where it took upon itself the task of supervising corruption
investigations, and in the S.R. Bommai v. Union of India, AIR 1994 SC 1918, where the Court seemed
to enter the political thicket.
\\footnote{164} Abhinav Chandrachud, supra note 73, p.131.
\\footnote{165} U.C.Gannerjee, R.C.Lahoti, and Bhawani Singh.
\\footnote{166} See Justice S.S. Sodhi, The Other Side of Justice, (New Delhi: Hay House Publications (India) Pvt. Ltd.,
\\footnote{167} U.C.Gannerjee and R.C.Lahoti were subsequently appointed to the Court on 9th December 1998.
\\footnote{168} Fali S. Nariman, supra note 134, pp.398-399.
In re Presidential Reference, the Bench was composed of the nine most senior judges of the Supreme Court. The President had posed nine questions to the Supreme Court of India. The Court consolidated these questions into three groups of issues: (a) the nature of the consultation process between the Chief Justice of India and other judges, (b) the judicial review, and (c) the relevance of seniority in making appointments to the Court. In its decision in the Third Judges’ Case, the Supreme Court made three significant departures from its decision in the Second Judges’ Case.

The first departure was that the Court increased the number of judges the Chief Justice of India would have to consult, before making an appointment to the Supreme Court of India. Under the Second Judges’ Case, the Chief Justice of India was only required to consult the two most senior judges on the Court. Now, before making appointments to the Supreme Court, he would have to consult the four most senior judges of the Court. The Court called this body, the ‘Collegium.’

The second significant departure that the Court made from the Second Judges’ Case was that it limited the President’s discretion when there was a difference of opinion between the Chief Justice of India and the judges he consulted. According to the Second Judges’ case, if one or both of the two most senior judges on the Court disagreed with the opinion of the Chief Justice of India, the President had the option of either accepting the Chief Justice’s recommendation for appointing or rejecting it. It has been discussed how this demonstrated that the Chief Justice of India did not have ‘primacy’ over the other judges he consulted, since the President had the option of refusing to accept the Chief Justice’s recommendation in that limited circumstances. However, now, in the Third Judges Case, the Court held that the President had no option but to refuse the Chief Justice’s recommendation if it was not in agreement with the views of a majority of the members of the Collegium, that is, if at least three judges of the collegium disagreed with the Chief Justice of India. In other words, it was not beyond

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169 AIR 1999 SC 1.
170 Bharucha, Mukherjee, Majmudar, Manohar, Nanavati, Ahmed, Venkataswami, Kirpal and Pattanaik JJ.
171 The fact that this was a bench of nine judges, and not 11 judges, meant that the Court could not overrule its decision in the Second Judges Case, but merely interpret it. Even the government did not want a reconsideration of the Second Judges case.
doubt that the Chief Justice of India did not have ‘primacy’ over his other senior colleagues on the Court- the President no longer had the discretion to accept the Chief Justice’s view when it was in conflict with the views of a majority of the members of the collegium.173

The third significant departure that the Court made from the Second Judges’ Case was that it watered down its previous emphasis on seniority; while making appointments to the Supreme Court. Judges of outstanding merit, could be appointed to the Supreme Court irrespective of seniority. Judges equally placed, in terms of merit, could be appointed to the Court based on other criteria, like seniority or regional representation. It was held that the collegium did not have to record ‘strong cogent reasons’ for deviating from the norm of seniority in making appointments to the Supreme Court, when a judge of outstanding merit was being appointed to the Court.174

Besides these three significant departures from the Second Judge’s Case, the Court issued some clarifications concerning the Second Judges’ case- reiterating the previous decision on the one hand, and adding more process on the other. Thus, for example; the Court reiterated that judicial review in the matter of appointment would be available on limited grounds (a) absence of consultation or (b) lack of eligibility.175 In the matter of transfer, judicial review would only be available if the transfer was not made in accordance with the prescribed process.176

Sir Robin Cooke writing on the Second Judge’s Case in all articles significantly entitled “Making the Angels Weep”, could not help expressing his amazement in polite language at the interpretation given by the Supreme Court. He states:

“The majority of the Court may have gone too far, if their conclusions be viewed as an interpretation of the Constitution intended to be binding in law. However, vulnerable in detail, it will surely always be seen as dramatic event in the international history of jurisprudence.”177

In another article “Where Angels fear to tread”, Sir Robin Cooke writes:

175 Ibid, p.19, para.29.
176 Ibid, p.21, para.35.
“It sounds more like a promulgation of policy than an exercise in juridical reasoning. The reasoning is noticeably limited. . . All in all the opinion of the Supreme Court in the Third Judge’s case must be the most remarkable rulings ever issued by a Supreme National appellate court in the common law world.”

A remarkable feature of the Second and Third Judges’ cases is the willing acceptance by the Government of the judgements and the denial of its own power to appoint judges. In fact in the Third Judges’ case, the judges recorded at the outset the statements of the Attorney General that -

“…the Union of India is not seeking a review or reconsideration of the judgement in the Second Judges case and that the Union of India shall accept and treat, as binding, the answers of this Court to the questions set out in the Reference.”

7.6.1.11 The Memorandum of Procedure - 1999

Following up on the decision and opinion rendered in the Second Judges’ case and the Third Judges’ case, the Ministry for Law and Justice, the Government of India framed and prepared Memorandum of Procedure for the appointment of judges of the Supreme Court and another for the appointment of judges of the High Court. These Memorandums remained operational and the appointment of judges to the superior judiciary made subsequent thereto has been in conformity with them.

7.6.1.12 Criticism of Second and Third Judges Cases

The new dispensation of appointment and transfer of judges laid down by the Supreme Court has not been well received in India. The Bar has been critical of it. In the Second Judges’ Case, the majority held that the Court’s prior decision of 1981 (in the First Judges’ Case) was erroneous and it was overruled. The Constitution was not to be interpreted literally (the majority said) - a ‘contextual and purposive’ construction was to be preferred. However, the interpretation of Article 124 (and Article 217) by the majority in the Second Judges’ Case was neither ‘contextual’ nor ‘purposive’. It was criticized that there was nothing in the language of the constitutional provision or in the debates in the

Constituent Assembly that indicated that the Founders ever contemplated that judges were to be entrusted with the power to select judges.\textsuperscript{182} First, Art. 124(2) makes it obligatory on the President to consult the Chief Justice of India for the purpose of obtaining his opinion on the suitability of a proposed candidate for appointment to the Supreme Court and it confers on the President, a discretionary power, to consult judges of the Supreme Court and the High Courts, if he deems it necessary to do so. It has been already shown that under Art. 124(2) the President is entitled to ‘consult any Judge of the Supreme Court’ and ‘not only two senior-most Judges.’ Secondly, it is well settled that Courts cannot add words to the provisions of the Constitution which are not there unless the words, so added, are necessarily implied in any particular provision. To insert into the Constitution 15 norms for the appointment of judges is to extensively amend the Constitution which is not only beyond the power of any Court but is also beyond the legislative power of Parliament itself. As stated earlier, it is only by Parliament exercising its constituent power to amend the Constitution as provided by Article 368 that the Constitution can be amended and the same applies to the 5 norms for the transfer of Judges from one High Court to another.\textsuperscript{183}

The word ‘Primary’ is not used in Articles 124(2) or 217. ‘Primary’ has been discussed in the \textit{First Judges’ Case} and in the \textit{Second Judges’ case}, in interpreting the word ‘Consultation’. ‘Consultation’ is said to mean ‘concurrence’ which is then equated with primacy. The word ‘Collegium’ is nowhere present in the Constitution of India.\textsuperscript{184} It was first used by Bhagwati J., in the \textit{First Judges’ Case}.\textsuperscript{185}

The critique of the \textit{Second} and \textit{Third Judges’} decisions is that, in a democracy, accountability is an important consideration and the authority or authorities making such appointments should be accountable to the people. The argument is that someone must be responsible for the appointment made and since the Chief Justice of India or his colleagues are not as accountable to the people, the concentration of power of appointment in them is undemocratic and there is no substantial evidence that the misused power of appointment, acknowledged to be with it by the \textit{First Judge’s Case}

\textsuperscript{182} Fali S. Nariman, \textit{supra} note 134, pp.396-397.
\textsuperscript{183} H.M. Seervai, \textit{supra} note 108, p.2964.
\textsuperscript{185} Paras.15 and 22 of the said judgment.
since 1982, of the 547 appointments to the higher judiciary in the decade ending in 1993 only 7 were not in accord with the opinion of the Chief Justice of India.\textsuperscript{186}

7.6.1.13 Criticism of Working of the Collegium System

The collegium method was created as a result of two judgments of the Supreme Court in the \textit{Second and Third Judges' Cases}, with the best of intentions of securing the independence of the judiciary.\textsuperscript{187} The Supreme Court rewrote the provisions of the Constitution for appointment of judges and appropriated the power to appoint judges by the judges.\textsuperscript{188} However, the performance of the collegiums, in the words of the former Judge of Supreme Court, V.R. Krishna Iyer J., has been hardly creditable “It has been dilatory, arbitrary, and smeared by favorites”\textsuperscript{189} The current system of judicial appointment is faulty; it is faulty because it is opaque. The opacity of this system attracts charges of nepotism and lack of transparency. It was also criticized that one, whether in the legal fraternity or outside, comes to know about a person becoming a High Court or Supreme Court judge only when the press publishes the news of his oath-taking.\textsuperscript{190} Mr. Fali S. Nariman in his autobiography writes-

“There is one important case decided by the Supreme Court in which I appeared and won, and which I have lived to regret …. It is the decision that goes by the title- \textit{Supreme Court Advocates on Record Association v. Union of India.”}\textsuperscript{191}

The criticism of the dictum in the \textit{Third Judges' Case} has been that the system of recommendation for appointments by a collegium of five senior most judges (like that of three that went before) has also not been institutionalized. According to Mr. Fali S. Nariman:

“It doesn’t see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment-not necessarily in superiority of wisdom or competence and no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of a high court judge (or an eminent advocate) to be a judge of the Supreme Court. It would suggest that the closed-circuit network of five judges should be disbanded. They invariably hold their ‘cards’ close to their chest. They ask no

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\textsuperscript{186} T.R. Andhyarujina, \textit{supra} note 114, pp.118-121.
\textsuperscript{190} Dr. K.N. Chandrasekharan Pillai, “A Comment on \textit{Shanti Bushan v. Union of India},” (2009) 3 SCC (J), p.46.
\textsuperscript{191} Fali S. Nariman, \textit{supra} note 134, p.390.
\end{footnotesize}
one. They consult one but themselves. This has been the pattern of functioning for years…. Many of the recommendations of this five-member collegium have been ‘good’, some have been ‘not so good’ or ‘could have been much better’; and more recently, at least one has been positively ‘bad’ - should never have been made. This is the result of the collegium not doing its homework. Homework is most important when picking judges for the higher court.¹⁹²

It was also criticized that appointment of judges by the collegium system conflicts with the intent of the framers of India’s Constitution; it ‘detracts the judges of the collegium from their principal judicial work of hearing and deciding cases; the collegium resorts to ‘ad hoc informal consultations’ with other judges, which consultations do not significantly investigate criteria such as work, standing, integrity, and so on; the collegium lays too heavy an emphasis on seniority in making appointments to the Supreme Court; assessments offered by judges during the consultations are sometimes ‘warped or tainted’; and there have been several instances where the Chief Justice of India and his senior colleagues could not agree with one another over the selection of candidates for appointment as judges and, at times, quite a few outstanding Chief Justices/ judges of High Courts have been overlooked. In some cases, highly deserving judges were pushed back and elevated to the highest court after years of waiting, thereby, cutting short their tenure in the final court.¹⁹³ Additionally, it was also criticized that the collegium system puts the Court outside the sphere of legitimate checks and balances. The legitimacy of counter-majoritarian judges in a democracy is hinged on their appointment by popularly elected representatives. Even Ruma Pal J. described the working of the collegium as under:

“…the process by which a judge is appointed to a superior court is one of the best kept secrets in this country. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge’s prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation, consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and ‘lobbying’ within the system.”¹⁹⁴

It was also criticized that in prescribing the appointment of judges of the Supreme Court and the High Courts by the Collegium, the Supreme Court did not realize the burden it was imposing on the collegium of selecting judges for the Supreme Court and High Courts and transferring them from one High Court to another. At any given time there are two to three vacancies in the Supreme Court, and 200 in the 22 High Courts and the transfer of a number of judges to be made. An administrative task of this magnitude must necessarily detract the judges of the collegium from their principal judicial work of hearing and deciding cases. The collegium has neither a secretariat to shoulder this burden nor an intelligence bureau to make appropriate inquiries of the competence, character, and integrity of a proposed appointee. Lacking this infrastructural backup, the collegium resorts to ad hoc informal consultations with other judges in the Supreme Court who are expected to know the merits of a proposed appointee from a High Court or occasionally by sounding a member of the Bar. These methods are poor substitutes for a full time intensive collection of data about an incumbent, his work, standing, merit, integrity and potential which requires to be made considerably in advance for filing in the vacancy. The Senior Council of the Supreme Court Mr. T.R. Andhyarujina criticized that “the collegium has necessarily limited its field of choice to the senior-most judges from the High Court for the appointments to the Supreme Court, overlooking the several talented junior judges in the High Courts or members of the Bar. Limiting the zone of selection to senior-most judges of the High Court has induced legitimate expectations in them to be promoted to the Supreme Court and consequent disappointment when they are overlooked.”

To be fair to the present collegium of the Supreme Court it has inherited a system with these limitations given to them by the two judgements of the Supreme Court. In good faith, the collegium suffers from institutional handicaps in its selection. It is ironical that those who created the collegium and argued in favour of vesting the power of appointment in judges today find faults in the working of the system. In *Suraz India Trust v. Union of India,* a petition was filed to review the decisions in the *Second

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197 W/P (Civil) No.204 of 2010.
and Third Judges’ cases. But the Supreme Court rejected the petition on the basis of *locus standi*.198

7.6.1.14 Recommendation of the National Commission to Review the Working of the Constitution

The National Commission to Review the Working of the Constitution199 (hereinafter called the NCRWC), in its recommendation, favoured a National Judicial Commission with a predominance of judicial members as an alternative to the collegium system for appointment of judges to higher judiciary.200 NCRWC said in that consultation paper:

“...when we talk of a National Judicial Commission, what is fundamentally important is its composition. Its composition should not be such as to affect directly or indirectly the independence of the judiciary and the power of judicial review both of which have been held to be the basic features of the Constitution.”201


The 214th Report of the Law Commission under the Chairmanship of A.R. Lakshmanan J., suggested a review of the Second and Third Judges Cases to rectify past mistakes and suggested that an independent commission be constituted for the appointment of judges to the higher judiciary.202

7.6.1.16 National Judicial Appointments Commission

The commission system for appointment of judges can provide a stronger form of scrutiny of prospective candidates for judicial office. It can ensure the selection of the best-qualified candidates for judicial office, if the commission uses a fair and non-discriminatory selection process. Thus, it is likely to increase transparency and accountability and to remove improper political control or other irrelevant considerations from the appointment system. The effectiveness of the commission system depends on the composition of the commission and the system used by it.203

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The idea of National Judicial Appointments Commission is an excellent one, for appointment of judges to higher judiciary in India. But it somehow could not muster support in Parliament on three separate occasions, in 1990, 2003 and 2013. Finally in 2014 the Constitution was amended with the ostensible objective of ‘providing an equal participation of the judiciary and the executive in the appointment of judges to the higher judiciary and make the system of appointments more accountable and thereby, increase the confidence of the public in the institution of judiciary.’ To achieve the purported objective, Articles 124 and 217 were inter alia amended, and Articles 124A, 124B and 124C were inserted in the Constitution, through the Constitution (Ninety-Ninth Amendment) Act, 2014 (hereinafter called Amendment Act) by following the procedure contemplated under Article 368(2), more particularly, the proviso there under. The amendment, received the assent of the President on 31.12.2014. It was however given effect to, with effect from 13.4.2015. Simultaneously therewith, the Parliament enacted the National Judicial Appointment Commission Act, 2014 (hereinafter called NJAC Act) which also received the assent of the President on 31.12.2014. The same was also brought into force, with effect from 13.4.2015.

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207 The Constitution (One Hundred and Twentieth Amendment) Bill, 2013 along with the National Judicial Appointment Commission Bill, 2013.

208 Article 368(2): An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-
(a) article 54, article 55, article 73, article 162 or article 241, or
(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
(c) any of the Lists in the Seventh Schedule, or
(d) the representation of States in Parliament, or
(e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

209 Consequent upon its notification in the Gazette of India (Extraordinary) Part II, Section 1.

210 By its notification in the Gazette of India (Extraordinary) Part II, Section 1.
The composition of the National Judicial Appointments Commission (hereinafter called as NJAC) was provided for in Article 124A\textsuperscript{211} of the Constitution. Therefore, Article 124A of the Constitution and Article 124(2) are required to be read in conjunction with each other. The Chief Justice of India was the Chairperson of the NJAC. The members of the NJAC are two other judges of the Supreme Court next to the Chief Justice of India, the Union Minister in-charge of Law and Justice and two eminent persons to be nominated by a Committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the Lok Sabha, failing which, the leader of the single largest Opposition Party in the Lok Sabha.

The duty of the NJAC, as provided for in Article 124B\textsuperscript{212} of the Constitution, was to recommend persons for appointment as the Chief Justice of India, judges of the Supreme Court, Chief Justices of High Courts and other judges of High Courts and to recommend the transfer of Chief Justices and other judges of a High Court from one High Court to any other High Court. The NJAC has the duty to ensure that the person recommended has ability and integrity.

\textsuperscript{211} Article 124A. (1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:-
(a) the Chief Justice of India, Chairperson, \textit{ex officio};
(b) two other senior Judges of the Supreme Court next to the Chief Justice of India - Members, \textit{ex officio};
(c) the Union Minister in charge of Law and Justice - Member, \textit{ex officio};
(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People - Members:
Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women:
Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination.
(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

\textsuperscript{212} Article 124B. It shall be the duty of the National Judicial Appointments Commission to—
(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and
(c) ensure that the person recommended is of ability and integrity.
Article 124C\textsuperscript{213} of the Constitution provides that Parliament may, by law, regulate the procedure for the appointment of the Chief Justice of India and other judges of the Supreme Court, the Chief Justice and other judges of the High Courts. The Article empowers the NJAC to lay down, by regulations, the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary.

The NJAC Act provides for recommending the senior-most judge of the Supreme Court as the Chief Justice of India ‘if he is considered fit to hold the office’ and for recommending names for appointment as a judge of the Supreme Court, persons who were eligible to be so appointed. Interestingly, the NJAC ‘shall not recommend a person for appointment if any two members of the Commission do not agree for such a recommendation.’\textsuperscript{214} A somewhat similar procedure has been provided for recommending the appointment of the Chief Justice of a High Court and a judge of a High Court.\textsuperscript{215}

\begin{itemize}
\item Article 124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.
\item Section 5 (1) The Commission shall recommend for appointment the senior-most Judge of the Supreme Court as the Chief Justice of India if he is considered fit to hold the office:
Provided that a member of the Commission whose name is being considered for recommendation shall not participate in the meeting.
(2) The Commission shall, on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, recommend the name for appointment as a Judge of the Supreme Court from amongst persons who are eligible to be appointed as such under clause (3) of article 124 of the Constitution:
Provided that while making recommendation for appointment of a High Court Judge, apart from seniority, the ability and merit of such Judge shall be considered:
Provided further that the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation.
(3) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Judge of the Supreme Court as it may consider necessary.
\item Section 6 (1) The Commission shall recommend for appointment a Judge of a High Court to be the Chief Justice of a High Court on the basis of \textit{inter se} seniority of High Court Judges and ability, merit and any other criteria of suitability as may be specified by regulations.
(2) The Commission shall seek nomination from the Chief Justice of the concerned High Court for the purpose of recommending for appointment a person to be a Judge of that High Court.
(3) The Commission shall also on the basis of ability, merit and any other criteria of suitability as may be specified by regulations, nominate name for appointment as a Judge of a High Court from amongst persons who are eligible to be appointed as such under clause (2) of article 217 of the Constitution and forward such names to the Chief Justice of the concerned High Court for its views.
\end{itemize}
The President may accept the recommendation of the NJAC for the appointment of a particular person as a judge, but may also require the NJAC to reconsider its recommendation. If the NJAC affirms its earlier recommendation the President shall issue the warrant of appointment.\cite{216}

The officers and employees of the NJAC shall be appointed by the Central Government in consultation with the NJAC and the convener of the NJAC shall be the Secretary to the Government of India in the Department of Law and Justice.\cite{217} The procedure for the transfer of judges from one High Court to another has been left to be determined by regulations to be framed by the NJAC.\cite{218} Similarly, the NJAC shall frame regulations with regard to the procedure for the discharge of its functions.\cite{219} The Central Government was empowered to make Rules to carry out the provisions of the NJAC Act\cite{220} and the Commission may make Rules to carry out the provisions of the NJAC Act.\cite{221} The Rules and Regulations framed by the Central Government and by the NJAC shall be laid before Parliament and these may be modified if both the Houses of Parliament agree to the modification and Parliament may also provide that a Rule or Regulation shall have no effect.\cite{222}

\cite{216}(4) Before making any nomination under sub-section (2) or giving its views under sub-section (3), the Chief Justice of the concerned High Court shall consult two senior-most Judges of that High Court and such other Judges and eminent advocates of that High Court as may be specified by regulations.

\cite{217}(5) After receiving views and nomination under sub-sections (2) and (3), the Commission may recommend for appointment the person who is found suitable on the basis of ability, merit and any other criteria of suitability as may be specified by regulations.

\cite{218}(6) The Commission shall not recommend a person for appointment under this section if any two members of the Commission do not agree for such recommendation.

\cite{219}(7) The Commission shall elicit in writing the views of the Governor and the Chief Minister of the State concerned before making such recommendation in such manner as may be specified by regulations.

\cite{220}(8) The Commission may, by regulations, specify such other procedure and conditions for selection and appointment of a Chief Justice of a High Court and a Judge of a High Court as it may consider necessary.

\cite{221}Section 7. The President shall, on the recommendations made by the Commission, appoint the Chief Justice of India or a Judge of the Supreme Court or, as the case may be, the Chief Justice of a High Court or the Judge of a High Court:

Provided that the President may, if considers necessary, require the Commission to reconsider, either generally or otherwise, the recommendation made by it:

Provided further that if the Commission makes unanimous recommendation after reconsideration, the President shall make appointment accordingly.
7.6.1.17 The Criticism of the NJAC Laws

The Constitution Amendment Act and the NJAC Act were enacted seek to abolish the collegium system and replace it with a NJAC. Both were criticized as the collegium is not just a failed experiment, but has also been undemocratic. Therefore, the real issue was whether the amendment would really democratise the method of appointment. Going by the text of the constitutional amendment, functionally and structurally, the NJAC would perpetuate many of the basic deficits and perils of the collegium in a different manner.

The Constitution was amended under the ostensible objective of providing a “meaningful role to the judiciary, executive and eminent persons to present their viewpoints and make the participants accountable while also introducing transparency in the selection.” But the amendments actually contain nothing to ensure either accountability or transparency.\textsuperscript{223} It was also criticized that there was a serious conceptual flaw in legislative design; an uncomfortable dichotomy between the constitutional provision and statutory scheme emerges through the new move. While the amendment act would create space for the new NJAC, its composition and voting pattern were designed, not by the amended Constitution, but by a statute, namely the NJAC Act. This would indicate that even the sole advantage of the NJAC i.e., the requirement for support of five out of the six members for a valid selection was vulnerable to statutory amendment by a simple majority in Parliament. Thus, even without a constitutional amendment, the limited virtues of the proposed NJAC would be taken away.\textsuperscript{224}

The key elements in the selection process were not embedded in the constitutional amendment and are either in the NJAC Act or in delegated regulations, both of which can be changed easily. For instance the constitutional amendment says ‘Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other judges of the Supreme Court and Chief Justices and other judges of High Courts’. R. M. Lodha J., former Chief Justice of India, voiced his concerns about this constitutional amendment that,

“...can the government which is the single largest litigant today, as a litigant, have any say in the appointment of Judges? Does it not defeat the very

fundamental principle of Natural Justice? However, no sane criticism of the collegium system would advocate restoration of political supremacy in judicial appointments.”

Under Article 124A, the composition of the Commission, Law Minister with two eminent jurists, was vulnerable to political intrusion that could jeopardise the independence of the judiciary. Eminent persons were to be chosen from the political sphere. This will only increase the government’s clout in the selection process, thereby compromising the independence of the judiciary, without dealing with the present problems in appointments. The Commission’s composition gives the judiciary an equal and not a majority say. The fact was that the politicians were not competent to judge the professional qualities of the candidates. The saying was that in order to become a judge, it was not important to know the law, but more important to know the Law Minister; this perhaps has become the prevailing ‘wisdom’! A judge will be grateful to his political mentor, who helped him to the Bench or be accountable to the interest of justice and to one’s own good conscience. The subversion of the independence of the judiciary by the appointment of convenient judges, became a major issue, especially with increasing corruption within the executive. Even Fali S. Nariman criticised the government for ignoring the recommendations of the M.N. Venkatachaliah J.’s NCRWC which, he said, had asserted that there must never be an “outvoting” of the judges in the Commission and eminent persons should be chosen by the President in consultation with the Chief Justice of India.

The amended Article 124B of the Constitution states, among other things, that one of the criteria for being recommended as a judge was that a person must be of “ability and integrity.” There was no system in place for judging ability and the act does not

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225 Ibid.
229 For example as per Association for Democratic Reforms Report, out of the 542 winners in Loka Sabha election 2014, analysed 185(34%) winners have declared criminal cases against themselves and out of it 112(21%) winners have declared serious criminal cases including cases related to murder, attempt to murder, communal disharmony, kidnapping, crimes against women etc. Available at adrinindia.org/research-and-report/election-watch, visited on 21-12-2014.
230 Ravi Kiran Jain, supra note 201, p.130.
define it either. Article 124C was most sinister and enables Parliament to empower the Commission to make regulations for selecting judges and for “other matters.” Thus, constitutional provisions and safeguards can easily be thwarted by regulations framed by the Commission.

Section 5 (1) of the NJAC Act says that the senior most judge in the Supreme Court should be appointed as Chief Justice of India but only if he was ‘fit’. With the incumbent CJI sitting out that vote, the judiciary will be in a minority when determining the next CJI and the determination of ‘fit’ will be left to non-judicial members. A majority can recommend a junior judge of the Supreme Court to be a CJI or even a Chief Justice or judge of the High Court can be recommended to be the CJI. The NJAC Act gives the Commission the power to supersede the senior-most judge for appointment as the Chief Justice on grounds of lack of merit or ability. In the absence of any methodology for judging ability and merit, this provision could end up packing the judiciary with ‘friendly’ judges. Integrity is a necessary requirement for a judge, yet there in no binding code of conduct for a judge, nor a complaints procedure in place. Rule of seniority has been given a go by. Every senior judge would now face a direct threat to his being appointed as Chief Justice. If the seniority rule is violated and junior associate justices are appointed as CJI, the independence of the judiciary is threatened. The rule of seniority ensured that judges could rise up to merit. Moreover, the appointment of a judge could be manipulated to ensure that a particular person becomes CJI, for example, even appointing a younger person as CJI. Does it not amount to threatening judicial independence, given the position that three members of the six members Commission would have an Executive tilt?

Appointment of ‘two eminent persons’ seems to be a matter of concern because, here, the Executive is vested with an edge. Ultimately the NJAC may confer the veto power in the hands of the Executive so that it can control the appointment of Supreme

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232 Arvind P. Datar, supra note 223.
233 The UPA Government had introduced a Judicial Standards and Accountability Bill, 2012, but the current NDA government has made no attempt to introduce any such bill.
235 Indira Jaising, supra note 231, p.18.
Court Judges and exercise this power whenever it wants. The veto given to the Law Minister or eminent persons is not in the best interest of the institution. The veto provision in the Act gives room to embarrass the highest judiciary because a candidate chosen by the CJI and two senior-most Supreme Court judges on the Commission can be rejected by the other half of the Commission. Veto power to “any two members” of the Commission can be misused. To allow powers to override the three judges is something which is wholly unconstitutional and really affects the independence of the judiciary.

Section 6(4) of the Act envisages consultation with senior-most judges and eminent advocates in the High Courts. But their opinion is not binding on the NJAC. Thus those at the Centre, through the NJAC, will select the High Court Judges, despite their lack of familiarity with the institutions of High Courts and lack of State-level mechanism for an open system for assessment of individual merit. This nullifies the constitutionally guaranteed federal traits in the realm of judicial appointments. Even the NJAC Act does not mention anywhere, the qualities and capabilities required for an advocate to be appointed as a judge.

The NJAC Act provides that the Central Government will appoint the officers and employees of the Commission, making its secretariat a government department. This is the most dangerous provision. If the secretariat or officers and servants of the Commission are treated as government departments, there are a hundred ways of making the Commission dysfunctional. In addition, the confidentiality and secrecy of the Commission’s deliberations cannot be maintained. The importance of an independent secretariat is a sine qua non for an independent and politically neutral NJAC. And the most dangerous part of the NJAC Act is that a lot of important things have been left to regulations, the Act would thus give unbridled power to the Parliament and Commission to regulate judicial appointments.


\[238\] Arvind P. Datar, supra note 223.


\[240\] Arvind P. Datar, supra note 223.
7.6.1.18 Validity of Laws on NJAC

The Constitutional Amendment and the NJAC Act are challenged through a bunch of petitions, which are collectively being heard by Supreme Court in the Supreme Court Advocates on Record Association and another v. Union of India (hereinafter called the Fourth Judges’ Case). The challenge is on the ground that by virtue of the aforementioned amendment and enactment of the Act, the basic structure of the Constitution of India has been altered and therefore, they should be set aside. However, the Union of India (the respondent) had defended the introduction of the new law saying that the two-decade-old collegium system where judges appointed judges was not free from defects and demanded a re-look at the 1993 and 1998 judgments in the Second and Third Judges’ Cases.

The Bench, by a majority of 4:1, rejected the NJAC Act and the Constitutional Amendment as “unconstitutional and void.” And the Supreme Court rejected the government’s demand to take a re-look at the Second and Third Judges’ Cases, which ushered in the collegium system. The Court held that the collegium system, as it existed before the NJAC, would again become “operative.” And the Court also rejected the plea of the Central Government that the petitions challenging the NJAC Act be referred to a larger bench.

Every judge on the Bench, comprising J.S. Khehar, Chelameswar, Madan B. Lokur, Kurian Joseph and A.K. Goel JJ., has written separate judgments explaining the debate, reasoning and individual conclusions they arrived at about the Constitutional Amendment and NJAC Act. While Lokur, Kurian and Goel JJ., agreed with Khehar J.’s 439-page ‘Order on Merits’ that the NJAC Act and the Constitutional Amendment defeated the primacy of judiciary over the government in the appointment of judges, Chelameswar J. disagreed with his fellow judges and upheld the validity of the Constitutional Amendment.

Khehar J., in his exhaustive judgment approved by the majority on the Bench, attacked the NJAC laws on merits and the majority judgement arrived at the conclusion,

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244 Pp.61-115, paras.20-53. The order on merit.
245 Pp.441-441 of the judgement.
that clauses (a) and (b) of Article 124A(1) do not provide an adequate representation, to the judicial component in the NJAC, clauses (a) and (b) of Article 124A(1) are insufficient to preserve the primacy of the judiciary, in the matter of selection and appointment of Judges, to the higher judiciary (as also transfer of Chief Justices and Judges, from one High Court to another). The same are accordingly, violative of the principle of “independence of the judiciary.”

Khehar J. observed that,

“… since the executive has a major stake, in a majority of cases, which arise for consideration before the higher judiciary, the participation of the Union Minister in charge of Law and Justice, as an ex officio Member of the NJAC, would be clearly questionable. In today’s world, people are conscious and alive to the fact, that their rights should be adjudicated in consonance of the rules of natural justice. One of the rules of natural justice is, that the adjudicator should not be biased. In the NJAC, the Union Minister in charge of Law and Justice would be a party to all final selections and appointments of Judges to the higher judiciary. It may be difficult for Judges approved by the NJAC, to resist a plea of conflict of interest (if such a plea was to be raised, and pressed), where the political-executive is a party to the lis. The above, would have the inevitable effect of undermining the “independence of the judiciary”, even where such a plea is repulsed. Therefore, the role assigned to the political-executive, can at best be limited to a collaborative participation, excluding any role in the final determination. Therefore, merely the participation of the Union Minister in charge of Law and Justice, in the final process of selection, as an ex officio Member of the NJAC, would render the amended provision of Article 124A(1)(c) as ultra vires the Constitution, as it impinges on the principles of “independence of the judiciary” and “separation of powers”.

Khehar J. asked how future judges appointed under the NJAC can be expected to be independent-minded when the Union Law Minister is one of the six members of the Commission appointing them. They would breed a culture of “reciprocity” of favours between the government and the judiciary, and thus, destroy the latter. Khehar J. observed:

“…reciprocity, and feelings of pay back to the political-executive, would be disastrous to the independence of the judiciary. [With] The participation of the political-executive, the selection of judges, would be impacted by political pressure and political considerations.” He said in a situation where government is a major litigant in the higher courts, this feeling of reciprocity may lead to disastrous consequences.”

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246 Para.158. (per majority by Kehar J.).
247 Para.169. (per majority by Kehar J.).
248 Para.168. (per majority by Kehar J.).
249 Para.165. (per majority by Kehar J.).
In the present case J.S.Kehar J. arrived at the conclusion, that clause (c) of Article 124A(1) is *ultra vires* the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an *ex officio* Member of the NJAC. Clause (c) of Article 124A(1), impinges upon the principles of “independence of the judiciary”, as well as, “separation of powers”.

The issue on the qualification of the ‘eminent persons’ for selection to the NJAC, J.S.Kehar J. says that, “the issue of description of the qualifications (– perhaps, also the disqualifications) of “eminent persons” is of utmost importance, and cannot be left to the free will and choice of the nominating authorities, irrespective of the high constitutional positions held by them. Specially so, because the two “eminent persons” comprise of 1/3rd strength of the NJAC, and double that of the political-executive component, and as such, will have a supremely important role in the decision making process of the NJAC.”

The majority judgement said, Article 124A(1)(d) is liable to be set aside and struck down, for not having laid down the qualifications of eligibility for being nominated as “eminent persons”, and for having left the same vague and undefined.”

For appointment of two ‘eminent persons’ to the NJAC, J.S.Kehar J. observed that, “…it is also difficult to appreciate the wisdom of the Parliament, to introduce two lay persons, in the process of selection and appointment of Judges to the higher judiciary, and to simultaneously vest with them a power of veto. The second proviso under Section 5(2), and Section 6(6) of the NJAC Act, clearly mandate, that a person nominated to be considered for appointment as a Judge of the Supreme Court, and persons being considered for appointment as Chief Justices and Judges of High Courts, cannot be appointed, if any two Members of the NJAC do not agree to the proposal. In the scheme of the selection process of Judges to the higher judiciary, contemplated under the impugned constitutional amendment read with the NJAC Act, the two “eminent persons” are sufficiently empowered to reject all recommendations, just by themselves. Not just that, the two “eminent persons” would also have the absolute authority to reject all names unanimously approved by the remaining four Members of the NJAC. That would obviously include the power to reject, the unanimous recommendation of the entire judicial component of the NJAC. In our considered view, the vesting of such authority in the “eminent persons” is clearly unsustainable, in the scheme of “independence of the judiciary”. Vesting of such authority on persons who have no nexus to the system of administration of justice is clearly arbitrary, and we hold it to be so.”

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250 Para.182. (per majority by Kehar J.).
252 Para.185. (per majority by Kehar J.).
J.S. Kehar J. concluded that inclusion of “eminent persons”, as already stated above, would adversely impact primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary (as also their transfer). For the reasons recorded hereinabove, he held, it is apparent, that Article 124A (1) (d) is liable to be set aside and struck down as being violative of the “basic structure” of the Constitution.\(^{253}\)

In the above context, J.S. Kehar J. set aside the Constitution (99\(^{th}\) Amendment) Act, 2014, as being *ultra vires* the provisions of the Constitution and for the validity of the NJAC Act, J.S. Kehar J. observed,

> “The National Judicial Appointments Commission Act, 2014 *inter alia* emanates from Article 124C. It has no independent existence in the absence of the NJAC, constituted under Article 124A (1). Since Articles 124A and 124C have been set aside, as a natural corollary, the National Judicial Appointments Commission Act, 2014 is also liable to be set aside, the same is accordingly hereby struck down. In view of the above, it was not essential for us, to have examined the constitutional vires of individual provisions of the NJAC Act. It was concluded, that Sections 5, 6 and 8 of the NJAC Act are *ultra vires* the provisions of the Constitution.”\(^{254}\)

J. Chelameswar J., in his dissenting opinion, upheld the validity of the said Constitutional Amendment and NJAC Act\(^{255}\). He observed, “The point sought to be highlighted is that the judiciary is not the only constitutional organ which protects the liberties of the people. Accordingly, primacy to the opinion of the judiciary in the matter of judicial appointments is not the only mode of securing independence of judiciary for protection of liberties.” and the judiciary’s insistence that its voice should have primacy over the other organs of governance is “empirically flawed without any basis in the constitutional history of the nation.” Chelameshwar J. wrote in his judgment.\(^{256}\)

> “There is no accountability in this regard. The records are absolutely beyond the reach of any person, including the judges of this court who are not lucky enough to become the Chief Justice of India. Such a state of affairs does not either enhance the credibility of the institution or good for the people of this country,”\(^{257}\)

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\(^{253}\) *Ibid.*

\(^{254}\) Para.167. (per majority by J.S. Kehar J.), paras.222. 223, 224, 229, 242, 244.

\(^{255}\) Para.120, p.571. Chelameshwar J. in dissenting opinion.


\(^{257}\) Para 103, pp.553-554. Chelameshwar J. in dissenting opinion.
Chelameswar J., countering Khehar J.’s leading judgment for the Bench that the presence of the Union Law Minister on the NJAC would give rise to “conflict of interest”, wrote:

“The executive, with vast administrative machinery under its control, is capable of making enormous and valuable contribution to the selection process. The Constituent Assembly emphatically declined to repose exclusive trust even in the CJI. To wholly eliminate the executive from the process of selection would be inconsistent with the foundational premise that government in a democracy is by chosen representatives of the people.”  

As far as appointment of two eminent persons to the NJAC is concerned, Chelameswar J. said he did not find anything “inherently illegal” with two members of the NJAC having the power of veto over the others to stall a recommendation. But interestingly, the Bench admitted that all is not well even with the collegium system of “judges appointing judges”, and that the time is ripe to improve the twenty one year old system of judicial appointments. Khehar J. told the government “Help us improve and better the system. You see the mind is a wonderful instrument. The variance of opinions when different minds and interests meet or collide is wonderful,” scheduling further debate for November 3rd on bettering the working of the collegium system.

The Supreme Court verdict striking down the NJAC legislation as “unconstitutional and void” has evoked mixed reactions from the legal fraternity. While some have deemed it “an error,” others welcomed it as necessary to preserve the independence of the judiciary. Former Attorney-General Mr. Soli Sorabjee said he was surprised by the judgment, he added:

“It is accepted that the Collegium system has failed, and while there may be legitimate concerns about the choice of eminent persons in the NJAC, striking down the whole Act was not warranted. The central question is: do the judges appoint themselves, or can there be other voices too in their appointment? I believe, so long as the voice of the judiciary is not diminished, we cannot rule out other voices.”

Senior Counsel Mr. Raju Ramachandran echoed the sentiments expressed by Mr. Sorabjee, though in stronger terms. “I am disappointed by the judgment,” he said,

“...which seems to proceed from a deep distrust of the political class. Along with an independent judiciary, a system of checks and balances is also very much a part of the basic structure of the Constitution. In this sense, to say that neither the political class nor civil society can have a say in judicial appointments militates against the democratic principle.”

Mr. Dushyant Dave, Senior Council, who has argued in favour of the NJAC, said that,

“...the SC was mistaken in holding the NJAC as unconstitutional. On the contrary, the NJAC was expanding on the original scheme of the Constituent Assembly wherein the government had a say in judicial appointments. The Collegium system, on the other hand, has not produced the best of judges and the judiciary has suffered as a result.”

The Finance Minister, Mr. Arun Jaitley, criticized that judgement stating that, “Indian democracy cannot be a tyranny of the unelected and if the elected are undermined, democracy itself would be in danger.” The Law Minister Mr. Sadanand Gowda, immediately after the pronouncement of the judgment by the Constitution Bench, said that he was surprised by the verdict. He went on to say, “...the NJAC was completely supported by Rajya Sabha and Lok Sabha; It had 100 per cent support of the people.” Telecommunications Minister Ravi Shankar Prasad, earlier the Law Minister who vigorously worked for the NJAC Bill, remarked that “Parliamentary sovereignty has received a setback.” The Attorney-General of India, Mr. Mukul Rohatgi echoed similar sentiments when he said, “It is a flawed judgment ignoring the unanimous will of the Parliament, half the State Legislatures and the will of the people for transparency in judicial appointments.” But Mr. Prashant Bhushan, a senior advocate who challenged the NJAC through the Centre for Public Interest Litigation, praised the Supreme Court for what he said “protecting judicial independence by striking down the NJAC through which the ‘politicos’ wanted to control [the] appointment of judges.”

The former Chief Justice of India, R.M. Lodha J. said the following about the NJAC judgement:

“The reaction of the executive to the NJAC verdict raises the fundamental question: Should the exercise of power of judicial review depend upon the will of the Parliament? …Our Constitution has given the power of judicial review to the unelected superior judiciary to declare ‘unconstitutional’ a legislative act, once it is found to be violative of the basic structure. It would be a sad day for our

261 Ibid.
262 Ibid.
democracy if the exercise of judicial function is made dependent on the will of the representatives of people. What remains of democracy if there is no rule of law? The institutional arrangement at the heart of our democracy provides that the will of the people, as reflected in the decisions of their elected representatives, is subject to the will of the Constitution, as reflected in the decisions of an independent judiciary.”

Close on the heels of the Supreme Court striking down the NJAC Act, the President of India, Mr. Pranab Mukherjee said “…no one could meddle in the process of appointment of judges to the Supreme Court and High Courts. He called for adopting the ‘highest standards of probity’ in the process for appointments.”

7.6.2 Appointment of Additional Judges

The Constitution (Seventh Amendment) Act, 1956, provided for appointment of Additional and Acting judges under Article 224 on the President’s satisfaction that there was temporary increase in the business of the High Court or by reason of arrears therein. In the First Judges Case, the majority of the seven-judge Bench upheld the action of the President. They held that an Additional judge had no right to be appointed; he only had a right to be considered for appointment. He had no right to be made as a permanent judge merely because he had been appointed as an Additional judge. For his appointment as a permanent judge, the procedure prescribed under Article 217 for appointment of judges had to be repeated.

In Shanti Bhushan v. Union of India, the question was raised whether the appointment of additional judge as permanent judge without following the procedure, was valid. A Bench ruled that while making the recommendations for appointments of the Additional judge as a permanent judge, the Chief Justice need not consult the collegium. But Chief Justice of India’s opinion, at the confirmation stage, would be

267 Ibid.
268 Writ Petition (Civil) No.375 of 2007.
269 Dr. K.N. Chandrasekharan Pillai, supra note 190, pp.46-48.
appropriate inasmuch as it may give the authorities a chance to prevent undesirable candidates being appointed as permanent judges.\textsuperscript{270}

7.6.3 Transfer of Judges

The transfer of High Court judges is another matter which has aroused, as can be expected, strong emotions in the context of the independence of the judiciary.\textsuperscript{271} Article 222(1) empowers the President to transfer a judge from one High Court to another after consulting the Chief Justice of India.\textsuperscript{272} The question of transfer of a judge from one High Court to another has raised controversies from time to time. A recommendation from the \textit{State Reorganisation Commission} in 1955 would have altered this arrangement. One-third of all High Court judges should come from out of State because this would enhance national unity; the Commission said.\textsuperscript{273} During the emergency in 1975, 16 High Court judges were transferred from one High Court to another. It was widely believed that the Government did so as a punitive measure to punish those judges who had dared to give judgements against it.\textsuperscript{274} As N.L. Untwali J. said, “The transfer orders created a sense of fear and panic in the minds of judges.”

In 1975, a judge of the Gujarat High Court was transferred to the Andhra Pradesh High Court without his consent. He challenged his transfer through a writ petition in the High Court and the matter came ultimately before the Supreme Court in \textit{Union of India v. Sankalchand Himatlal Sheth}.\textsuperscript{275} As regards the interpretation of Article 222, the Supreme Court was divided, 3:2. The minority took the view that ‘to preserve judicial integrity and independence, the word “transfer” in Article 222 should be interpreted to mean only “consensual transfer,” i.e., transfer of the judge with his consent and not otherwise because transfer constitutes a stigma on the judge and is very inconvenient to him.’ On the other hand, the majority took a more literal view of Article 222 and held that ‘Article 222 does not require consent of a judge to his transfer from one High Court to another.’ As a safeguard against misuse of power by the Executive,

\textsuperscript{270} \textit{Ibid}.
\textsuperscript{272} Under Article 222(2), the transferred judge is entitled to receive, in addition to his salary, such compensatory allowance as may be determined by Parliament by law, and until so determined, as the President may fix by order. M.P. Jain, \textit{supra} note 131, p.380.
\textsuperscript{273} \textit{States Reorganisation Commission Report}, Ministry of Home Affairs, 4\textsuperscript{th} December 1955.
\textsuperscript{275} AIR 1977 SC 2328.
the majority ruled that ‘consultation’ with the Chief Justice, as envisaged by Article 222, has to be ‘full and effective consultation’ and not a ‘mere formality.’ The opinion given by the Chief Justice would be entitled to the greatest weight and any departure from it would have to be justified by the Government on strong and cogent grounds.

Mr. H.M. Seervai, who appeared for Mr. Justice Sheth opined that the majority judgments of the Supreme Court were wrong. It was however necessary to do so, because he could believe that one provision relating to the judiciary is so interpreted as to nullify all the provisions designed to secure the independence of the judiciary. Sometimes subordinate judges enjoy higher security in matters of transfer than High Court judges, as would be the case under the majority judgements, because subordinate judges are protected from the executive in respect of leave, transfers, promotion and the like and by being placed under the protection of the High Court, whereas judges of the High Court would be left to the mercy of the executive. The majority of judges were influenced by the fact that public interest may, at times, demand the transfer of a judge from one State to another. Sometimes ‘public interest’ is a euphemism to cover the case of judges whose conduct in a particular High Court is considerably objectionable. In the opinion of Mr. H.M. Seervai, in so far as public purpose is used to cover the case of a judge guilty of misbehaviour, the correct remedy is to remove him by impeachment. In so far as public interest is said to need the transfer of judges from one High Court to another in order to strengthen the latter High Court, there is an element of truth in the view that such a transfer might be in the public interest. But bearing in mind the grave abuse of the power to transfer judges which has in fact taken place, and may take place again, it is necessary to determine which of the two conflicting public interests must be preferred.276

Again, the question of transfer of High Court judges was raised in S.P. Gupta v. Union of India.277 Bhagwati J., reiterated the minority view in Sankalchand case that a judge could not be transferred without his consent. In any case, he said that the transfer of a judge could never be in the public interest. He emphasized that ‘whenever transfer of a judge by way of punishment could never be bearing upon the conduct or behaviour

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277 AIR 1982 SC 149.
of the judge, it would be by way of punishment.’ Transfer, being a serious matter, the burden of sustaining the validity of the transfer order must rest on the government.  

7.6.3.1 Conditions for Transfer of High Court Judges

Though the Article 222 does not amplify the conditions, the following safeguards have been judicially evolved as conditions for transferring a judge from one High Court to another:

1) Consultation with the Chief Justice of India is an absolute condition precedent. Such condition must be an effective consultation, which means that the President must place all relevant data available to him, on the basis of which the Chief Justice may give his considered opinion. The initiation of the proposal for the transfer of a Judge/Chief Justice of a High Court should be by the Chief Justice of India alone. This requirement in the case of transfer is greater, since consultation with Chief Justice of India alone is prescribed. However, in the case of Jammu and Kashmir, the special provision relating to that State must be kept in view, while initiating the proposal.

2) The Chief Justice owes a duty both to the President and the Judge concerned, so that if the Chief Justice feels that other relevant facts are necessary to be considered, he shall be within his right to elicit those facts from the President.

3) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of the High Court Judges/Chief Justices.

4) Consent of the transferred Judges/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

5) The power to transfer can be exercised only in the public interest and not only on the basis of any administrative policy. Each case must be considered separately, and not on any wholesale basis.

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278 Ibid, p.270.
281 Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268.
282 Ibid.
6) No transfer should be made by way of punishment.\textsuperscript{284}

7) The transferred judge would be entitled to compensatory allowance, in accordance with Article 222 (2).

After Second and Third Judges' cases, for transfer of judges from one High Court to another, the interpretation made by the Supreme Court for appointment of judges will apply.

### 7.6.3.2 Problems in Transfer of Judges

The dangers of transfer are many. Firstly, some of the practitioners with roaring practice may be persuaded to join the bench and may agree to serve on the bench at their home town. In case of danger of being transferred at any moment, they may decline to accept such jobs. Secondly, there is move to encourage judgements in regional languages and transfer of judges may not be suitable or apt. There may also be problem in the hearing of cases. In the wake of the transfer of the Chief Justice of Kerala to Madras, there was a protest from Tamil Nadu that only a Tamil speaking person should be appointed as Chief Justice in the State. Thirdly, the insistence on transfer policy may jeopardize the institutional character of the court. Fourthly, the State government may be deprived of its role in appointing judges to the High Courts as there would be no need to consult the Governor, if vacancies are filled up by outside judges through transfer.\textsuperscript{285}

### 7.6.4 Security of Tenure

The security of tenure which the judge enjoys, is at bottom the most essential fact underlying the principle of independence. It results in a recognition by the general public that the judge has nothing to lose by doing what is right and nothing to gain by doing what is wrong. It is founded on the belief that a man cannot be relied upon to act rightly regardless of the personal consequences. This is secured by the express provision in the Indian Constitution that judges of the Supreme Court or of a High Court shall not be removable except by an address by both Houses of Parliament to the President, passed by a special majority, and on the ground of 'proved misbehaviour or incapacity'. Apart from this procedure of 'joint address' which is a difficult one, a judge of the superior courts, in

\textsuperscript{284} Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268.

India, is guaranteed absolute security of tenure.\textsuperscript{286} A reasonable security of tenure has been provided to the judges which is an important condition to enable them to act in an atmosphere of independence. The court has been reasonably immunized from the stresses and strains of contemporary politics in the country.\textsuperscript{287} While the power to appoint a judge is an executive power, the power to determine his age is a judicial power.\textsuperscript{288}

7.6.5 Removal of Judges

In every democratic State, the question of removal of a judge before the age of retirement is an important one as it has a significant bearing on the independence of the judiciary. If a judge of the superior judiciary is removed without much formality, the judiciary would lose its independence.\textsuperscript{289} Therefore, special provisions are made making removal of judges an extremely difficult exercise.

7.6.5.1 The Procedure for Removal of Judges

The Constitution of India makes a provision under Articles 124(4)\textsuperscript{290} and 218,\textsuperscript{291} for the removal of Supreme Court and High Court judges. Judges may be removed from office by the President on an address by both Houses of Parliament presented in the same session for ‘proved misbehaviour or incapacity.’\textsuperscript{292} The address must be supported by a majority of the total membership in each House, and also by a majority of not less than two thirds of the members of each House present and voting. Article 124(5)\textsuperscript{293} mandates enactment of a Parliamentary law to regulate the investigation and proof of misbehaviour or incapacity of a judge under Article 124(4) and pursuant to it, the Judges (Inquiry) Act, 1968,\textsuperscript{294} has been enacted by the Parliament.

\textsuperscript{287} M.P. Jain, \textit{supra} note 131, p.309.
\textsuperscript{288} \textit{Union of India v. Jyoti Prakash Mitter}, AIR 1971 SC 1093.
\textsuperscript{289} M.P. Jain, \textit{supra} note 131, pp.199-203.
\textsuperscript{290} Article 124(4) - A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
\textsuperscript{291} Article 218 - The provisions of clauses (4) and (5) of article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.
\textsuperscript{292} These expressions are taken from Section 72 of the Australian Constitution.
\textsuperscript{293} Article 124 (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).
\textsuperscript{294} Act of 51 of 1968. Objective and reasons of the Act - An Act to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a judge of the Supreme Court or of a High
Under the Judges (Inquiry) Act, for removal of judges, a notice of a motion for presenting such an address may be given by 100 members of the Lok Sabha, or 50 members of the Rajya Sabha. The Speaker or the Chairman may either admit or refuse to admit the motion. If it is admitted, then the Speaker/Chairman is to constitute a Committee consisting of a Supreme Court judge, a Chief Justice of a High Court and a distinguished jurist.

The Committee of Inquiry has to frame definite charges against the judge on the basis of which the investigation is proposed to be held and give him a reasonable opportunity of being heard including cross-examination of witnesses. If the charge is that of physical or mental incapacity, the Committee may arrange for the medical examination of the judge by a medical board appointed by the Speaker/Chairman or both as the case may be. For the purpose of making any investigation, the Committee shall have the power of a civil court, while trying a suit, under the Code of Civil Procedure, 1908.

At the conclusion of the investigation, the Committee shall submit its report to the Speaker or, as the case may be, to the Chairman, or where the Committee has been constituted jointly by the Speaker and the Chairman, to both of them, stating therein its findings on each of the charges separately with such observations on the whole case as it thinks fit. The report of the Committee is to be laid before the concerned House or Houses. If the Committee exonerates the judge of the charges laid against him, then no further action is to be taken on the motion for his removal. If, however, the Committee finds the judge to be guilty of misbehaviour, or suffering from incapacity, the House can take up consideration of the motion. On the motion being adopted by both Houses

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295 Before initiation of motion against the Supreme Court judge for his removal, definite materials or evidence in support of the grounds of motion must exist. Krishna Swami v. Union of India, AIR 1993 SC 1407; (1992) 4 SCC 605.
296 Section 3(1), the Judges (Inquiry) Act, 1968.
297 Section 3(2). If notices for the motion are given on the same day in both the Houses, the Committee of Inquiry is to be constituted jointly by the Speaker and the Chairman.
298 Section 3(3).
299 Section 3(4).
300 Section 3(5).
301 Section 5. (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on oath; (d) issuing commissions for the examination of witnesses or documents; (e) such other matters as may be prescribed.
302 Section 4(2).
according to Article 124(4), an address may be presented to the President for removal of the judge. The judge will be removed after the President gives his order for removal on the said address.

On a construction of Article 124, the policy appears to be that the entire stage upto the proof of misbehaviour or incapacity, beginning with the initiation of investigation on the allegation being made, is governed by the law enacted under Article 124(5) and in view of the restriction provided in Article 121,\textsuperscript{303} the machinery has to be outside the Parliament and not within it and the Parliament comes into picture only when a finding is reached by that machinery that the alleged misbehaviour or incapacity has been proved.\textsuperscript{304} The word ‘proved’ in Article 124(4) indicates that the address can be presented by Parliament only after the alleged charge of ‘misbehaviour or incapacity’ against the judge has been investigated, substantiated and established by an impartial Committee.

The Enquiry Committee is not a tribunal or authority and, therefore, no appeal would lie in Supreme Court against the finding of guilt by the Committee.\textsuperscript{305} It was held therein that the finding of the Committee is only a recommendation which the Parliament may or may not accept. The finding by the Committee is not final and conclusive and no appeal lies to the Supreme Court under Article 136 of the Constitution against the finding.\textsuperscript{306} The member of the Committee can be removed on the ground of bias.\textsuperscript{307} The procedure prescribed by Article 124(4) is the only mode for removing a judge of the Supreme Court or High Court. The \textit{Judges (Inquiry) Act}, 1968 and the Rules\textsuperscript{308} made thereunder only provide for removal of a judge on the ground of proved misbehaviour or inability. It does not provide for prosecution of a judge for offences under the \textit{Prevention of Corruption Act}.\textsuperscript{309} No court can issue a writ of mandamus for the purpose, however

\textsuperscript{303} Article 121 - No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.


\textsuperscript{305} Sarojini Ramaswami v. Union of India, AIR 1992 SCC 2219: (1992) 4 SCC 506.

\textsuperscript{306} D.D. Basu, supra note 286, p.5600.

\textsuperscript{307} P.D.Dinakaran (1) v. Judges, Inquiry Committee, (2011) 8 SCC 380.

\textsuperscript{308} Rules under the Act are to be made by a committee consisting of 10 members from the Lok Sabha and 5 members from the Rajya Sabha.

gross the conduct of a judge may be. Even the provisions of Article 310 are not applicable to the judges of the Supreme Court and the High Courts.

7.6.5.2 Understanding ‘Incapacity’ and ‘Misbehaviour’

Literally speaking, “incapacity” means physical or mental inability to manage one’s affairs. But since the term is not defined under the Constitution, it has to rely on the Judges (Inquiry) Act to understand the meaning of the term incapacity. This would mean that ‘Where it is alleged that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity…’ action for removal of a judge may be taken when either the same is certified by a Medical Board after such medical examination of the judge as may be considered necessary under the Judges Inquiry Act, or, where he refuses to undergo a medical examination, the same is presumed by the Inquiry Committee under the said Act. Therefore, inefficiency (not out of incapacity) would be covered under professional misconduct.

The word ‘misbehaviour’ used in Article 124(4) is a vague and elastic word. The term ‘misbehaviour’ has not been defined either under the Constitution, or under the Judges (Inquiry) Act. So it is left to understand its meaning from various case law. The judiciary has often used the terms ‘misconduct’ and ‘misbehaviour’ synonymously in its judgements in this respect. Literally speaking, misconduct means ‘unacceptable or improper behaviour.’ In other words, it would be a conduct making him unworthy of

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310 Avadhesh v. State, AIR 1991 All 52, para.6; See also Sub Committee on Judicial Accountability v. Union of India, AIR 1992 SC 320: (1991) 4 SCC 699, wherein the court rejected the contention that court itself has jurisdiction to remove a judge and held that jurisdiction is only with the Constitutional machinery as provided in the Article.

311 Article 310(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.


313 Section 3(5).

314 Section 3(6).

315 Section 3(7).
holding the office of a judge and it embraces within its sweep, facts of conduct as opposed to good conduct. 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 judicial duties of the judge or willful abuse of the office ‘*dolus malus*’ would be misbehaviour. Misbehaviour would extend to conduct of the judge in or beyond the execution of judicial office;\(^{316}\) Willful abuse of judicial office, willful misconduct in the office, corruption, lack of integrity or any other offence involving moral turpitude would be misbehaviour. It is important to mention that removal for ‘misbehaviour’ refers to personal misbehaviour, not for constitutional transgressions.\(^{317}\) In *C. K. Daphtary v. O. P. Gupta*,\(^{318}\) it was held that misbehaviour does not mean gross error in judgement. In fact, misbehaviour would mean gross deviation from the normal standards of conduct expected from a judge.\(^{319}\)

### 7.6.5.3 V. Ramaswami J. Case

The procedure outlined for the removal of a judge of the higher judiciary was activated in 1991. Steps were initiated to remove a Supreme Court judge V. Ramaswami J., on charges of misconduct prior to his appointment when he was the Chief Justice of a High Court. The charge against him was that he committed financial irregularities while he was the Chief Justice of Punjab and Haryana High Court. The Speaker of the Lok Sabha admitted the motion on 12\(^{th}\) March, 1991, and proceeded to constitute an Enquiry Committee consisting of P.B. Sawant,\(^{320}\) Desai\(^{321}\) JJ. and Chinnappa Reddy J.\(^{322}\) This was done by the Speaker in terms of Section 3(2) of the *Judges (Inquiry) Act*. Before the Committee could present its report, the Lok Sabha was dissolved.

In *Sub-Committee of Judicial Accountability v. Union of India*,\(^{323}\) the Supreme Court was called upon to consider the question whether dissolution of Lok Sabha put an end to the motion for removal of the concerned Supreme Court judge. The Court’s response to this question was that the motion for removal of a judge under Article

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\(^{318}\) AIR 1970 SC 1132.


\(^{320}\) A sitting judge of the Supreme Court.

\(^{321}\) Chief Justice of the Bombay High Court.

\(^{322}\) A retired Supreme Court judge as a distinguished jurist.

\(^{323}\) AIR 1992 SC 320.
124(4) of the Constitution does not lapse with the dissolution of the House. The motion having been submitted to the Speaker, its validity would in no way be impaired by the dissolution of the House. The Court reached this conclusion as a result of interpretation of Sections 3(1) and 6 of the Judges (Inquiry) Act. The Court ruled that the Committee of Inquiry appointed by the Speaker was a body outside Parliament and a statutory body under the Judges (Inquiry) Act, and till it furnishes its findings to the House, the Committee maintains its own separate identity. Another petition was filed by V. Ramaswami’s J. wife Smt. Sarojini Ramaswami, objecting to the process adopted by the Committee. The Court held that an objection against the finding of the Inquiry Committee cannot be filed by a judge until he is removed by the President. In any case, judicial review can only be on procedural grounds and not on the merits of the grounds of removal.

Finally, the Inquiry Committee gave its report in December 1992, and found V. Ramaswami J. to be guilty of deliberately misusing his office and of using government money for his private work. The matter was then placed before the Lok Sabha to decide if the judge was to be removed or not. 176 votes were cast in favour of impeachment but no one in the opposition voted in favour of impeachment because the ruling party walked out. Therefore, V. Ramaswami J. could not be removed. However, he abstained from work until he retired in July, 2002. Ultimately, votes in Parliament were cast on political considerations and not on the merits of the case. The judge was found guilty of misconduct, but could not be removed.

In Lily Thomas v. Speaker, Lok Sabha, the petitioner attempted to give flexibility to the procedure for removal by alleging that the motion of impeachment against a sitting judge of the court moved in the Lok Sabha for his removal from office, should be deemed to have been carried by construing the expression, ‘supported by a majority’ under Article 124(4) in such a manner that any member who abstains from voting should be deemed to have supported the motion. But the Supreme Court held that the right to vote includes the right to remain neutral. Hence, abstention from voting,

324 Sarojini Ramaswami v. Union of India, AIR 1992 SC 2219.
though present, is legitimate and valid and cannot be deemed to be a vote in support of the motion.

In Capt. Virendra Kumar, Advocate v. Shivaraj Patil, Speaker, Lok Sabha,\textsuperscript{327} concerns a petitioner who has given some material to the Speaker to disseminate the same among the members of Parliament for convincing them to vote in favour of impeachment of a Supreme Court judge. The Speaker failed to do so and the motion of impeachment failed. It was alleged that the oral whip of the ruling party to its members to abstain from voting was effective because of the fault of the Speaker in not circulating his papers to the MPs. In this case, the Court held that voting on a motion of impeachment is a political process and that Parliament is sovereign with respect to the conduct of its business. Hence, the Supreme Court could not have any say in that political process.

In view of V. Ramaswami’s J. Case, it would not be wrong to say that the Constitutional procedure for removal of a judge is so rigid and complex that it ends up being uncertain whether a judge, despite proved misbehaviour, would be removed from office or not.\textsuperscript{328} Failure of removal of V. Ramaswami J., as the noted writer H.M. Seervai called it is ‘one of the most disgraceful episodes in the history of the Supreme Court.’\textsuperscript{329}

\textbf{7.6.5.4 Judges’ Prosecution under Prevention of Corruption Act, 1976}

In 1976, the CBI registered a case against K. Veeraswami J.\textsuperscript{330} by registering a First Information Report in one of the Courts in New Delhi against him for possessing pecuniary resources and property in huge amounts, disproportionate to known sources of income, which he could not satisfactorily accounts for, and he had thereby committed the offence of criminal misconduct under Section 5(1)(e) of the Prevention of Corruption Act, 1976.\textsuperscript{331} A copy of the FIR was also filed before the Court of the

\textsuperscript{327} (1993) 4 SCC 97.
\textsuperscript{329} H.M. Seervai, supra note 108, p.2909.
\textsuperscript{330} K. Veeraswami J. was elevated to the bench as a permanent judge of the Madras High Court in 1960 and in 1969 he was appointed as its Chief Justice.
\textsuperscript{331} Act 10 of 1976.
Special Judge, Madras.\textsuperscript{332} However, the investigation against him continued and finally a charge-sheet was filed before the Special Judge, Madras.

On perusal of the charge-sheet, the Special judge, Madras issued process for the appearance of K. Veeraswami J. The judge then filed a petition before the Madras High Court for quashing the prosecution on the ground that judges of the High Courts and the Supreme Court are not within the purview of the \textit{Prevention of Corruption Act}. He contended that since the Act is a special enactment applicable to public servants, in whose case prosecution can be launched after sanction is granted under Section 6 of the Act and which requires the accused to be a public servant having above him an authority competent to remove him from his office, is alien to the scheme envisaged for constitutional functionaries like judges of the High Courts and Supreme Court. The full bench of the High Court dismissed the case, stating that though there are various protections afforded to judges to preserve the independence of the judiciary, there is no law providing protection for judges from criminal prosecution. Thus, K. Veeraswami J. went on appeal before the Supreme Court, which upheld the order of the High Court and dismissed his appeal.\textsuperscript{333} In \textit{K. Veeraswami v. Union of India},\textsuperscript{334} the Supreme Court observed that a judge of the High Court or the Supreme Court comes within the definition of ‘Public Servant’ given under Section 21 of the \textit{Indian Penal Code}, 1860 and that, in view of the provision for ‘removal’ of a judge under Article 124 of the Constitution, there is also an authority competent to remove a judge on the ground of proved misbehaviour, i.e. the President. Thus, the judges of the High Courts and the Supreme Court can be prosecuted under the \textit{Prevention of Corruption Act} for criminal misconduct under Section 5(1)(e) of the said Act, with previous sanction of the authority competent (the Chief Justice of India) to remove them.

The proved ‘misbehaviour’ for removal of a judge under clause (4) of article 124 may also in certain cases involve an offence of criminal misconduct. But there is no ground for withholding criminal prosecution till the judge is removed by Parliament. One is the power of Parliament and the other is the jurisdiction of a criminal court. Both are

\textsuperscript{332} On coming to know about the FIR, K. Veeraswami J. went on leave from March 9, 1976 and subsequently retired on April 8, 1976.
\textsuperscript{334} (1991) 3 SCC 655.
mutually exclusive. Even a government servant who is answerable for his misconduct which may also constitute an offence under the IPC or under section 5 of the Prevention of Corruption Act is liable to be prosecuted in addition to a departmental enquiry. It is not objectionable to initiate criminal proceedings, and a fortiori prosecution of a judge for criminal misconduct before his removal by Parliament for proved misbehaviour is unobjectionable. 335

7.6.6 The Power to Punish for Contempt of Court

In order for any legal system to be maintained and to flourish, rules must be enforced to protect the status, authority, integrity and fairness of the courts. 336 Courts, if they are to serve their purpose of administering justice, must have the power to secure obedience to their judgements, to prevent interference with their proceedings and to ensure a fair trial to parties who resort to them to vindicate their rights. 337

Under Articles 129 and 215 of the Indian Constitution, both the Supreme Court and the High Courts are ‘courts of record.’ The Constitution does not define ‘court of record,’ but this expression is well recognized in the judicial world. A court of record is a court, ‘whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony’ 338 and as a court of record, the Supreme Court has the power to punish not merely for contempt of itself, but also for contempt of all courts as also tribunals subordinate to it, like the contempt of Income Tax Appellate Tribunal. 339 Unlike a court of limited jurisdiction, a superior court of record is entitled to determine the question about its own jurisdiction. 340 In S.K. Sardar v. Vinay Chandra Misra, 341 it was held that,

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339 Sahara India Real Estate Corp. Ltd. v. SEBI, 2012 (10) SCC 603.
342 AIR 1981 SC 723.
“Both Article 129 and 215 preserve all the powers of the Supreme Court and High Courts respectively as a ‘court of record’ which includes the power to punish contempt of itself, and there is no curb on this power except that this be subject to the constitutional provision in Article 129 and 215.”

The power of the High Courts and the Supreme Court, to punish for their contempt, is also used to vindicate their independence. In order to maintain judicial independence, the Supreme Court has deprecated in very strong terms the attempt made by a lawyer or a litigant to brow beat the Court or malign the presiding judge with a view to get a favourable order. The Court has said:

“Lawyers and litigants cannot be allowed to ‘terrorize’ or ‘intimidate’ judges with a view to ‘secure’ orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it.”

The Supreme Court exercises this power to punish an act which tends to interfere with the course of administration of justice. The following inter alia have been held to constitute contempt of court:

a) Derogatory to the dignity of the Court which are calculated to undermine the confidence of the people in the integrity of the judges;
b) An attempt by one party to prejudice the Court against the other party to the action;
c) To stir up public feelings on the question pending for decision before the Court and to try to influence the judge in favour of himself;
d) An attempt to affect the minds of the judges and to deflect them from performing their duty by flattery or veiled threats;
e) An act or publication which scandalizes the Court attributing dishonesty to a judge in the discharge of his functions;
f) Willful disobedience or non-compliance of the Court’ order.

If a citizen in the garb of exercising the right to free speech and expression under Article 19(1)(a), tries to scandalize the court or undermine the dignity of the court, then the court would be entitled to invoke its power under Article 129 and 215, as the case

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may be. Freedom of speech and expression, so far as they do not contravene the statutory limits as contained in the Contempt of Court Act, 1971 are to prevail without any hindrance. However, the maintenance of dignity of courts is one of the cardinal principles or rule of law in a democratic setup and any criticism of the judicial institution couched in language that apparently appears to be mere criticism, but ultimately results in undermining the dignity of the courts cannot be permitted when found to have crossed the limits and has to be punished.

The power of courts under Constitution is a summary power. The court may proceed suo motu or on the petition of an advocate of the court. The contemnor is not allowed to plead justification or to examine witnesses in defence, to prove that his allegations, e.g., of corruption or dishonesty are true. But Section 13 of the Contempt of Court Act was amended as per Act 6 of 2006. This section is split into two. The former section has been retained as clause (a) and a new provision is added as clause (b) which makes truth as a ground of defence in contempt proceedings. At the same time, the procedure must be fair; a notice should be issued to the contemnor and an opportunity must be given to him to file an affidavit to state facts and contentions in answer to the charge. There is no need to draw up any formal charge, but sufficient particulars must be given and an apology may be accepted to purge the offence if it reflects sincere remorse and contrition.

The object of contempt power to punish is not for the protection of the judges personally from imputations to which they may be exposed as individuals, but the protection of the public themselves from the mischief they will incur if the authority of the tribunal is impaired. Hence,-

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347 Act 70 of 1970. An Act to define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto.
(i) The power to punish for scandalizing the court is a weapon to be used sparingly and always with reference to the administration of justice and not for vindicating personal insult to a judge, not affecting the administration of justice.

(ii) Fair and reasonable criticism of a judicial act in the interest of the public good does not amount to contempt and correctness of earlier decision cannot be questioned in contempt proceedings.

(iii) Any speech or conduct which tends to influence the result of a pending trial, civil or otherwise tends to interfere with the proper course of justice amounts to contempt of court.

The power conferred under Articles 129 and 215 on the higher judiciary are constitutional in nature and cannot be abridged by legislature. The law of contempt has been enacted so secure public respect and confidence in the judicial process. If such confidence is shaken or broken, the confidence of the common man in the institution of judiciary and the democratic set up are likely to be eroded which, if not checked, is sure to be disastrous for the society itself.

7.6.7 Fiscal Autonomy of the Judiciary

Financial or fiscal autonomy is connected with institutional independence of the judiciary. As Lord Denning said in The Road to Justice, “It is necessary to state that the independences of a judge can be threatened not only by the executive or by political interference, but also by financial anxiety.” As far as the question of salary and pension are concerned, a judge should, according to his social status and dignity of his office,
receive an adequate and fixed salary. Besides, he should be entitled to a decent pension on retirement. \textsuperscript{364} In the words of Churchill:

“Our aim is not to make our judges wealthy men, but to satisfy their needs and to maintain a modest and a dignified way of life suited to the gravity, and indeed, the majesty, of the duties they discharge.”

In India the salaries of the Supreme Court and High Court judges are fixed by Parliament by law and cannot be reduced during the tenure of a judge. \textsuperscript{365} Parliament may prescribe the privileges, allowances, leave and pension of judges, subject to the safeguard that these cannot be varied during the course of tenure of a judge to his disadvantage. \textsuperscript{366} All these matters are now regulated by the \textit{Supreme Court Judges (Salaries and Conditions of Services) Act}, 1958 and the \textit{High Court Judges (Salaries and Conditions of Service) Act}, 1954 as amended in 2002. \textsuperscript{367}

In an effort to remove salaries of judges from the discretionary area of the executive, a provision for payment of salaries and allowances and pensions to judges of Supreme Court and High Court \textsuperscript{368} and the administrative expenses of the Supreme Court and High Court, including salaries, etc., of its staff, are charged upon the Consolidated Fund of India and Consolidated Funds of the concerned States, \textsuperscript{369} which means that this item is non-votable in Parliament although a discussion on it is not ruled out. \textsuperscript{370} Therefore, making payment to the judiciary, independent of Parliamentary vote is a great step in ensuring the judicial independence from political pressures. The Chief Justice of India in the case of the Supreme Court, and the Chief Justices of the High Courts have absolute powers in the matter of conditions of services of officers and servants and the

\begin{thebibliography}{9}
\bibitem{salary} The salary payable to a Supreme Court and High Court Judge was specified in the Constitution (Articles 125(1), 221 and the Second Schedule). But then by the \textit{Constitution (Fifty-Fourth Amendment) Act}, 1986, Parliament has been given power to determine the salary payable to a Supreme Court and High Court judge by law.
\bibitem{sandhawalia} Article 125(2), 221. \textit{Justice S.S. Sandhawalia v. Union of India}, AIR 1990 P&H 198.
\bibitem{amendment} This Act has been recently amended by the \textit{High Court and Supreme Court Judges (Salaries and Conditions of Services) Amendment Act}, 2002.
\bibitem{article} Articles 112(3)(d)(i), 202(3)(d).
\bibitem{amended} Articles 146(3) and 229(3).
\bibitem{dubas} D.D. Basu, \textit{supra} note 286, p.5612.
\end{thebibliography}
expenses of the courts. But, if any rules made by the Chief Justice relate to salaries, allowances, leave or pensions, they require approval of the President or the Governor.  

The judiciary today faces debilitating financial fetters and lack of basic infrastructure. Justice—the first promise in the Constitution is a low priority in the budget. The courts face financial constraints. The number of judges at all levels is well below the minimum required. The facilities remain inadequate; working conditions are not conducive to an optimum output. While it is true that the judiciary cannot expect an undue share of the finances as compared to certain other important items of governmental expenditure having higher priorities, the fact remains that the judiciary has not received in the last sixty-five years, even a reasonable proportion of what was due to it. The constitutional text is silent as to what is the quantum of amount required year after year by the judiciary to achieve norms in discharge of its functions. Even the Report of the NCRWC, observes that, “Judicial administration in the country suffers from deficiencies due to lack of proper planning, adequate financial support for establishing more courts and providing them with adequate infrastructure. For several decades the courts have not been provided with any funds under the five-year plans nor has the Finance Commission been making any separate provisions to serve the financial needs of the courts.”

One of the main reasons for the serious fall in standards was the deliberate refusal of the Government to increase the salary of High Court and Supreme Court judges. The failure to raise the salary made it impossible to attract the best talent from the Bar. Things are much better now and not only have the salaries increased manifold, attractive perks in the nature of housing, transportation, domestic servant etc. are also provided.

7.6.8 Administrative Independence

Under the Constitutional scheme as framed for the judiciary, the High Court is not a court ‘subordinate’ to the Supreme Court. The Union judiciary and State judiciary are

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371 Articles 146(2) and 229(2).
373 During the Tenth Plan, the allocation is, which is 0.071% of the total plan outlay. Justice S.B. Sinha, supra note 363, p.34.
376 Arvind P. Datar, supra note 181, p.61.
undoubtedly independent of each other except in a few areas such as appellate jurisdiction. The Chief Justice of India in relation to the Supreme Court, has administrative power in the day to day business of the court. The executive will not interfere in matters relating to administration of the court. Judicial independence has a complex interrelationship with discretionary power. Courts need discretionary powers to make meaningful decisions. It needs structural mechanisms that protect judges from internal and external pressures. Courts cannot be made instruments of State rule. The structural arrangements of the court’s decision making process constitute as significant an input as the nature of its work. The term, ‘structural arrangement’ here, refers to the manner in which the court is organized in terms of bench compositions and assignment of work division of the court into various panels of judges comprising the division benches. The division of the court into various panels of judges for all practical purposes conceptually amounts to creation of more than one court within the institutional frame work and implies the induction of an important variable in the court’s decision making process. Even Article 145 gives to the Supreme Court power to frame rules including rules regarding condition on which a person (including an Advocate) can practice in the Supreme Court. Such a rule would be valid and binding on all.

In relating to the High Court, it is the prerogative of the Chief Justice of the High Court to constitute a Bench of his choice; the Supreme Court will not interfere with the prerogative and it is an administrative function performed by the Chief Justice of the High Court. Normally the Supreme Court will not issue any direction to the High Court in regard to judicial administration. But when the High Court is facing a crisis in judicial administration virtually making it come to a grinding halt, the Supreme Court gives direction while emphasizing that it is not having any supervisory control over the administration of the High Court.

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379 In exercise of powers conferred by Article 145 of the Constitution, and all other powers enabling it in this behalf the Supreme Court hereby makes, with the approval of the President, The Supreme Court Rules, 1966 framed.
381 Hon’ble Chief Justice of High Court, M.P. v. Mohan Kumar, 1994 (Supp-2) SCC 602.
7.6.9 Judicial Immunities

Under the provisions of various statutory enactments, some of them passed before independence and some others, passed after independence, there is protection given to judges against any legal action for what they do in their judicial capacity. Protection is afforded to almost all judicial officers irrespective of their rank or status.\(^{382}\)

The *judicial officers Protection Act*, 1850, was the first statute which afforded protection to the judicial officers thus, ‘No judge, magistrate, justice of the peace, collector or other person, acting judicially, shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.’\(^{383}\) The scope of the *Judicial Officers Protection Act* may be explained by a reference to a few cases, thus, in *Anowar Hussain v. Ajoy Kumar Mukherjee*\(^ {384} \) the Supreme Court said,

‘...the statute, it must be noticed, protects a judicial officer only when he is acting in his judicial capacity and not in any other capacity. But within the limits of its operation it grants large protection to judges and magistrates acting in the discharge of their judicial duties.’

This is in addition to the protection given by Section 77 of the *Indian Penal Code*, 1860, which provides that: ‘Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.’

The Constitution insulates the court from political criticism, and thus, ensures its independence from political pressures and influence, by laying down that neither in Parliament nor in a State Legislature the conduct of a Supreme Court and High Court judges in the discharge of his duties, can be discussed.\(^ {385} \) In *Keshav Singh v. Speaker, Legislative Assembly U.P.*\(^ {386} \) the Supreme Court has taken opportunity to underline the significance of this provision. It protects a judge of the court from any contempt proceedings which may be taken against him in any House of Parliament or State Legislature for anything that the judge may do in the discharge of his duties. The


\(^{383}\) Ibid.

\(^{384}\) AIR 1965 SC 1651.

\(^{385}\) Articles 121 and 211.

\(^{386}\) AIR 1965 All 349.
provision amounts to an absolute constitutional prohibition against any discussion in a
House, except when a motion to remove him is before Parliament, with respect to a
Supreme Court and High Courts judges.\(^{387}\)

Section 3 of the *Judges (Protection) Act, 1985*\(^{388}\) confers additional protection to
judges by declaring that ‘no court shall entertain or continue any civil or criminal
proceedings against a judge for any act, thing or word committed, done or spoken by him
while acting in the discharge of his official duty.’\(^{389}\) Additional protection has been given
by judicial directions in *Delhi Judicial Service Association v. State of Gujarat*,\(^{390}\) where
the Supreme Court laid down binding guidelines in the matter of arrest or handcuffing of
a judicial officer.

In *K. Veeraswami v. Union of India*,\(^{391}\) the Supreme Court directed that in order
to protect a judge from prosecution and unnecessary harassment, the President of India
should consult the Chief Justice of India and act on his advice for giving sanction to
launch prosecution or for filing FIR against a judge\(^{392}\) and for the judges of higher courts,
no acceptance is required to make the resignation complete. These constitutional
dignitaries have the privilege of quitting their office at their unilateral volition and action,
by sending to the President a written letter of resignation.\(^{393}\)

### 7.6.10 Subordinate Judiciary

In India, in each State, there is a system of subordinate courts below the High
Court. The subordinate judiciary\(^{394}\) constitutes a very important segment of the judicial
system as it is in these courts that the judiciary comes in close contact with the people. It
is therefore essential to maintain the independence and integrity of the subordinate
judiciary\(^{395}\) and for this purpose Article 233 to 237 have been placed in the

\(^{387}\) M.P. Jain, *supra* note 131, p.308.
\(^{388}\) Act 59 of 1985.
\(^{389}\) Section 1.
\(^{394}\) Which is judiciary up to the level of district courts in a State, i.e. on the civil side, civil judge (junior
division), civil judge (Senior Division) and district judge and on the criminal side, comprising of
judicial magistrates of first class, chief judicial magistrates and sessions judges.
Constitution. Even the Supreme Court has emphasized again and again on the maintenance of independence and integrity of the subordinate judiciary. Accordingly, the Court has through its various decisions, promoted the independence of these courts from executive control and, to this effect, has expanded the control of the High Courts over the subordinate judiciary, so as to strengthen the independence of the subordinate courts from executive control.

7.6.10.1 Appointment of District Judges

Under Article 233(1), appointment, posting and promotion of district judges in the State are made by the Governor in consultation with the High Court. Under Article 233(2), a person not already in the ‘service of the State’, is eligible to be appointed as a district judge only if-

(i) He has been, for not less than seven years, an advocate or a pleader, and
(ii) Is recommended by the High Court for such appointment.

From the tenor of Article 233, it appears that there are two sources of recruitment of district judges, viz.;

(i) Service of the Union or the State;
(ii) Members of the Bar.

The Supreme Court has been very careful in safeguarding the independence of the subordinate judiciary in India. In the State of Assam v. Raga Md. it has been held that any rule made by the Governor under Article 309 which is violative Article 233 shall be void. In Chandra Mohan v. U.P. extending its protection to the lower judiciary, it ruled that a High Court must be consulted when District Judges are appointed. The Court pointed out that the meaning of ‘consultation’ is that it is mandatory and also binding on

396 Chapter VI in Part VI of the Constitution of India.
398 The expression ‘district judge’ includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge: Article 236(a).
399 The word ‘service of the State’ means only judicial service and no other service. According to Article 236(b), the expression ‘judicial service’ means ‘a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.’ See also, Satya Narain Singh v. High Court at Allahabad, AIR 1985 SC 308.
the government in making the appointment of district judges. In an earlier case\textsuperscript{403} it ruled further that the power to appoint a Registrar belongs solely to the Chief Justice.\textsuperscript{404} Even in \textit{State of Assam v. Kuseswar}\textsuperscript{405} it has been held that the requirement of consultation with the High Court at the time of each appointment is not a mere empty formality, but is mandatory.\textsuperscript{406} An appointment without consulting the High Court, is invalid.\textsuperscript{407}

\textbf{7.6.10.2 Appointment of Subordinate Judges}

Below the district judges, there are other subordinate courts, according to Article 234 appointment of persons, other than district judges, to the State judicial service is made by the Governor in accordance with the rules made by him for the purpose, after consultation with the State Public Service Commission and the High Court. Consultation with the High Court under Article 234 is mandatory. If rules are made by the State Government without consulting the High Court then such rules would be \textit{ultra virus}.\textsuperscript{408}

\textbf{7.6.10.3 High Courts Control over District and Subordinate Courts}

The control of the High Court over the subordinate judiciary is comprehensive, exclusive and effective and subserves the basic feature of the Constitution i.e., independence of the judiciary.\textsuperscript{409} Article 235 is the pivotal provision. The control, vested in the High Court over the subordinate judiciary, is for the purpose of preserving its independence and its protection from executive interference.\textsuperscript{410} The control vested in the High Court by Article 235 over the judiciary below is complete and comprehends a wide variety of matters and is ‘exclusive in nature, comprehensive in extent and effective in operation.’\textsuperscript{411} Under Article 235, having control over subordinate judiciary, the High Court has a duty to protect judicial officers from unscrupulous litigants and lawyers.\textsuperscript{412}

\textsuperscript{403} AIR 1967 SC 903.
\textsuperscript{404} Ibid. p.650; Rajeev Dhavan, \textit{supra} note 26, pp.84-85.
\textsuperscript{405} AIR 1970 SC 1616.
\textsuperscript{406} \textit{Gauhati High Court v. Kuladhar Phukan}, AIR 2002 SC 1589 (1594).
\textsuperscript{411} \textit{Chief Justice, Andhra Pradesh \textit{v. L.V.A.Dikshitulu}}, AIR 1979 SC 193, 201.
While the posting, transfer\textsuperscript{413} and promotion\textsuperscript{414} of District judges shall be in the hands of the Governor acting in consultation with the High Court, - the posting and promotion and granting of leave to officers of the State Judicial Service other than District judges shall be exclusively in the hands of the High Courts, subject, of course, to such appeal as are allowed by the law regulating conditions of the service.\textsuperscript{415}

Under Article 235, the High Court exercises disciplinary powers over the district and subordinate judges. ‘Control’ under Article 235 is control over the conduct and discipline of the judges. An inquiry into the conduct of a member of the judiciary can be held by the High Court alone and by no other authority.\textsuperscript{416} Accordingly, the High Court can suspend a judge with a view to holding a disciplinary inquiry. The High Court can itself impose punishments over judicial officers, short of ‘dismissal of removal’ or ‘reduction in rank.’ These major punishments fall within the purview of the Governor under Article 311, but even such an action can be taken only on the recommendation of the High Court made in exercise of the power of control vested in it. The advice of the High Court is binding on the Governor in this matter.\textsuperscript{417} And the compulsory retirement is not dismissal or removal or reduction in rank because the concerned person does not lose the terminal benefits earned by him. The power to recommend compulsory retirement of a district and subordinate judge belongs to the High Court and it is binding on the Governor.\textsuperscript{418} Article 235 enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the ‘black sheep’ or weed out the ‘deadwood.’ The constitutional power of the High Court cannot be circumscribed by any rule or order.\textsuperscript{419} In \textit{State of W.B. v. Nripendra Bagchi}\textsuperscript{420} it was held that the High Court alone can hold disciplinary proceedings against a District Judge. It has therefore tried to interpret separation of powers to preserve judicial independence from the executive. Thus for keeping stream of justice unpolluted, repeated scrutiny of service records of judicial

\textsuperscript{413}Devashyam v. State of Madras, AIR 1958 Mad. 53 (61); High Court of Judicature of Bombay v. Shirish Kumar Rangrao Patil, AIR 1997 SC 2631.


\textsuperscript{415}High Court v. Amal Kumar, AIR 1962 SC 1704.

\textsuperscript{416}Punjab & Haryana High Court v. State of Haryana, AIR 1975 SC 613.

\textsuperscript{417}Baldev Raj v. Punjab & Haryana High Court, AIR 1976 SC 2490.


\textsuperscript{420}AIR 1966 SC 447; Rajeev Dhavan, \textit{supra} note 26, p.85.
officers after a specified age/completion of specified years of service provided under the rules is a must by each and every High Court as lower judiciary is the foundation of judicial system.\(^{421}\)

The disciplinary control which the High Court exercises over the subordinate judiciary is a very sensitive and delicate function. The Supreme Court has cautioned that in exercising its disciplinary powers over the subordinate judiciary, the High Court is to act with fairness and in a non-arbitrary manner. While, on the one hand, it is imperative on the High Court to protect honest judges, on the other hand, it cannot ignore any dishonest performance by any subordinate judge. As the Supreme Court has emphasized, judicial service is not merely an employment, nor the judges merely employees. ‘They are holders of public offices of great trust and responsibility.’ ‘Dishonest judicial personage is an oxymoron.’\(^{422}\) And any inquiry against a judicial officer must be conducted according to natural justice.\(^{423}\) In *Union of India v. K.K. Dhawan*,\(^{424}\) the Supreme Court indicated the basis on which disciplinary action can be initiated against subordinate judges, viz.:

1) Where the judicial officer has conducted himself in a manner as would reflect on his reputation or integrity or good faith or devotion to duty;
2) That there is prima facie material to show recklessness or misconduct in the discharge of his duty;
3) That he has acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
4) That he had acted to unduly favour a party;
5) That he had been actuated by corrupt motives.

The Supreme Court has clarified that there is possibility on a given set of facts to arrive at a different conclusion. This cannot be a ground ‘to indict a judicial officer for taking one view’ and to infer misconduct for that reason alone. Merely because the order passed by a judicial officer is wrong or that the action taken could have been different, would not warrant initiation of disciplinary proceedings. According to the Supreme

Court, unless there are strong grounds to suspect the officer’s confides and that the order has been actuated by malice, bias or illegality, disciplinary proceedings against the officer would affect the morale of the subordinate judiciary and no officer would be able to exercise power freely and independently. 425

7.6.10.4 Power of Superintendence by the High Court

Article 227 vests the High court, in each State, as the highest court therein, with a special responsibility and power over the judicial institutions in the State with the object of securing that such judicial institutions function properly and discharge their duty according to law. 426 The power of superintendence under Article 227 of the Constitution is conferred on every High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justiciable i.e., to meet the ends of justice. The power of superintendence must ‘advance the ends of justice and uproot injustice.’ 427 The High Court under Article 227 of the Constitution can interfere in the order of erroneous assumption, errors apparent on the face of record, arbitrary or capricious exercise of discretion, a patent error in procedure or arriving at a finding based on no material. 428

7.6.10.5 The Supreme Court on Improvement of Subordinate Judiciary

The Supreme Court has constantly endeavoured to secure the betterment of the conditions of service of the members of the subordinate judiciary. In 1992, in All –India Judges’ Association v. Union of India, 429 the Supreme Court considered a writ petition under Article 32 filed by the All India Judges Association seeking directions for setting up of an All India Judicial Service and for bringing about uniform conditions of service for members of the subordinate judiciary throughout the country. The Court referred to what the Law Commission had said in its 14th Report in the year 1958 on the question of setting up of an All India Judicial Service and observed:

“There is considerable force and merit in the view expressed by the Law Commission. An All India Judicial Service essentially for manning the higher services in the subordinate judiciary is very much necessary. The reasons

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428 Chitra v. Pankaj Kashyap, AIR 2012 Del 91 (3).
advanced by the Law Commission for recommending the setting up of an All India Judicial Service appeal to us.”

The Court has thus directed the Central Government and other authorities concerned to take appropriate steps to set up an All India Judicial Service, and bring about uniformity in the designation of judicial officers. This requires action being taken under Article 312. In addition, the Supreme Court also directed various improvements being effectuated in the conditions of service of the subordinate judiciary, e.g., raising the retirement age to 60 years, examination of the pay structure of judicial officers, provisions of allowance for purchase of law books and journals for a residential library for every judicial officer, provision of residential accommodation, etc.

7.6.10.6 Contempt of Subordinate Judiciary

The Supreme Court, while interpreting Sections 10, 14 and 15 of the Contempt of Courts Act, 1971, in S.K.Sarkar, Member, Board of Revenue, State of U.P. v. Vinay Chandra,430 has ruled that the phrase ‘courts subordinate to it’ used in section 10 is wide enough to include all courts which are judicially subordinate to the High Court, even though administrative control over them under Article 235 does not vest in the High Court. The Supreme Court has made very creative use of Article 129 to protect the honour and integrity of the lower courts. In Delhi Judicial Service Association v. Gujarat,431 the Supreme Court has given a broad and liberal interpretation to its contempt power. The Court has ruled that under Article 129, it has power to punish not for its own contempt but even that of the High Courts and the lower courts. Explaining the reasons for taking such a liberal view of its own contempt power, the court has observed:

“The subordinate courts administer justice at the grass roots level. Their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice as its base level.”

The Supreme Court has emphasized that as it has the power of judicial superintendence and control over all the courts and tribunals, it also has, correspondingly, a duty to protect and safeguard the inferior courts so as to keep the flow to protect themselves and, therefore, it is necessary that the Supreme Court should

430 AIR 1981 SC 723.
431 AIR 1991 SC 2176.
protect them. The Supreme Court has now taken them all under its own protective umbrella.432

7.6.10.7 Article 50

The separation of the judiciary from the executive as contemplated in Article 50, has a specific reference to such separation ‘in the public service of the State,’ the phrase ‘Public Service of the State has a bearing also upon the Judicial Service of the State, and Judicial service means a service consisting of District judges and other judicial posts inferior to the posts of District judges.433 Further, judicial service is not a service in the sense of employment as is commonly understood; judges discharge their functions while exercising the sovereign judicial power of the State.434 Their honesty and integrity is expected to be beyond doubt.435 As R.V. Ravidran J. has said,

“In the exercise of your judicial functions you are independent and not subordinate to anyone. The difference between the members of the subordinate judiciary and members of the higher judiciary is only in jurisdiction.”

7.7 The Concept of Reflective Judiciary

Studies on judicial behaviour have long established that a judge’s background plays an important role in his decision making. Social backgrounds and political circumstances shape judicial decision-making.437 For a fair representation of different backgrounds, Mr. Shimon Shetreet clarifies that not a numerical or accurately proportional representation but only a fair reflection of the society in the judiciary is expected. Such reflection is necessary for the independence as well as competence of the judiciary.438 As A.P. Shah J. has said,

“A truly democratic judiciary must represent the people it judges. Indian courts operate like closed country clubs, which is their major failing. Diversity is as important as merit and ability. This means not just representation from women, but also from backward classes and minorities.”

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434 T. Devidas & L. Vishwanathan, supra note 149, p.175.


437 Madhav Khosla & Sudhir Krishnaswamy, “Inside Our Supreme Court,” EPW 46(34) 2011, p.29.


The reflective judiciary was not an issue either in the Second or Third Judges cases, one of the judges in the former clearly spoke for it while the entire Court acknowledged its relevance in the latter. Nowhere did the Court speak against it in either of these two cases. Some of the Judges spoke clearly for it. Thus, in the Second Judges’ Case, Pandian J. stated:

“It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or scheduled castes or scheduled tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outstanding and meritorious candidates belonging to all sections of the society and not by any selective or insular group.”

Pandian J. clarifying that he was not asking for quota or reservation for anyone, he supported himself by examples drawn from the United States and United Kingdom and reiterated:

“Though appointment of judges to superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society.”

7.7.1 Applicability of Article 16(4) to Appointment of a Judge under Articles 124(2) and 217

The provision in Article 16(4) for reservation for members of the backward classes does not apply to the appointment of a judge of the Supreme Court or a High Court, because the judges of these courts hold a ‘constitutional office.’ They are not ‘government servants’ not do they hold any ‘appointment or post’ under the State. Secondly, the provisions in Article 124 and 217 are special provisions regarding the appointment of particular officers, to which the general provisions in Articles 15(4) and 16 (4) should not be applicable. Thirdly, Article 16(4) is only an enabling provision and does not create any right. It follows that if the person appointed possesses any of

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440 Supreme Court Advocates on Record Association v. Union of India, AIR 1994 SC 268, p.348.
441 Ibid.
the qualifications specified in clauses (2) (3) of Article 124 and he is deemed fit for appointment by the President in consultation with the Chief Justice of India, the appointment cannot be challenged on the ground that the claim of members of the SC and ST was not considered.  

Reflective judiciary should not be confused with provision for reservations or quotas. The diversity of the Indian society, however, cannot be ignored. How this diversity is to be dealt with is a complex and delicate issue on which opinions may sharply differ. But for the present purpose of achieving, maintaining and improving the quality of justice administered by the courts and for reposing greater faith or the people in them and thereby ensuring the independence and competence of the judiciary, the principle of reflection of the society should be observed. To quote Shetreet:

“An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. This is based on a doctrinal ground, which has been suggested: the principle of fair reflection. This doctrinal approach may be supported by additional arguments. The judiciary is a branch of the Government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection. There are other grounds for ensuring well-balanced composition of the judiciary. First, the need to preserve public confidence in the courts. Secondly, the need to ensure balanced panels in appellate courts, particularly in cases with public or political overtones…Those understandings are judge-made and are based on the interpretation of the judge. If the judiciary is not reflective or society as a whole, the adjudication may be based on background understanding strongly coloured by a narrower set of values.”  

7.7.2 Concept of Merit

Therefore, apparently it may not be disputed that merit must be the consideration for appointment to, or holding of public offices. But it may also be remembered that merit is not a fixed or set standard. Generally speaking, merit means qualities relevant for the purpose of achieving certain goals and objectives. In the context of a public office it means the qualities relevant for achieving the goals of that office. Of course these qualities, at least in some respects, will differ from office to office because the goals of

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447 M.P. Singh, supra note 438, pp.7-8.
different offices will not be the same in all respects. Not only that, the goals of the same office may also differ from time to time and from society to society. Accordingly the context of merit desirable for that office will also change. For example, merit for a judge in a pluralistic and diverse society will certainly require a few elements which may not be the same as merit for a judge in a monolithic and homogenous society. 449

7.8 A Comparative Analysis with United Kingdom and United States of America

The modern concept of judicial independence in India was essentially an English plant. It has taken root in free India and flourished on Indian soil. 450 In the United Kingdom historically, the judges were appointed by the Crown on the advice of the Lord Chancellor and judges’ appointment depended on wishes of the government for continuation in office. Now in UK, judges are appointed on the basis of recommendations made by the independent Judicial Appointments Commission (hereinafter called the JAC), which was established under the Constitutional Reforms Act, 2005. The JAC has a representative and participative character. There is no predominance either of the judiciary or of the executive. There is no ‘collegium syndrome’, much less any ‘kin syndrome,’ nor is there any political highhandedness. The JAC in the UK, in contrast with the NJAC in India, was a larger, permanent body responsible for appointing all permanent judges and tribunal members to courts in England and Wales. It has a substantial secretariat, equivalent to the section of the government department which previously carried out by the Lord Chancellor. 451 The JAC of the UK has neither politician nor any person remotely involved in politics on it. In contrast, the NJAC, that was established in India had provided a place for the Union Law Minister as a member. The UK model is better designed to secure independence of the judiciary than what was contemplated in India.

Unlike the American Constitution there is no Article in the Indian Constitution vesting the judicial power of the ‘Union’ in the Supreme Court. 452 Appointment of federal judges in the United States is the product of a constitutional power-sharing

449 M.P.Singh, supra note 438, pp.11-12.
between the executive and legislative branches. The President is empowered to nominate ‘judges of the Supreme Court.’ Confirmation, however, is subject to ‘the advice and consent of the Senate.’ In America, the selection of judges is not a closed-door intrigue or arbitrary majority view of accidentally top three judges as followed in India. The people have a voice through the Senate Judicial Committee. The involvement of the President and the Senate, in judicial appointments, inevitably gives that process a political cast. It is also to be noted that judges have no role in appointment of judges to federal judiciary. However, in India, judges are appointed by judges through collegium system which has come into existence through judicial interpretation and not contemplated in the text of the Constitution. The supervision by the collegium at the top is poor since they have no training in management and no opportunity for examining the work done by judges in the country.

The composition of the Supreme Court of United States - the number of judges constituting the court- is not constitutionally regulated; the present membership of nine justices is the number fixed by Congress in the Judiciary Act, 1789. The number of sitting judges can be changed by legislation. But, in India, the number of judges to the Supreme Court is fixed in Constitution itself under Article 124(1) of the Indian Constitution. It can be changed through, only, by the process of constitutional amendment. As far as qualifications for judicial appointments are concerned, the United States’ Constitution does not contain any provision laying down the qualifications of a candidate aspiring to be appointed as a judge of the Supreme Court. By a literal interpretation of the constitutional provision, the President is free to appoint any person, as a judge of the Supreme Court, who is not objected to by the Senate. But in India the qualification for judges’ appointment to the higher judiciary are laid down in Articles 124(3) and 217(2) of Constitution of India.

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454 V.R. Krishna Iyer, supra note 28, p.15.
457 The Judiciary Act, 1789 initially set the number of Supreme Court Judges at six. In later years, the number was increased and decreased until it was finally settled at nine.
458 Supra note 70.
In the USA, different States have adopted different procedures for appointment of judges. Five distinct procedures to select and retain judges are used in the American States today: two forms of election (partisan and non-partisan), two forms of appointment (gubernatorial and legislative), and one appointment/election hybrid (the merit plan) are on vogue. Each new procedure was developed in order to increase the independence of the judges and was then superseded by a newer procedure, owing in large part to unanticipated agency problems. In India the judges of High Courts are appointed by the President under Article 217 in the same manner as Supreme Court judges. The purpose clearly is to ensure the functioning of a system of impartial administration of justice unaffected by local influences and pressures from the regional/state governments.

In highest court of the nation in USA and UK, they sit either *en banc*, i.e. of its full strength, or in large benches of five or more judges considering the importance of the case, as such a large composition of judges is considered fitting for deciding important cases in the highest court. By contrast, now a day’s benches of two judges of the Supreme Court of India decide cases of major importance. In this regard the Chief Justice of India has more power to constitute benches and assigning of cases as compared to the Chief Justices in USA and UK. His position is pivotal and consequently the appointment of Chief Justice of India, assumes importance for ensuring judicial independence in India.

From the above analysis and the recent developments in UK of abolition of Law Lords, creation of the Supreme Court in 2009 and the establishment of JAC for appointment of judges to judiciary is a appreciable step in securing the judicial independence compared to the process available in India and USA.

7.9 Conclusion

Independence of judiciary ensures the rule of law and realization of human rights and also the prosperity and stability of a society. The Indian Constitution makes provisions to ensure independence of the judiciary, the basic patterns of the courts, their composition, powers, jurisdiction etc. The Constitution makes detailed provisions which cannot be touched by ordinary legislative process and the Constitution of India provides for the independence not only of the Supreme Court, but also the High Courts

459 Articles 124 -147, 214-237, the *Constitution of India.*
and the subordinate courts. Independence of judiciary being a basic feature of the Constitution, any attempt to curtail it directly or indirectly even by an amendment of the Constitution would be invalid.

The *First Judges’ Case* decision had the effect of unsettling the balance till then obtaining between the executive and judiciary in the matter of appointment. The balance tilted in favour of the executive. Not only was the office of the CJI diminished in importance, the role of judiciary as a whole in the matter of appointments became limited. After this judgement, certain appointments were made by the Executive overruling the advice of the CJI. Naturally, this state of affairs developed its own backlash.

However, before the *Second Judges’ case* in 1993, the executive could interfere with the independence of the judiciary by tampering with judicial promotions and transfers or by offering judges post-retirement rewards. The executive primarily controlled four kinds of promotions prior to 1993: (a) the promotion of a subordinate court judge as a High Court judge, (b) the promotion of an additional High Court judge as permanent High Court judge, (c) the promotion of a High Court judge to the post of High Court Chief Justice, and (d) the promotion of a High Court judge or Chief Justice to the post of Supreme Court judge. Additionally, the government in 1973 and 1977, seized control of a fifth kind of promotion in order to control the judiciary: the promotion of a Supreme Court judge to the post of Chief Justice of India. The Supreme Court of India seized control of all kinds of promotions in its 1993 and 1998 decisions in the *Second* and *Third Judges cases* respectively, and by doing so, it enhanced the independence of the judiciary in India.

The criticism of the *Second* and *Third Judges’* decisions is that in a democracy, accountability is an important consideration and authorities making such appointments should be accountable to the people. The contrary argument in support of the collegium method is that in Indian conditions and culture, entrusting this power to or involvement of the executive in the appointment process is bound to prove detrimental to the independence and integrity of the judiciary, as the experience during the years 1973 to 1977 and again during the period 1982 to 1993 show.

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461 In some cases, constitutionally speaking, these may be considered fresh appointments, though that does not take away from their essential character of being in the nature of promotions.
The collegium solved problems of excessive executive intervention in appointments, as well as the systematic “court packing” practiced by governments. Despite good intentions, the collegium also has many faults. It lacks transparency, is inherently secretive, and provides for no oversight, due to which there are no checks or balances on the judiciary. And the extra-curricular task (imposed upon five senior most judges by a judgement of the court itself), that of recommending appointments to the highest court, has not been conducted with the care and caution that it deserves. There is too much ad hocism and no consistent and transparent process of selection. As a result, the image of the court has gravely suffered.

No doubt, the fault is not wholly of the Collegium; the active silence of the Executive in not preventing such unworthy appointments has been actually one of the major problems. The Second and Third Judges Cases have provided effective tools in the hands of the Executive to prevent such aberrations.

The majority opinions of the court in the Fourth Judges’ Case primarily proceeds on touchstones of judicial independence, a principle few would quarrel with. The bench, in its opinion, doesn’t restrict itself to a criticism of the defects of the NJAC but objects to it on principle itself. Underlying such legal analysis is a premise of judicial independence being absolute. The second major plank on which most of the reasoning is premised are the aberrations which resulted in the past before the existence of the collegium system. The collegium system came to be created from actual controversies where the political executive sought to subvert the independence of the judiciary.

The judges who delivered the judgment in the NJAC case also hold the view that an improvement in the working of the collegium system is the need of the hour. They proposed a hearing on this aspect on November 3rd 2015. R.M. Lodha J. suggested that instead of seeing the NJAC verdict as one that leads to a confrontation between the Parliament and the judiciary in the matter of the appointment and transfer of judges of the superior judiciary, the executive must use this as an opportunity to help the Supreme

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462 Ajit Prakash Shah, supra note 439.
Court in preparing an institutional design so that all appointments by the collegium meet the tests of fairness and transparency and all selections are made solely on merit with an encouragement provided to the diversity in the persons available for selection. ‘Appoint good judges; the rest will follow.’ \(^{465}\) In this context, it is pertinent to recall the words of Dr. Ambedkar on the working of the Constitution:

“…however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution.” \(^{466}\)

\(^{465}\) R.M. Lodha, \textit{supra} note 264.
\(^{466}\) Available at http://parliamentofindia.nic.in/ls/debates/vol11p11.htm, visited on 20.11.2015.