APPOINTMENT OF THE JUDGES OF HIGHER JUDICIARY IN INDIA: CONSTITUTIONAL ASPECT

The Constitution of India is the supreme law of the land. Art. 50 requires the state to take steps to separate the Judiciary from the Executive in the public services of the State. To promote the rule of law, this is very essential. Justice is the very first objective enshrined in the Preamble of the Constitution. It declares that the *Sovereign Socialist Secular Democratic Republic* of India has to secure to all the citizens ‘justice’ *social, economic and political*. The primary instrument of justice is the Judiciary. It has to dispense justice not only between one person and another, but also between citizens and the State. In a Federation like ours, the Judiciary has also to act as an umpire and *decide disputes between the Federation and federating Units* and the Units *inter se*. It interprets the Constitution and acts as its protector and guardian by keeping all authorities within its bounds. Justice *Untwalia* has compared the Judiciary to “a watching tower above all the big structures of the other limbs of the State” from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme. All these facts highlight importance of the institution of Judiciary. The Indian Constitution has made elaborate provisions for the establishment of an independent, authoritative and impartial judiciary.

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1 The words ‘socialist’ and ‘secular’ were not there in the original Preamble but were added by the Constitution (42nd amendment) Act, 1976.
Here an attempt is made to study these provisions in some details.

(A) The Judicial Hierarchy

The Constitution provides for a single hierarchical judicial system. The Supreme Court stands at the apex of the system. Just below it are the High Courts and at the lowest level are the subordinate courts. The Supreme Court is the final judicial authority in the country and a law declared by it is binding on all courts within the territory of India. The court sits at Delhi, or at such other places, as the Chief Justice of India may, with the approval of the President, appoint from time to time. The Court thus enjoys the top most positions in the judicial set up of the country with all powers to control and supervise the functioning of the entire judicial system. As regards High Court, it may be stated that each state in India has a High Court. Parliament may, however, establish by law a common High Court for two or more states. The States of Panjab and Haryana, have a common High Court. The State of Assam, Nagaland, Meghalaya, Manipur and Tripura commonly known as north-eastern states have a common High Court at Gauhati. Now coming to subordinate courts, we find that in each state these courts function under the direct superintendence and control of respective High Court. The Constitution makes a few provisions in Articles 233 to 237 to regulate the

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5 The Government of India Act, 1935 to a limited extent also provided for a single judicial system with the Federal Court as the highest Court within India in all Constitutional matters. But the Court was not the final judicial authority as appeals could go the Privy Council even from the Federal Court. See M.V. Pylee, Constitutional Government in India p.468 (1965).
7 Constitution of India, 1950 Art. 141.
8 Ibid., Art. 130. See also Union of India v. S.P. Anand AIR 1998 SC 2615.
9 Ibid., Art. 144.
10 Ibid., Art. 214.
11 Ibid., Art. 231(1).
13 Art. 227.
organization of these courts. Explaining the nature of our judicial system, Dr. Ambedkar said in the Constituent Assembly:

“The Indian Federation, though a dual polity, has no dual judiciary at all. The High Courts and the Supreme Court form one single integrated judiciary having jurisdiction and providing remedies in all cases under the constitutional law, the Civil Law or the Criminal Law. This is done to eliminate all diversities in a remedial procedure. Canada is the only country which furnishes a close parallel. The Australian system is only an approximation.”

This unified judicial system has brought out not only jurisdictional unity but also the formation of a single judicial cadre for the whole of India and thereby helped in maintaining a unification of laws and judicial standards throughout the country.

(B) Courts and their Jurisdiction

The judicial system, as we know, deals with the administration of laws through the instrumentality of courts. The system provides the machinery for settlement of disputes of the aggrieved approaching the courts. Here the researcher proposes to discuss the various Constitutional provisions relating to the set up of Supreme Court and High Court vis-à-vis its jurisdiction.

(a) The Supreme Court

The Supreme Court stands at the apex of India’s judicial hierarchy with effective powers to supervise and control the working of the entire judicial system and to ensure the realization of high judicial standards.

The Court usually consists of such number of judges as the Parliament may by law prescribe. When the Court was inaugurated with the new Constitution, it had only seven judges excluding the Chief Justice.\textsuperscript{15} The Supreme Court (Number of judges) Act, 1955 enhanced the number of judges to eleven. In the year 1977, the Act was further amended and the strength of judges raised to seventeen. The parliament once again amended the law and the total strength of the Supreme Court judges including the Chief Justice has been fixed at twenty-six.\textsuperscript{16} Recently it has been enhanced to 31. Thus, we find that the Parliament has been constantly keeping under review the strength of the judges from time to time.

The Supreme Court is a court of record and has all the powers of such a court including the power to punish for contempt of itself.\textsuperscript{17} The Constitution has conferred a very wide jurisdiction and powers on the court. This jurisdiction is three-fold, namely, original, appellate and advisory. The court has an exclusive original jurisdiction over disputes between the Government of India and State and the States \textit{inter se}. But this jurisdiction is dependent upon the condition that the dispute involves a question, either of law or facts, on which the existence or extent of a legal right depends.\textsuperscript{18} It has also the power to issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by the Part III of the Constitution. This right to move the Supreme Court is guaranteed by Art. 32 which is itself a guaranteed

\textsuperscript{15} Art. 124.
\textsuperscript{16} This has been done by the amendment of 1987.
\textsuperscript{17} Art.129.
\textsuperscript{18} Art. 131: The proviso to this Article excludes disputes arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument executed before the commencement of the constitution and continuing in force after such commencement.
fundamental right. This is also the original jurisdiction of the court though not exclusive. However, the Parliament is competent to enlarge this jurisdiction of the court for purposes other than those mentioned in Art.32.\textsuperscript{19} So for the Parliament has not passed any law enlarging the writ jurisdiction of the Supreme Court.

The Supreme Court has also a wide appellate jurisdiction. This jurisdiction is again three-fold. In constitutional cases an appeal lies to the Supreme Court from a judgment of the High Court provided the High Court certifies that the case involves a substantial question as to the interpretation of the Constitution.\textsuperscript{20} In civil matters an appeal lies to the Supreme Court from any judgment of the High Court if the High Court certifies that the case involves a substantial question of law of general importance, and that in the opinion of the High Court the question needs to be decided by the Supreme Court. Thus, no appeal in a civil matter lies to the Supreme Court as a matter of right. In other words, the above conditions relating to the issuance of a certificate for the purpose should be satisfied.\textsuperscript{21}

In criminal cases an appeal lies to the Supreme Court from a High Court if the High Court: (a) has an appeal reversed another of acquittal of an accused person and sentenced him to death; (b) has withdrawn from trial before itself any case from any court subordinate to its authority and in such trial convicted the accused person and sentenced him to death; or (c) certifies that the case is a fit one for appeal.\textsuperscript{22} These powers, according

\textsuperscript{20} See Art. 132.
\textsuperscript{21} See Art. 133(1). Before 1972, there was a right of appeal provided the value of the subject matter was \textsterling}20000 or more. This has now been changed as the value test has been found unsatisfactory.
\textsuperscript{22} Art. 134(1).
to Dr. Ambedkar “ought to be given having regard to the enlightened conscience of the modern world and of the Indian people.” However, the grant of certificate by a H.C. does not preclude the Supreme Court from determining whether it has been properly granted or not. Art. 134(2) empowers the Parliament to enlarge the criminal jurisdiction of the Supreme Court. In exercise of this power, Parliament has enacted the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and the Supreme Court has been permitted to entertain appeals from a High Court if: (a) The High Court has an appeal reversed an order of acquittal of an accused and sentenced him to imprisonment for life or for a period of not less than 10 years; or (b) the High Court has withdrawn for trial before itself any case from a subordinate court and has convicted the accused and sentenced him to imprisonment for life or for a period of not less than 10 years.

Over and above the Constitutional provisions mentioned above regulating Supreme Court appellate jurisdiction, Art. 136 gives power to the court which is similar to the certiorari jurisdiction of the United States Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India under this provision the Court hears appeals not only from courts but also administrative tribunals. The expression “any court” occurring in Art.136 further empower the Supreme Court to hear appeals from judgments given not only by High Court even by a subordinate court. The only condition for appeal is that the circumstances must be special and extra-ordinary, i.e.,

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cases of gross miscarriage of justice.\textsuperscript{26} Even from interlocutory orders the S.C. has heard appeals under the above provision.\textsuperscript{27} Subject to the provisions of any law made by Parliament or any rules made under Art. 145, the S.C. has also the power to review its own judgment or order.\textsuperscript{28} This shows that the doctrine of Stare Decisis\textsuperscript{29} does not stand in the way of the Supreme Court.

The supremacy of the judicial power exercised by the S.C. is established by Art. 141 of the Constitution which says that “the law declared by the S.C. shall be binding on all courts within the territory of India.”

Art. 144 further provides that all authorities civil and judicial in the territory of India shall act in aid of the Supreme Court. These provisions along the full faith and credit clause\textsuperscript{30} establish uniformity in the results and exercise of judicial power in the India to enable the Supreme Court to effectively discharge its functions and jurisdictions.\textsuperscript{31}

The Supreme Court had also been given consultative jurisdiction and the President can, under Art. 143 of the Constitution refer question of law or fact to obtain the opinion of the Supreme Court. Whether the opinion so obtained is binding on the President. The Constitution does not answer this question. It is submitted that the above provision is in essence a Constitution device under which the Supreme Court acts as a legal

\textsuperscript{26} Rajendra Kumar v. State, AIR 1980 SC 1510.
\textsuperscript{27} Union Of India v. Swadeshi Cotton Mills, AIR 1978 SC 1818.
\textsuperscript{28} Art. 137.
\textsuperscript{29} The doctrine of Stare Decisis is a major feature of the English Common Law. It envisages that judicial decisions have a binding force for the future. For detailed discussion on this aspect, see M.P. Jain, supra note 3 at p. 150-52.
\textsuperscript{30} Art. 261.
\textsuperscript{31} P.B. Mukherji, supra note 2, at 98.
advisor to the President and hence the opinion tendered by it is not binding on the President who may not act according to it.  

(b) High Court

The High Court stands at the apex of the State Judiciary. It is a court of record and has all the powers of such a court including the power to punish for contempt of itself. The power is similar to the one enjoyed by the Supreme Court. The Constitution does not make elaborate provisions to outline the jurisdiction of the High Courts. It simply says that the High Courts would retain their existing jurisdiction which was enjoyed by them immediately before the coming into force of the present Constitution. But there is one noticeable improvement regarding the exercise of original jurisdiction concerning revenue matters which was not previously enjoyed by the High Courts in the pre-Constitution era. In addition to the normal appellate and original jurisdiction, the Constitution confers four additional powers on the high courts. There are:

(1) The power to issue writs or orders for the enforcement of fundamental rights or for any other purpose;

(2) The power of superintendence over all courts falling within their territorial jurisdiction;

32 In the United States of America, the Supreme Court has constantly refused to render advisory opinions. See Bernard Schwartz, The Supreme Court, 142 (1957). In Canada, the practice of detaining advisory opinions from the judiciary has been extensively used. See Rubin, The Nature, Used and Effect of Reference Cases in Canadian Constitutional Law, 6 McGill Law Journal, 168 (159-160).

33 India the following References have been made to S.C. under Art. 143 (i) : In Re Delhi Laws Act, AIR 1951 SC 332 ; In Re Kerala Education Bill, AIR 1958 SC 996 ; In Re Berubari Union, AIR 1960 SC 845 ; In Re Sea Customs Act, AIR 1963 SC 1760 ; Keshav Singh’s Case AIR 1965 SC 745 ; In Re Presidential Poll, AIR 1974 SC 1682 ; and In Re Special Courts Bill, 1978, AIR 1979 SC 478 and also the reference made to the court for advice has been the Resettlement Bill passed by the State of Jammu & Kashmir in 1982. Cf. Govt. of India Act, 1935, Section 213.

34 Ibid., Art. 225.

35 Ibid., proviso to Art. 225.
(3) The power to transfer cases to itself from subordinate courts involving the interpretation of the Constitution; and

(4) The power to appoint officers and servants of the High Court.

Under Art. 226, High Courts have been empowered to issue directions, order or writs for the enforcement of fundamental rights and for any other purpose. This is a concurrent power which the High Court has with the Supreme Court but in one sense larger than the power of the latter. Art. 32 confines the Supreme Court’s power to only fundamental rights whereas Art. 226 extends this power of the High Court to issue writs even for “any other purpose”. Thus even a simple legal right may be enforced under this provision. However, only a person who has a legal standing can move the court for a writ under Art. 226 or for seeking any other relief. In other words, only a person’s whose legal right is infringed or who has sufficient interest in the subject matter can approach the High Court under the above provision. The Supreme Court has relaxed this rule of standing and in the famous judges case it held that in all matters of public interests not only the affected individual but even an organization, or association of individuals may maintain an action. Where legal rights of the poor, ignorant or socially and economically backward persons are sought to be vindicated through a court action, the court has allowed public representatives to agitate such matters before it.

Under Art. 227, every High Court has the power of superintendence over all courts and tribunals within its jurisdiction except

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36 Art. 226 has become a powerful instruments of judicial review of many Acts passed by the Legislature including administrative action.
37 S.P. Gupta v. President of India, AIR 1982 SC 149.
those which are constituted by or under any law relating to the Armed Forces. The supervision under the above provision is completed and is both judicial as well as administrative. The power is usually exercised to keep the courts and tribunals within their powers and jurisdiction. This power is of great significance. The Supreme Court has no such similar power. No constitutional provisions vest the Supreme Court with the power as enjoyed by the High Court under the Art. 227 of the Constitution. This fact is further testified by Art. 235\(^{39}\) which makes the High Court the controlling authority over the district courts and the courts subordinate thereto.\(^{40}\) The Supreme Court has no similar powers over High Courts or over any other courts in India.

Art. 228 vests in the High Court the power to transfer constitutional cases from subordinate courts the article states that if the High Court is satisfied that the case pending in a subordinate court involves a substantial question of law relating to the interpretation of which is necessary for the disposal of the whole case or may decide only constitutional question and return the case to the concerned subordinate court for final disposal. The idea behind this provision is to make the High Court the sole interpreter of the constitution in a state and to avoid the possible multiplicity of constitutional interpretations by subordinate court.

(c) Subordinate Courts

The constitutional being the fundamental law does not deal with matters concerning the jurisdiction and working of subordinate courts. It

\(^{39}\) Art. 235 reads: “The control over district courts subordinate thereto including the posting and promotion of; and the grant of leave to, persons belonging to the judicial service of a State and holding any post—inferior to the post of a district judge shall be vested in the High Court……”

\(^{40}\) The superintendence of High Courts under Art. 227 extends to the Courts and Tribunals, the controlling power under Art. 235 extends only to courts and not to tribunals. It may be added that the Administrative Tribunals Act, 1985 enacted by Parliament in pursuance of the powers conferred on it by Art. 223 A has ousted the jurisdiction of High Courts over Tribunals dealing with service matters.
only provides that the State Legislature is competent to legislate on the jurisdiction and powers of subordinate courts on matters within the State List. These courts have been established for the disposal of both civil and criminal cases. Every district has a District and Session judge’s court exercising both original and appellate jurisdiction. In the metropolitan cities like Delhi, Bombay, Calcutta and Madras, we have Metropolitan Magistrate’s courts, City Civil and Sessions Courts and Small Causes courts. As regards the structure and functions of these courts we find almost a uniformity it all parts of the country. Each state is divided into several districts and in each district there is a hierarchy of judicial officers exercising their respective jurisdiction. This whole hierarchy functions under the supervision and control of High Courts.\(^\text{41}\)

(C) Appointment of Supreme Court Judges

According to Art. 124 (2), the Judges of the Supreme Court are appointed by the President. While appointing the Chief Justice, the President has consultation with such of the Judges of the Supreme Court and the High Courts as he may deem necessary. In case of appointment of other judges, the President is required to consult the Chief Justice of India though he may also consult such other Judges of the Supreme Court and the High Courts as he may deem necessary. [Proviso to Art. 124(2)].

(a) Position before 1993

Before the year 1993, the President’s power to appoint the Supreme Court Judges was purely of a formal nature, for, he would act in this matter, as in other matters, on the advice of the concerned Minister, \textit{viz.} the Law Minister. The final power to appoint Supreme Court Judges

\(^{41}\) See Arts. 233 – 235.
rested with the Executive and the views expressed by the Chief Justice were not regarded as binding on the Executive.

For long, the practice in India had been to appoint the senior-most Judges of the Supreme Court as the Chief Justice whenever a vacancy occurred in that office. In 1958, the Law Commission criticized this practice on the ground that a Chief Justice should not only be an able and experienced Judge but also a competent administrator and therefore, succession to the office should not regulated by mere seniority.\(^{42}\) The Government did not act upon this recommendation for long. It continued to appoint the senior-most Judge as the Chief Justice as it was afraid that it might be accused of tampering with judicial independence. A mechanical adherence to the rule at times resulted in the Chief Justice holding office only for a few months before he retired from the Court.

In 1973, the Government suddenly departed from this practice and appointed as Chief Justice a Judge [Justice A.N. Ray] who was fourth in the order of seniority. Thus, three senior Judges were by-passed, who then resigned from the Court in protest. This raised a hue and cry in the country and the Government was accused of tampering with the independence of the judiciary.\(^{43}\) Although The Government invoked the Law Commission’s recommendation to support the step taken by it, no one believed that the seniority rule had been jettisoned only because of what the Law Commission had said a few years back.

The appointment of the new Chief Justice was even challenged in the Delhi High Court through a petition for *quo warranto* under Art. 226 on the ground that- (i) it was malafide, (ii) it was against the rule of

\(^{42}\text{Law Comm., XIV Rep., I, 39-40(1958).}\)

\(^{43}\text{For details of the controversy See, Kuldip Nayar, Supersession of Judges (1973).}\)
seniority inherent in Art. 124(2) and (iii) the mandatory consultative process envisaged in Art. 124 (2), had not been resorted to.

The High Court dismissed the petition holding that the motives of the appointing authority are irrelevant *quo warranto* proceedings. Without expressing any definitive opinion on points (ii) and (iii), the court ruled that even if these contentions were correct, any writ issued by the court would be futile as Justice RAY could immediately be reappointed, by following the requisite consultative procedure as he was now the senior-most Judge on the Bench.\(^{44}\)

Again in 1976, the Government appointed Justice BEG as the Chief Justice by-passing Justice KHANNA who was senior to him at the time. Consequently, Justice KHANNA resigned in protest. However, after the retirement of Chief Justice BEG, the senior-most Judge, Justice CHANDRACHUD was appointed as the Chief Justice. Since then again the rule of seniority has been followed in the matter of appointment of the Chief Justice of India.

In the context of India, It appears to be best to adhere to the convention of appointing the senior-most Judge as the Chief Justice. This will avoid any suspicion that the Government seeks to tamper with the judiciary. Also, when the Government has discretion to appoint the Chief Justice, there is no guarantee that the best man for the post will always be appointed and that considerations other than merit will not come into play. Appointment of a junior Judge invariably results in the resignation of Judges senior to him and thus the country loses the services of able and experienced Judges who could make significant contribution to the cause of law and justice. In India, the tradition so far has been to have a non-

political Judiciary and it appears to be best to maintain that tradition. Since 1978, again, the practice has developed of appointing the senior-most judge as the Chief Justice.

(b) Position After 1993

The question of selection and appointment of the Judges is crucial to the maintenance of independence of the judiciary. If the final power in this respect is left with the executive, then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges.

The Constitution does not lay down a very definitive procedure for the purpose as it merely says that the President is to appoint Supreme Court Judges in consultation with the Chief Justice and “such” other Judges of the Supreme Court and of the High Courts as “the President may deem necessary”. [Art.124(2)]. It was not clear from this provision as to whose opinion was finally to prevail in case of difference of opinion among the concerned persons. This important question has been considered by the Supreme Court in several cases.

In 1991, in Subhash Sharma v. Union of India, a three Judge Bench of the Supreme Court expressed the view that consistent with the constitutional purpose and process, as expressed in the Preamble to the Constitution, “it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to the Supreme Court…”

As regards the word “consultation” in Art.124(2), the Court said: “The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to

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the extent recognised and adumbrated and the cherished values of judicial independence”. The Bench suggested that this question be considered by a larger Bench. The Bench emphasized:

“An independent non-political judiciary is crucial to the sustenance of our chosen political system. The vitality of the democratic process, the ideals of social and economic egalitarianism; the imperatives of a socio-economic transformation envisioned by the Constitution as well as the Rule of law and great values of liberty and equality are all dependent on the tone of the judiciary. The quality of the judiciary cannot remain unaffected, in turn, by the process of selection of judges”.

Subsequent to Shubhash Sharma, the question of the process of appointing the Supreme Court Judges came to be considered by a nine Judges bench of the Supreme Court in S.C. Advocates on Record Association v. Union of India. A public interest writ petition was filed in the Supreme Court by the Lawyers’ Association raising several crucial issues concerning the Judges of the Supreme Court and the High Courts. The petition was considered by a bench of nine Judges. The majority judgment was delivered by J.S. Verma, J., on behalf of himself and Yogeshwar Dayal, G.N. Ray, A.S. Anand and Bharucha, JJ.

The Court considered the question of the primacy of the opinion of the Chief Justice of India in regard to the appointment of the Supreme Court Judges. The Court emphasized that the question has to be considered in the context of achieving “the constitutional purpose of selecting the best” suitable for composition of the Supreme Court “so

46 Ibid. at 640.
essential to ensure the independence of the judiciary, and, thereby, to preserve democracy.”

Referring to the ‘consultative’ process envisaged in Art. 124(2) for appointment of the Supreme Court Judges, the Court emphasized that this procedure indicates that the Government does not enjoy ‘primacy’ or “absolute discretion” in the matter of appointment of the Supreme Court Judges.

The Court has pointed out that the provision for consultation with the Chief Justice was introduced because of the realization that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court Judge, and it was also necessary to eliminate political influence.

The Court has also emphasized that the phraseology used in Art. 124(2) indicate that it was not considered desirable to vest absolute discretion or power of veto in the Chief Justice as an individual in the matter of appointments so that there should remain some power with the Executive to be exercised as a check, whenever necessary. Accordingly, the Court has observed:

“The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight, the selection should be made as a result of a participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus the executive element in the

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49 Ibid, at 429.
50 Ibid, at 430.
appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word ‘consultation’ instead of ‘concurrence’ is used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual.”

Thus, in the matter of appointment of a Supreme Court Judge, the primary aim ought to be to reach an agreed decision taking into account the views of all the consultees giving the greatest weight to the opinion of the Chief Justice, when decision is reached by consensus, no question of primacy arises. Only when conflicting opinions emerge at the end of the process, the question of giving primacy to the opinion of Chief Justice arises, “unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable.”

The Court have further clarified that “the primacy of the opinion of the Chief Justice of India” is, in effect, “primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion”.

Emphasizing upon this aspect further, the Court has said that the principle of non-arbitrariness is an essential attribute of the Rule of Law and is all pervasive throughout the Constitution. An adjunct of this principle is “the absence of absolute power in one individual in any sphere of constitutional activity.” Therefore, the meaning of the “opinion of the Chief Justice” is “reflective of the opinion of the judiciary” which means that “it must necessarily have the element of plurality in its

51 Ibid, at 430.
The final opinion expressed by the Chief Justice is not merely his individual opinion but “the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function”. The Court has observed in this connection:

“Entrustment of the task of appointment of superior Judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive much less in any individual, be the Chief Justice of India or the Prime Minister.”

The Court also laid down the following propositions in relation to the appointment of the Supreme Court Judges:

(1) Initiation of the proposal for appointment of a Supreme Court Judge must be by the Chief Justice.

(2) In exceptional cases alone, for stated and cogent reasons, disclosed to the Chief Justice, indicating that the person who was recommended is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not

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52 Ibid, 434.
54 Kuldip Singh and Pandian, JJ., in separate opinions mainly concurred with the majority opinion.
accepted by the Chief Justice and other Supreme Court Judges who have been consulted in the matter, on reiteration of the recommendation of the Chief Justice of India, the appointment should be made as a healthy convention.

(3) No appointment of any Judge to the Supreme Court can be made by the President unless it is in conformity with the final opinion of the Chief Justice formed in the manner indicated above.

(4) As the President acts on the advice of the Council of Ministers in the matter of appointment of a Supreme Court Judge, the advice of the Council of Ministers is to be given in accordance with Art. 124(2) as interpreted by the Supreme Court.

(5) All consultation with everyone involved, including all the Judges consulted, must be in writing. Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection.

(6) Appointment to the office of Chief Justice of India ought to be of the senior-most Judge of the Supreme Court considered fit to hold the office. “The provision in Art. 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the senior-most Judge to hold the office, which alone may permit and justify a departure from the long standing convention”, i.e., to appoint the senior-most Supreme Court Judge to the office of the Chief Justice of India.

(7) “*inter se* seniority among Judges in their High Court and their combined seniority on all India basis” should be “kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify
departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.”

The main purpose underlining the law laid down by the Supreme Court in the matter of appointing Supreme Court Judges was to minimize political influence in judicial appointments as well as to minimize individual discretion of the constitutional functionaries involved in the process of appointment of the Supreme Court Judges. The entire process of making appointment to high judicial offices is sought to be made more transparent so as to ensure that neither political bias, nor personal favouritism nor animosity play any part in the appointment of judges.

Clarifying certain points arising out of the above judgment, the Supreme Court has now delivered an advisory opinion on a reference made by the President\(^{55}\) under Art. 143\(^{56}\). In this opinion, the Court has laid down the following propositions in regard to the appointment of the Supreme Court Judges:

(1) In making his recommendation for appointment to the Supreme Court, the Chief Justice of India ought to consult four senior-most puisne Judges of the Supreme Court. Thus, the collegium to make recommendation for appointment should consist of the Chief Justice and four senior-most puisne Judges.

(2) The opinion of all members of the collegium in respect of each recommendation should be in writing.

(3) The views of the senior-most Supreme Court Judge who hails from the High Court from where the person recommended comes must be obtained in writing for the consideration of the collegium.

\(^{55}\) In re Presidential Reference, AIR 1999 SC 1.

\(^{56}\) See Art. 143.
(4) If the majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The Court has gone on to say that “if even two of the Judges forming the collegium express strong views, for good reasons, that are adverse to the appointment of a particular person, the Chief Justice of India would not press for such appointment.”

(5) The following exceptions have now been engrafted on the rule of seniority among the High Court Judges for appointment to the Supreme Court:

(a) A High Court Judge of outstanding merit can be appointed as a Supreme Court Judge regardless of his standing in the seniority list. “all that needs to be recorded when recommending him for appointment is that he has outstanding merit”.

(b) A High Court Judge may be appointed as a Supreme Court Judge for “good reasons” from amongst several Judges of equal merit, as for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench.

Thus, the responsibility to make recommendations for appointment as Supreme Court Judges has been taken away from the Central Executive and has now been placed on a collegium consisting of the Chief Justice of India and four senior-most puisne Judges. The sphere of consultation has thus been broadened. Before this opinion was delivered, this collegium consisted of the Chief Justice and two senior-most Judges. The Court has now specifically stated that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in matter of appointments to the Supreme Court and the Government is not
obliged to act thereon.\textsuperscript{57} The process of consultation among the members of the collegium has now been formalized as every member Judge has to give his opinion in writing.

\textbf{(c) Proposal for Setting up a Judicial Commission}

In its 121\textsuperscript{st} report issued in 1987, the Law Commission has advocated the setting up of a Judicial Commission. In 1987, after the case of \textit{S.P. Gupta}\textsuperscript{58}, the executive came to wield overriding powers in the matter of selection and appointment of Judges. The Commission was unhappy with the situation prevailing at the time. Criticizing the system prevailing in 1987, the Law Commission observes:

“The present model….confers overriding powers on the executive in the matter of selection and appointment of judges and in dealing with the judiciary. The constitutional mandate all was to separate executive and judiciary in all its ramifications. The Constitution aims at ensuring independence of Judiciary, when translated in action, independence from executive.”

Accordingly, the Law Commission suggested that a National Judicial Commission be set up. But the Law Commission did not work out its composition and function. In this regard, the Law Commission said: “Composition and functions of such a National Judicial Service Commission will have to be worked out in meticulous detail.” Tentatively, however, the Law Commission suggested the following composition: Chief Justice of India (chairman); three senior-most judges of the Supreme Court; retiring Chief Justice of India; three Chief Justices of the High Courts according to their seniority; Minister of Law and

\textsuperscript{57} \textit{Ibid}, at 16.
Justice, Government of India; Attorney-General of India, and an outstanding law academic.

The Law Commission issued its report in 1987. It is clear that it was primarily to dilute the executive power, and as a hedge against executive interference with the judiciary, that the Law Commission mooted the idea of a Judicial Commission. Since then things have changed drastically as a result of the two Supreme Court cases mentioned above. In fact, the 121st report of the Law Commission played a significant role in the Supreme Court decision in <em>Advocates-on-Record</em> case in 1994.

The rationale underlying the Report has now been overtaken by the two Supreme Court decisions <em>viz., Supreme Court Advocates-on-Record Association v. Union of India</em> and <em>In Re Presidential Reference</em>, as discussed above. As a result of these judicial pronouncements, the effective power to appoint Supreme Court and High Court Judges has come to vest in a collegium of Judges as mentioned above. The executive interference in this matter has now ceased. Judicial independence has been guaranteed. A <i>de facto</i> Judicial Commission has already come into existence. The present arrangement to appoint the Judges is free from political considerations and pressures. But it has its own faults and defects, the Researcher has dealt with this in subsequent chapters.

In India, at present, every institution seems to have been politicized. Politics in every sphere is the bane of the present day India life. Let the Judiciary remain free from this malady.

In 1987, the Law Commission headed by Justice D.A. Desai in its 121st report, suggested the setting up of a National Judicial Commission.
The recommendations of the report of Justice D.A. Desai Commission found express in the Constitution (67th Amendment) bill, 1990. This was perhaps the most progressive and well-meaning of amendments to bring accountability and independence of the judiciary. This bill was prepared after extensive consultations with the Executive, the Chief Justice of India, the Chief Justice of High Courts, the Attorney General, the Chairman of the Bar Council and State Bar Councils and Bar Associations. The bill did not pass because the Lok Sabha stood dissolved in May 1991.

In February 2000 the NDA government set up the National Commission to Review the Working of the Constitution consisting of the former CJI Justice Venkatchliah, Justice Jeevan Reddy and Justice Sarkaria. Again the paramount concern was “the necessity of preserving and promoting the concept of judicial independence and the all pervading fact that independence of the judiciary is a basic feature of the Constitution”\(^59\). It went on to elaborate, “if tomorrow a National Judicial Commission is created and it is so constituted that the Executive dominates it, it would equally be violated of the basic structure of independence of the judiciary of our Constitution”.\(^60\) And further elucidated their position “it is equally essential that the commission be presided over by the Chief Justice of India and by none else.”\(^61\) The Commission proposed the National Judicial Commission was as follows:

(a) The Chief Justice of India: Chairman
(b) The two senior most judges of the Supreme Court: member
(c) The Union Minister for Law and Justice: member

\(^{59}\) National Commission to Review the Working of the Constitution, Volume 2 of the Report of Venkatchaliah Commission ch. 7 para 7.3.7.-7.3.11.
\(^{60}\) Ibid.
\(^{61}\) Ibid.
(d) One eminent person nominated by the President after consulting the Chief Justice of India: member.

It is interesting to note that the Commission’s report expressly provided “the recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary”. 62

The report of the Venkatchaliah Commission (2002) transmuted into the Constitution (98th Amendment) Bill number 41 of 2003. The Bill came to be introduced by the then NDA government in the 13th Lok Sabha. The Bill could not be passed because of the dissolution of the Lok Sabha in March 2004 when the government called for fresh elections.

The Law Commission headed by J. DR. A.R. Lakshmanan as Chairman *suo moto* submitted its 214th Report. Strangely it made no reference to the Venkatchaliah Commission Report naught of the Constitution (98th Amendment) Bill, 2003. It came with the bizarre conclusion, that there were two alternatives available to the Government. One was to seek reconsideration of the three judgments before the Supreme Court to restore the original balance of power. The other option was “to pass a law to restore the primacy of the Chief Justice of India and the power of the Executive to make appointments”. This Commission also submitted Report No. 230 on reforms in the judiciary-some suggestions. Several bills were proposed in 2006, 2010, 2013 regarding accountability and appointment but did not pass.

(i) **National Judicial Appointment Commission Act, 2014**

National Judicial Appointment Commission Bill and Constitutional Amendment Bill, was ratified by 16 of the state legislatures in India, and

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62 Ibid.
subsequently assented by the President of India on 31st December 2014. It has come into force on April 13, 2015 and the Constitution (Ninety-ninth Amendment) Act, 2014 has come into force on same day.

Section 2 of the Constitution (Ninety-ninth Amendment) Act, 2014 says that under clause 2 of Article 124 of the Constitution, for the words “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”, the words, figures and letters “on the recommendation of the National Judicial Appointments Commission referred to in article 124A” shall be substituted. The first proviso, which said that “in the case of appointment of a Judge other than the chief justice, the chief Justice of India shall always be consulted”, is omitted.


The petitions (writ petition no. 13 of 2015) were filed on by senior advocate Fali S. Nariman, the Supreme Court Advocate-on-Record Association, NGO change India, Centre for Public Interest Litigation (CPIL), Bar Association of India and others. A Clutch of these petitions were heard before a five-judge bench led by Justice J.S. Khehar and other judges viz., J. Chelameswar, Madan B. Lokur, Kurian Joseph and Adarsh K. Goel.

At last this five judges Supreme Court Bench headed by Justice J.S. Khehar on 16th Oct. 2015 by a majority of 4:1 struck down the
Constitution 99th Amendment Act and National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional on the grounds—Firstly, the participation of the Union Law and Justice Minister as NJAC member as contemplated under Art. 124A(1) in the matter of appointment of judges to the Higher Judiciary, would breach the concepts of “separation of powers” and the “independence of the judiciary”, which are both undoubtedly components of the “basic structure” of the Constitution. Secondly, the Commission shall not recommend a person for appointment if any two members of the Commission do not agree for such recommendation. Thirdly, however there has not been mention about whether two eminent members is to be eminent in the field of law or otherwise. Hence there is possibility that, two persons handpicked by the government, coming from a background of anything else but law, who can make politically influenced recommendations exactly in line with the wishes of the Executive – a perfect instance of trespassing boundaries that lay down the separation of powers between the three organs. Fourthly, this law undermines the independence of the judiciary, and the basic structure of the Constitution because “consultation with the judges” under Art. 124 is substituted with “on the recommendation of the NJAC” under new Article 124A which is inserted in the Constitution providing for setting up of the six-member NJAC.

However, in his dissenting judgment J. Chelameswar disagreed with the majority and upheld the validity of the 99th Amendment, on the ground that the assumption that primacy of the judiciary in the appointment of judges is a basic feature of the Constitution is empirically flawed. He said proceedings of the collegiums were absolutely “opaque

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66 Infra
and inaccessible” to the people at large and “transparency is a vital factor in constitutional governance”.

However, the researcher likes to emphasize that in these deliberations both Supreme Court and the government failed to realize that the ‘Collegium System’ envisaged by the Supreme Court was meant to assure independence of the judiciary. But, by doing so Judiciary failed to realize inherent danger involved in it viz., in the name of ‘Collegium System’ the Supreme Court succeeded to retain all powers to itself regarding appointment of judges at Higher Judiciary by violating constitutional mandate under Art. 124. However, it has taken 22 years to realize that the ‘Collegium System’ was not a creative interpretation of the Constitution rather it was clearly judicial overreach. Therefore, it is pertinent to note that 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 22-year-old system of judicial appointments. Therefore, on 16th December 2015 S.C. has sought suggestions from the Centre and interested persons to improve the working of the ‘Collegium System’. So department of Justice, Ministry of Law and Justice had requested through a public notice to send valuable suggestions in the following four categories: Transparency, A Secretariat for the Collegium, Minimum eligibility criteria and dealing with the complaints against the prospective appointments. After S.C. quashed the NJAC Act, left it to the Centre to consult the CJI for drafting the MOP (Memorandum of Procedure) for appointments to the higher judiciary. The Centre seeks to introduce Performance Appraisal as a standard for appointment.

(d) Qualifications

A person to be appointed a Supreme Court Judge should be a citizen of India. In addition, he may have been-
(i) Either a Judge of a High Court (or High Courts) for five years, or
(ii) An advocate of a High Court (or High Courts) for ten years, or,
(iii) May be, in the opinion of the President, a distinguished jurist [Art 124(3)].

It is thus possible to appoint an eminent non-practising, academic lawyer to the Supreme Court. This provision has been inspired by the American example where distinguished law teachers have often been appointed to the Supreme Court and they have proved to be successful Judges. At times, a non-practising lawyer-judge might be in a better position because of his breadth of outlook and freedom from a narrow and technical approach to law, to deal with problems of public law. Till now, however, no jurist, as such, has been appointed as a Supreme Court judge in India.

Even though the above observation may not be literally true of India, it can be safely submitted that for the highest Tribunal of the land, a solid foundation of the highest juristic principle is no less important than mature experience of the procedure in courts. It may be mentioned, in this connection, that the superior Judiciary in both France and West Germany is recruited exclusively from academic jurists, having no judicial experience at all.

It is not suggested above that the entire composition of our S.C. should be similar, but that the composition should be balanced by having some academic jurists, as prescribed by the Constitution itself.

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67 VIII CAD 254; Law Commission of India, *ibid.*., 36.
68 Without meaning disrespect to anybody, it may be stated, broadly that a busy practitioner is more concerned with cases, while an academician has to build on basic principles and has more freedom to arrive at conclusions where there are no precedents or to differ from precedents of the highest authority where they are out of tune with fundamental principles. For the highest tribunal of the land, it will be agreed, such freedom of approach is essential.
Under this clause, it is possible to appoint an eminent non-practising academic lawyer to the Supreme Court. This provision is inspired by the American example where distinguished law teachers are often appointed to the S.C. and have proved to be successful Judges.\(^{69}\) At times in non-practising lawyer Judge might be in a better position because of his breadth of outlook and freedom from a narrow and technical approach to law, to ideal with problems of public law. These are precedents in U.S.A. of non-practising lawyers being appointed Judges of Supreme Court. Felix Frankfurter is a living example. He was a teacher of law at Harward before his appointment in the Supreme Court. Though our Constitution enables an eminent Jurist being appointed as a Judge of the S.C. so far no such appointment is made.

The S.C. has laid stress on the qualities a Judge should possess such as rectitude, impartiality and independence.\(^{70}\) In Aswini Kumar Ghose case Hon’ble S.C. hinted the desirability of the formulation of a code of judicial ethics and etiquette.

**Expla I:** This definition of ‘High Court’ is a special definition which governs only sub-cla. (a)-(b) of Cl. (3) of Art. 124. For the meaning of ‘H.C.’ in other Articles of the Constitution, e.g., Art. 214 et seq., see the general definition in Art. 366 (14), *post*.

**(e) Salary:**

*Art. 125 Cl.(1):*

To begin with, the salary payable to a S.C. Judge was specified in the Constitution [Art.125 (1) and the Second Schedule]. But by the

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\(^{69}\) CAD VIII 254.

\(^{70}\) S.P. Gupta v. Union of India, AIR 1982 SC 149.
Constitution (54th Amendment) Act, 1986, Parliament has been given power to enact legislation in this matter from time to time, and so long as this is not done, the 2nd Sch. Will continue in operation.

The 54th Constitution Amendment has itself amended the 2nd Sch. to raise the salary of a S.C. Judge from 4,000 to 9,000 per month and of the Chief Justice of India from 5,000 to 10,000. Parliament is also authorized to determine from time-to-time, by law, such question such as the privileges, allowances, rights in respect of leave of absence and pension for Judges. All these matters are now regulated by the Supreme Court Judges (Salaries and Conditions of Service) Act, 1958, as amended by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Act, 1998.71

By Art. 112(3)(d)(i) of the Constitution, the salaries, allowances and pensions payable to S.C. Judges are charged on the Consolidated Fund of India and can not, therefore, be reduced by vote of Parliament.

But the President is empowered to reduce the salaries of the Judges during the period of a Proclamation of ‘Financial Emergency’, under Art. 360(4)(b).

But there is nothing to bar the levy of a tax on the income of a judge. Also see Art.221 relating to salaries, etc., of High Court Judges, which is exactly similar to Art.125.

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71 The High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2008 was introduced in the Lok Sabha on December 22, 2008. The Sixth Central Pay Commission recommended revision in the salaries, allowances and pensions of the central government employees. The revised rules have come into force on January 1, 2006. The Bill seeks to revise the salaries of the judges with effect from January 1, 2006 as follows: (a) Chief Justice of India from Rs 33,000/ to Rs 1,00,000/ per month; (b) Judge of Supreme Court from Rs 30,000/ to Rs 90,000/per month; (c) Chief Justice of High Court from Rs 30,000/ to Rs 90,000/per month; and (d) Judges of High Court from Rs 26,000/ to Rs 80,000/per month.
(f) Ad Hoc Judges and Employment of Retired Judges

Art. 127 appears to be based on S. 30 of the Canadian Supreme Court Act and Art. 128 follows S. 10 of the (English) Administration of Justice Act, 1970.

The Chief Justice may call a judge of a High Court to act as an *ad hoc* Judge of the S.C., (to decide any particular case or cases) for such period as may be necessary, if the quorum of the S.C. Judges is insufficient to hold or continue a session of the Court. The Judge so appointed should be qualified to act as a Supreme Court Judge.

Before making such an appointment, the Chief Justice of India has to consult the Chief Justice of the High Court concerned and also obtain the prior consent of the President [Art.127(1)]. It is the duty of the H.C. Judge so appointed, in priority to other duties of his office, to attend the sittings of the Supreme Court as such time and for such period for which his attendance is required there. While so attending the S.C., an *ad hoc* Judge enjoys all the jurisdiction, powers and privileges of and discharges all such duties like, any other Supreme Court Judges [Art. 127(2)]. No such appointment has so far been made.

Art. 128 reads that the Chief Justice of India, with the previous consent of the President, may request any retired S.C. Judge or a retired High Court Judge (duly qualified to be appointed as a S.C. Judge) to sit and act as a Judge of the Court. If he agrees to do so, then while so sitting and acting, he is entitled to such allowances as may be determined by an order of the President but he shall not be deemed to be a Judge of the Court.
Art. 128 makes similar provisions in respect of a retired Judge of the S.C.\textsuperscript{72} or of a H.C. But while absence of a quorum of the permanent Judges of the S.C. is a condition precedent for the exercise by the Chief Justice of the power under Art. 127, there is no such condition precedent under Art. 128.

Though in Art. 127(1), a different expression is used, namely, that the \textit{ad hoc} judge “shall discharge the duties of a judge of the Supreme Court”, the status of an \textit{ad hoc} Judge under Arts. 127(1) and 128 appears to be the same. The meaning of the words ‘discharge the duties’ may be gathered from Art. 65, where both the expressions ‘act as’ and ‘discharge the functions of’ are used.

The result is that an \textit{ad hoc} Judge, whether appointed under Art. 127(1) or under Art. 128, shall discharge the functions of a judge of the Supreme Court, but shall not be regarded as a judge of the S.C., within the meaning of Art. 124. An \textit{ad hoc} Judge may, therefore, be appointed in addition to the maximum number of judges prescribed by Art. 124(1). A judge so appointed can not also claim any seniority amongst the Judges, by reason of his age or otherwise.

But there is some difference as regards conditions of service. As regards emoluments, Art. 127 is silent, it seems, therefore, that a High Court Judge, when appointed an \textit{ad hoc} Judge of the S.C., shall continue to have the emoluments of a High Court Judge. Art. 128, on the other hand, says that a retired Supreme Court Judge, when appointed ‘to act as Judge of the S.C.’, shall be entitled to “such allowances as the President may by order determine.” This means that such \textit{ad hoc} Judge is not

\textsuperscript{72} Instances of such appointment are that of Sri CHANDRASEKHARA IYER, j., (Twice) IN 1955 and that of Sri VENKATARAMA AYYAR, J., (twice) in 1961-62; G.K. MITTER J.
entitled to the salary of a S.C. Judge by reason of the appointment. In practice, the amount of pension enjoyed by the retired Judges is taken into account in fixing his ‘allowances’ for acting as an *ad hoc* Judge.

Though he may have all the jurisdictions, powers and privileges of a S.C. Judge, a retired Judge appointed under Art. 128 shall not be reckoned as a ‘Judge of the S.C.’ for other purposes under the Constitution, e.g., Art. 124(1).

It is questionable whether an appointee under Art. 128 shall have the same dignity and independence as that of regular appointees of the Supreme Court.

A person who has held office as a Supreme Court Judge can not plead or act in any Court or before any authority in India [Art. 124(7)]. This disqualification has been placed on the ex-judge with a view to preserving the dignity of the S.C. and also to avoid embarrassment to the Tribunal or the court before whom he may appear.

**(g) Tenure**

A Judge of the S.C. may resign his office by writing to the President.73 He holds office until he attains the age of 65 years.74 If a question arises regarding his age, it is to be determined by such authority and in such manner as Parliament may by law provide.75 Parliament has now laid down the procedure for the purpose.

The Indian provision fixing a retiring age has this virtue that it ensures infusion of new talent from time to time and thus protects the Court from falling into a groove or getting out of tune with the

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73 Art. 124(2), proviso (a).
74 Art. 124(2).
75 Art. 124(2A).
contemporary social and economic philosophy and this aspect is important because of the Court’s significant function of interpretation of the Constitution. On the other hand, an unfortunate result of the provision at times may be to remove some Judges untimely from the Bench just when they may be beginning to find their feet as Constitutional Judges and approaching the period of their greater intellectual usefulness. It may therefore be advisable to extend the age of retirement of a Supreme Court Judge to 70 years. The Indian Constitution does not provide for life tenure for judges. Accordingly, the judges of the Supreme Court hold office until they attain the age of 65 years. Similarly, judges of the High Courts hold office till the attainment of the age of 62 years. The Law Commission has suggested to raise the retirement age of High Court judges to 65.

(h) Resignation

A judge of the S.C. may, at any time, before superannuation or removal, resign his office by addressing the President in writing to that effect. Acceptance of the resignation is not necessary to make it effective. Art. 217 (1) proviso (a) which deals with resignation by High Court Judges is identical with this clause which enables a Supreme Court Judge to resign. In Union of India v. G.C. Misra, it was held that High Court Judge can withdraw his resignation before its becoming effective. A prospective resignation can be withdrawn, but not when the resignation is in presenti. It was held that Constitution does not bar such withdrawal.

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76 Art. 124(2).
77 Art. 217(1).
78 The Constitution (15th Amendment) Act, 1963 raised the retirement age of High Court judges from 60 to 62 years and gave a partial effect to Law Commission’s recommendation. See M.P. Jain, supra note 3, at p. 903.
79 AIR 1978 SC 694.
Another very important aspect of court administration relates to the assignment of cases which is an integral part of the internal operations of court. The assignment of cases in the High Court and the Supreme Court is done by the court’s ministerial staff under the supervision of the Chief Justice. In the subordinate courts, the assignment is done under supervision of the senior judge. Each judge has a cause list in which cases to be tried before him are enumerated along with the date of prospective trial. In the matter of assignment of cases, various factors are taken into consideration. These include the workload of the judges, their experience and specialization and their age and state of health. Sometimes the Chief Justice takes over a particular case. Normally he does so in significant cases which have attracted public attention to ensure that the trial will not give rise to any adverse comments or criticism.

Should there be some statutory rules regarding assignment of cases? If the answer is in the affirmative, will they not bring about undesirable inflexibility which would be against an efficient court administration? To this, it may be stated that if such rules are designed and enacted in a well thought out manner, these may eliminate chances for rumours and inspire public confidence in the judicial process. This should not be taken to mean that such rules are a must but the matter merits considerations.

(D) Constitution of High Courts

A High Court Judge is a holder of constitutional office and not a government servant. Arts. 50, 214, 217, 219 and 221 of the Constitution show that a judge of the High Court belongs to the third organ of the State which is independent of other two organs, namely, the Executive and the Legislature.
The legislative power to constitute a High Court belongs to Parliament [Entry 78, List I, 7th Sch.]. Art. 216 refers to the number of Judges constituting a High Court.

Entries 77 and 78 of List I of Seventh Schedule deal with “Constitution” and “organization” of the Supreme Court and the High Court because after coming into force of the Indian Constitution, the Supreme Court was required to be set up and so also the High Courts were required to be established and/or reconstituted. However, the Parliament and State Legislatures can invest a High Court with general jurisdiction by enacting an appropriate legislation, referable to “administration of justice” under Entry 11-A of List III.80

(a) Fixation of strength of High Court

The earlier view that fixation of strength of High Court is not justiciable as was held in S.P. Gupta v. Union of India,81 is no longer good law. It was held that if it is shown that the existing strength is inadequate to provide speedy justice to the people-speedy trial being a requirement under Art. 21- in spite of the optimum efficiency of the existing strength, a direction can be issued to assess the felt need and fix the strength of judges commensurate with the need to fulfill the State’s obligation of providing speedy justice and to thereby ensure that the operation of the legal system promotes justice- a solemn resolve declared also with Preamble of the Constitution. In making review of the judges’ strength in a High Court, the President must attach great weight to the opinion of the Chief Justice of that High Court and of the Chief Justice of India, and if the Chief Justice of India so recommends, the exercise must be performed with due dispatch. It was observed that Art.216, like all

81 S.P. Gupta v President of India, AIR 1982 SC 149.
Constitutional provisions, is not to be construed in isolation, but as a part of the entire Constitutional scheme conforming to the Constitutional purpose and its ethos. So construed, this matter is justiciable to the extent in the manner indicated. The area of justiciability does not extend further to enable the court to make the review and fix the actual Judge strength itself, instead of requiring the performance of that exercise in accordance with the recommendation of the Chief Justice of India. It was further held that the duty cast on the President under Art.216 is a mandatory obligation; the failure to perform this obligation will certainly result in the negation of the rule of law by law’s delay. Such failure to perform that mandatory duty is justiciable to compel performance of that duty. If the executive which is charged with the duty under the constitution to undertake a periodical review of the Judges’ strength, fails to perform that duty, an order of mandamus can lie to compel performance within a reasonable time.  

(b) Appointment of High Court Judges

Art. 217 provides (1) 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, and shall hold office, in the case of an additional or acting judge, as provided in Art. 224, and in any other case, until he attains the age of sixty-two years]:

Provided that-

82 Supreme Court Advocates-on Record-Association v. Union of India AIR 1994 SC 268 ;Subhesh Sharma v. Union of India, AIR 1991 SC 631.
83 Subs. For the words ‘shall hold office until he attains of sixty years” by the Constitution (Seventh Amendment) Act, 1956.
84 Subs. For the words ‘sixty years’ by the Constitution (fifteenth Amendment) Act, 1963, S.4 (w.e.f. 05-10-1963).
(a) A Judge may, by writing under his hand addressed to the President, resign his office;

(b) A Judge may be removed from his office by the President in the manner provided in Clause (4) of Art. 124 for the removal of a Judge of the Supreme Court;

(c) The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

(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

(b) has for at least ten years been an advocate of a High Court\(^{85}\) or of two or more such courts in succession;

Explanation – For the purposes of this clause—

\(^{86}\)[(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;]

\(^{85}\) The words “in any State specified in the First Schedule” omitted by the Constitution (Seventh Amendment) Act, 1956, s. 29 sch.

\(^{86}\) Ins. By the Constitution, (44th Amendment) Act, 1976, s. 28 (w.e.f. 20-6-1979).
in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law] after he become an advocate;

(c) In computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, with in India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be

(3) If any question arises as to the age of a judge of a High Court, the question shall be decided by the President after consultation with the chief justice of India and the decision of the President shall be final.

(1) This Article corresponds to Art. 124(2), ante. The appointment will be made by the President. But he will consult the following persons in the matter-(1) Chief Justice of India; (2) Governor of the State concerned; (3) Chief Justice of that High Court. In the case of appointment of the Chief Justice himself, only (1) and (2) need be consulted.

(2) But even though the Constitution requires the President to consult the dignitaries specified in Cl. (1), the function of appointment remains an executive function, and since this function is not excluded from the
purview of Art. 74(1), the President has, ultimately, to exercise his power of appointment in accordance with the advice tendered by his Council of Ministers, even though such advice be contrary to the recommendations of the dignitaries who are required to be consulted, by Cl. (1). 90

(3) But to consult the specified dignitaries at all may nullify the appointment and such consultation must be effective, 91 but the President is entitled to take into consideration the opinions of all the persons whom he is required to consult and the opinion of the Chief Justice of India as such, is not entitled to any primacy. 92

The decision S.P. Gupta case was commented upon in Subhash Sharma v. Union of India in which held that “it became imperative that the role of the institution of Chief Justice of India be recognized as of crucial importance in the matter of appointments to the Supreme Court and the High Court of States”. The Bench also did not agree with the finding that the opinion of the Chief Justice of India has no primacy. It was observed that primacy be given to the views of the Chief Justice of India in the matter of selection of the High Court Judges. This would improve the quality of selection. It was held: “In India, however, the judicial institution, by tradition, have an avowed political commitment and the assurance of non-political complexion of the judiciary cannot be divorced from the process of appointments. Constitutional phraseology of “consultation” has to be understood and consistent with and to promote constitutional spirit. The appointment is rather the result of collective

90 S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (PARAS, 28-29 (Bhagwati, J.); 124 (Gupta, J.); 321 (Fazal Ali, J.); 876 (PATHAK, J.); 1003 (Venkataraiamiah, J.).
91 S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (PARAS, 28-29 (Bhagwati, J.); 124 (Gupta, J.); 321 (Fazal Ali, J.); 876 (PATHAK, J.); 1003 (Venkataraiamiah, J.); Cf. Union of India v. Sankalchard Himatal Seth, AIR 1977 SC 2328 : (1977) 4 SCC 193 (paras, 15, 21, 37, 27, 44, 45, 63, 102, 114, 124).
92 Supra note 128.
constitutional process. It is a participatory constitutional function. It is, perhaps, inappropriate refer to any “power” or “right” to appoint judges. It is essentially a discharge of Constitutional trust of which certain Constitutional functionaries are collectively repositories…”. The Bench recommended reconsideration of the decision in *S.P. Gupta’s case* by a larger Bench.

As a consequence, a nine-member Bench was constituted to reconsider the decision in *S.P. Gupta’s case*, in so far as it held that the opinion of the Chief Justice of India has no primacy. Except learned Judge Ahmadi. J. who held that primacy could not be accorded to the view of the Chief Justice of India, though such a proposition sounded convincing to the ideal of Judicial independence, all other Judges were of the view that the opinion of the Chief Justice of India must be given primacy. It was further observed by the majority that the Chief Justice of India has to be formed collectively after taking into account the views of the senior colleagues who were required to be consulted by him for the formulation of the opinion.93

The majority gave up the literal interpretation and adopted a wider meaning of the Constitutional provision concerning the judiciary. The expression “consultation” in Art. 217(1) was given a wider meaning. It was observed that when the Government too had held out that it had been guided in the matter of appointments by the Chief Justice of India (except in exceptional cases) the actual practice had to be accorded legal sanction by permissible constitutional interpretation and thereby primacy was accorded to the opinion of the Chief Justice of India. It was held that “in the choice of a candidate suitable for appointment, the opinion of the

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Chief Justice of India. Should have the greatest weight as he is the best suited to know the worth of the appointee; the selection should be made as a result of a participatory consultative process in which the Executive has the power to act as a mere check on the exercise of power by the Chief Justice of India to achieve constitutional purpose. Thus the executive element in the appointment process is reduced to the minimum and any political influence is eliminated”. It was observed that no question of primacy would arise when a decision is taken on consensus. But if the opinions are conflicting the opinion of the Chief Justice of India will have primacy. Norms were laid down for the appointment of Judges of High Court. (1) The opinion has to be formed in a pragmatic manner and practice based on convention is a safe guide. (2) the Chief Justice of India is expected to be conversant with the affairs of the concerned High Court. The CJI may also ascertain the views of one or more senior Judges of that High Court whose opinion according to CJI is likely to be significant is the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight and the opinion of the other functionaries involved must be given due weight in the formation of the opinion of the CJI. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the senior most Judges of High Court. (3) The CJI can recommend the initial appointment of a person to a High Court other than that for which the proposal was initiated, provided that the Constitutional requirements are satisfied. (4) The opinion of CJI for the purpose of Art. 217(1) has primacy in the matter of all appointments and no appointment can be made by the President unless it is in conformity with the final opinion of CJI. (5) In cases where the recommendation of CJI is considered unsuitable on the basis of positive available materials on
record and placed before CJI, such a nominee may not be appointed. In such case, primacy of the opinion of CJI does not arise. It was observed that there are certain areas relating to suitability of the candidate, such as his antecedents and personal character, which at times consultees other than the CJI are in a better position to know. In such cases, the opinions of other consultees have great weight. (6) Non-appointment of any one recommended by CJI must be for good reasons and disclosed to CJI to enable him to reconsider and withdraw the recommendation. If the CJI does not find any ground to withdraw the recommendation even thereafter, but the other Judges who had been consulted in the matter are of the opinion that it ought to be withdrawn, the non-appointment of that person for reasons to be recorded may be permissible in public interest. But, if after due consideration of the reasons disclosed to CJI, that recommendation is reiterated by Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.

In cases where there is conflict of opinion between the CJI and Chief Justice of High Court, the person may not be appointed for reasons to be recorded and communicated to CJI. Likewise, appointment need not be made where the antecedents and character of the person are doubtful, where the nominee will have only very short period in office on appointment, or where the health condition of the nominee is not good, appointment need not be made.

The reasons for the disagreement must be disclosed to all others, to enable reconsideration on that basis. All consultations with every one involved including all Judges consulted and the expression of their
opinion must be in writing. The CJI and Chief Justice of the High Court must transmit with their opinion the opinion of all Judges consulted by them as part of their record. The exclusion of justiciability in this sphere, it was hoped, would prevent any inhibition against the expression of a free and frank opinion.

The process of appointment to the High Court should be initiated by the Chief Justice of the High Court.

The decision also provides for a time bound schedule for completion of the entire process, which has to be strictly followed. It was also suggested that a memorandum of procedure be issued by the Government of India to this effect after consulting CJI and with the modification, if any, suggested by CJI to effectuate the purpose.

The court has emphasised that the plurality of Judges in the formation of the opinion of the CJI is an in-built check against the likelihood of arbitrariness or bias. In view of this safeguard, Judicial review of the appointment of a High Court Judge is available only on the following on the grounds; (a) If, in making the decision as regards the appointment of a High Court Judge, the views of the Chief Justice and the senior Judges of the High Court concerned and of the Supreme Court Judges having knowledge of the High Court have not been sought or considered by CJI and his senior most colleagues, and (b) if the appointee lacks eligibility for appointment as a High Court Judge.

In view of some doubts, the President of India made a reference to clear the doubts in Presidential Reference In re.\(^\text{94}\) It was held therein that the Chief Justice of India is not entitled to act solely in his individual

\(^{94}\) Presidential Reference In Re, AIR 1999 SC 1:(1998) 7 SCC 739.
capacity without consultation with other Judges of the Supreme Court in respect of material and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment, it was further explained that in the matter of appointment to Supreme Court and High Court, the opinion of CJI has primacy and the opinion of CJI is reflective of the opinion of Judiciary which means that it must necessarily have an element of plurality in its formation. Recommendations made by CJI without complying with the norms and requirements of the consultation process are not binding on the Government of India; where appointments to the High Courts are concerned, the decision making Collegium consists of the CJI and two senior most puisne Judges of Supreme Court: the Chief Justice of India should form his opinion in regard to a person to be recommended for appointment to a High Court in the same manner as he forms it in regard to a recommendation for appointment to the Supreme Court, i.e., in consultation with the senior most puisne judges; for an appointment to be made, it has to be in conformity with the final opinion of CJI formed in the manner indicated and an opinion formed by CJI in any manner other than the one indicated has no primacy in the matter of appointment to Supreme Court and High Courts, and the Government of India is not obliged to act thereon. The expression “consultation” with CJI in Arts. 217(1) and 222(1) requires consultation with a plurality of judges in the formation of the opinion of CJI. The sole individual opinion of CJI does not constitute “consultation” within the meaning of Arts. 217(1) and 222(1). The requirement of “consultation” CJI with his colleagues who are likely to be conversant with the affairs of the High Court concerned dose not refer only to those Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer and the views of other Judges consulted should be
in writing and should be conveyed to the Government of India by the CJI along with his views.

Public interest litigation against appointment of a person as a High Court Judge on the ground that such a person is not qualified for such appointment is not maintainable when want of consultation with named Constitutional functionaries or lack of any condition for appointment is not pleaded.\(^95\)

At the stage of initial appointment under Art. 217 (1), no one has a right to be appointed as a Judge of a High Court, nor the right to be considered for such an appointment. A writ of mandamus at the instance of the aggrieved person for reconsideration of his case would not therefore lie as the proposed appointee for initial appointment does not have the right to be considered. An advocate or a member of subordinate judiciary whose name is recommended dose not get a vested right to be appointed as a Judge of High Court. He has no justiciable right at all and if for some reason he is not appointed, he cannot move the court to appoint him as a Judge of the High Court.\(^96\)

Where the incumbent considered for appointment as a Judge of High Court does not fulfill the qualification as laid down expressly under the provisions of the Constitution itself, it becomes the bounden duty of court to see that no person ineligible or unqualified is appointed to a high constitutional and august office of a Judge of the High Court.\(^97\) Generally speaking, no writ would go to Constitutional authorities to form an opinion about the eligibility suitability of a person for appointment as a


Judge of the superior court. Where a senior most District Judge wants a pre-emptive “quia timer action”, the same is dismissed as not maintainable.\(^98\)

Where recommendation for appointment is already finalized by CJI, the same need not be reopened by government merely because of change in personnel of Chief Justice of High Court or Chief Minister of the State.\(^99\) It was held in that case that there should not be any delay in filling the vacancies and the process must be completed within 3-4 months.\(^100\)

(c) Resignation by a Judge

1. While in the case of other Government servants in general, a resignation does not become effective unless and until it is accepted by the employer or order competent authority, in the case of certain constitutional dignitaries, such as a Judge of the Supreme Court [Art. 124(1), Prov. (a)] or of a High Court [Art. 217(1), Prov. (a)], no acceptance is required to make the resignation complete. These constitution dignitaries have the privilege of quitting their office at their unilateral volition and action, by sending to the President a written letter of resignation.

2. If by that writing the Judge expresses his resignation to be in praesenti, the resignation terminates his office forthwith, and it can not be withdrawn or revoked thereafter.\(^101\)


3. If, however, by such writing, he intends to resign from a *future* date, his tenure does not terminate before such date, so that, at any time before the arrival of that date, the Judge may withdraw his letter of resignation, because the Constitution does not bar such withdrawal.

Bar Council or Bar Association is not entitled to pass resolution demanding a Judge to resign nor could they force a resignation. A Judge is not to be pressurized to resign. Where the Bar Association or Bar Council reasonably and honestly believes the conduct of a Judge is bad, the remedy is not meet the Judge in camera and appraise him or to approach the Chief Justice of that High Court to deal with the matter appropriately. After due verification and confidential enquiry, the Chief Justice of the High Court must consult the CJI by placing all information with him. Where the imputations are against the Chief Justice of the High Court, the Bar Association may directly approach the CJI. Thereupon, the CJI after taking such Judge into confidence, if circumstances so permit, will take a decision in the matter which will be final. Until such decision is taken, the Bar should suspend all further action and await response for a reasonable period.\textsuperscript{102}

Writing under his hand’ does not mean that the letter of resignation must be in the Judge’s own handwriting. A written or typewritten letter “signed” by the Judge would suffice.\textsuperscript{103}

\textit{Art. 218. Application of certain provision relating to Supreme Court to High Courts.-}

The provisions of clauses (4) and (5) of Art. 124 shall apply in relation to a High Court and they apply In relation to the Supreme Court

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\textsuperscript{103} Vice Chairman, Village Panchayat v. Channabasappa B. Gaddi, AIR 1985 Karn 252.
with the substitution of references High Court for references to the Supreme Court.

(d) Removal of High Court Judges

This provision aims securing the independence of High Court Judges by providing that they can be removed from office only in the same manner as Judges of the Supreme Court, under the special procedure laid down in Art. 124(4)-(5). This is the only power to punish a High Court Judge for misconduct. The provisions of Art. 310 are not applicable to Judges of the Supreme Court and the High Courts.

A Judge of the High 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 him in the same session for such removal on the ground of proved misbehavior or in capacity. Parliament is empowered to prescribe by law the procedure for the presentation of an address and for the investigation and proof of misbehavior or incapacity of a Judge for the Purpose of his removal.

According to learned author H.M. Seervai, if judges who abuse their power to “interpret” earlier judgments of Constitution Bench by basing their “interpretation” on half-truths and by turning a blind eye to those parts of earlier judgments which are destructive of their pet theories, they are liable to be removed, and for that purpose, Art. 124(4) and (5) and Art. 218 should be amended. According to the learned author, under Art. 141, the law laid down by the Supreme Court is binding on all

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105 Pradyat v. Chief Justice, (1955) 2 SCR 1351
courts in India. When that law is laid down by Constitution Benches of 5 or more Judges, Judges of smaller Benches cannot flout the law so laid down with impunity under the guise of “interpreting” them. The well known saying “Be you never so high, the law is above you” applies to Judges as well as to persons holding high public office.\textsuperscript{106}

Together with this is to be read the \textit{new} provision in Art. 217(3), which provides for an alternative mode of removal of a High Court Judge in case any dispute arises as to his real age.

Art. 222 Transfer of a Judge from one High Court to another-

(1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court\textsuperscript{107} [{***}]

(2)\textsuperscript{108} [(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.]

(1) There was no specific provision in the Act of 1935 for the transfer of a Judge from the High Court to another.\textsuperscript{109} The present Article provides for such transfer, as a condition of the service, on term of payment of compensatory allowance.

\textsuperscript{107} The words “within the territory of India” omitted by the Constitution (Seventh Amendment) Act, 1956, Sec 14.
\textsuperscript{108} Ins. By the Constitution (Fifteenth Amendment) Act, 1963, Sec. 5 Original Clause (2) was omitted by the Constitution (Seventh Amendment) Act, 1956, Sec. 14.
\textsuperscript{109} The only provision in s. 220 (2) of the Government of India Act, 1935, was for appointment of a Judge of one High Court to another High Court, after vacating his existing appointments. [Union of India v. Sankalchand, AIR 1977 SC 2328: ( 1977) 4 SCC 193 (paras. 26-27)]
The Article has received interpretation by a Constitution Bench\textsuperscript{110} and a special Bench of several Judges,\textsuperscript{111} so that frequent references to these two decisions will be necessary in interpreting the various ingredients of the Article.

(e) **Conditions for transfer of a Judge of a High Court**

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

(a) *Consultation* with the Chief Justice of India is an absolute condition precedent.\textsuperscript{112} Such condition must be an effective consultation, which means that the President must place all relevant data available to his, 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 CJI alone is prescribed. However, in the case of Jammu & Kashmir, the special provision relating to that State must be kept in view, while initiating the proposal.\textsuperscript{113}

(b) 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


\textsuperscript{112} *Union of India v. Sankalchand*, AIR 1977 SC 2328: (1977) 4 SCC 193 (paras. 15, 21, 37, 41, 45, 41, 63, 102,104, 114, 124, 126, 128).

\textsuperscript{113} *Supreme Court Advocates- on Record Association v. Union of India* AIR 1994 SC 268: (1993) 4 SCC 441.
are necessary to be considered, he shall be within his right to elicit those facts from the President.\footnote{Union of India v. Sankalchand AIR 1977 SC 2328: (1977) 4 SCC 193 (paras. 15, 21, 37, 41, 45, 41, 63, 102, 104, 114, 124, 126, 128).} 

(c) Since what the Article requires is ‘consultation‘ with and not, concurrence of the Chief Justice, the President is free to come to his independent decision, but normally, the Chief Justice’s opinion should be accepted by the President.

(d) The power to transfer can be exercised only in the public interest\footnote{Union of India v. Sankalchand, AIR 1977 SC 2328: (1977) 4 SCC 193 (paras. 15, 21, 37, 41, 45, 41, 63, 102, 104, 114, 124, 126, 128); S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (paras. 638, 641, 674, 1124-25).} and not only on the basis of any administrative policy. Each case must be considered separately, and not on any wholesale basis.

(e) No transfer should be made by way of punishment.\footnote{S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (paras. 638, 641, 674, 1124-25).}

As instances of transfers in the public interest, without involving any element of punishment for misconduct may be mentioned—where a transfer is necessary to import better talent or a specialist on a particular branch of the law to a High Court where it may not be locally available or to import a man unaffected by local politics or local jealousies; or where it is necessary to adjust the required strength of the two High Courts; or for achieving national integration. As the power of transfer can be exercised only in “public interest”, i.e.. For promoting better administration of justice throughout the country, any transfer in accordance with the recommendation of the CJI cannot be treated as punitive or as an erosion in the independence of Judiciary. Transfer is an obvious incident of a Judge’s tenure. This applies to all Judges appointed after the adoption of transfer policy, irrespective of the fact whether they gave an undertaking to go on transfer or not.
The power under Article 222 is available throughout the tenure of a High Court Judges/Chief Justice and it is not exhausted after the first transfer is made. The contrary view expressed in S.P. Gupta v. Union of India, was overruled. It was held that it is reasonable to assume that the Chief Justice of India will recommend a subsequent transfer only in public interest, for promoting better administration of Justice throughout the country or at the request of the concerned Judge.\(^{117}\)

On the other hand, as instances of transfers without public interest may be mentioned- a transfer of a Judge because of his judgments which are unpalatable or inconvenient to the Government; transfer on the ground of any misconduct for which impeachment might lie,\(^{118}\) would obviously be penal and not a ‘transfer’; mass transfers without considering the merits of each case, on the standard of public interest (para 38).\(^{119}\)

Of course, the mere formulation of a general or uniform policy for the transfer of Judges may not be held to contravene Art. 222(1); but even in applying such policy, the facts and circumstances of each case must be examined to determine whether such transfer is motivated by some oblique consideration or whether it is in the public interest.\(^{120}\)

(f) The transferred Judge would be entitled to compensatory allowance, in accordance with Cl. (2)

(2) On the other hand:


\(^{120}\) S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (paras 642-3); 911A, 1234, some- what different approach is taken by Fazal Ali, J. in paras. 382-98).
Consent of the judge concerned would not be required for his transfer.\textsuperscript{121}

But the requirement of natural justice are out of place in the scheme of Art. 222(1), which provides other safeguards to prevent arbitrariness.\textsuperscript{122}

(3) Any Judge of a High Court may be transferred, including the Chief Justice.

In the formation of his opinion, the CJI, in the case of Judge other than Chief Justice, is expected to take in to account the views of the Chief Justice of the High Court from which the Judge is to be transferred, any Judge of the Supreme Court whose opinion may be of significance in that case, as well as the view of at least one other Senior Chief Justice of a High Court or any other person whose views are considered relevant by CJI. The personal factors relating to the Judge concerned and his response to the proposal including his preference to places of transfer should be taken in to account by CJI before forming his final opinion objectively, on the available material, in public interest for better administration of justice.

Care must be taken to ensure that no Chief Justice is transferred without simultaneous appointment of his successor in office and ordinarily the acting arrangement should not exceed one month, the maximum period needed usually for the movement of the Chief Justice to their new position. This is essential for proper functioning of the High Court and to avoid rendering headless any High Court for a significant

\textsuperscript{121} Union of India v. Sankalchand, AIR 1977 SC 2328: (1977) 4 SCC 193 (paras. 15, 21, 37, 41-45, 41, 63, 102, 104, 114, 124, 126, 128); S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (paras. 638, 641, 674, 1124-29).

\textsuperscript{122} S.P. Gupta v. President of India, AIR 1982 SC 149: 1981 (Supp) SCC 87 (paras. 665, 1128-29).
period which adversely affects the functioning of the Judiciary of that State.

The continuing practice of having Acting Chief Justice for long periods, transferring permanent Chief Justice and replacing them without due deference, appointing more than one Chief Justice from the same High Court resulting in frustration of the legitimate expectation of Judges of some other High Courts commensurate with their seniority to be appointed Chief Justice in their turn, except in extraordinary situation, must be deprecated and avoided. Application of the policy has been quite often selective and it is essential to make it uniform to prevent any injustice.

It may be desirable to transfer in advance the senior most Judge due for appointment as Chief Justice to the High Court where he is likely to be appointed Chief Justice, to enable him to take over as Chief Justice as soon as the vacancy arises, and in the meantime acquaint himself with the new High Court. This would ensure a smooth transition without any gap in filling the office by Chief Justice. In transfer of puisne Judges, parity in proportion of transferred Judges must be maintained between the High Courts, as far as possible.

The opinion of CJI has been given “not mere primacy”, but a “determinative” character in the transfer process. The proposal for transfer should be initiated by CJI “alone” and the power can be exercised only in “public interest”. 123

The above decision was further explained in In Re, Presidential Reference, 124

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Wherein it has been stated that before recommending the transfer of a Judge of one High Court to another, the CJI must consult a plurality of Judges. He must take into account the views of: (a) the Chief Justice of a High Court from which he is to be transferred, (b) any Judge of the Supreme Court whose opinion may have significance in the case and (c) the Chief Justice of the High Court to which he is to be transferred. All these views are to be expressed in writing and should be considered by a collegium consisting of the Chief Justice and four senior most puisne Judges of a Supreme Court. The collegium should consider the response of the Judge to be transferred. These views and the views of the four senior most Judges should be conveyed to the Government of India along with the proposal for transfer. Unless there decision to transfer is taken in the manner aforesaid, it is not decisive and does not bind the Government of India.

An order of transfer can be challenged only by the aggrieved Judge and not by any other person.\textsuperscript{125} In view of the safeguards taken while issuing order of transfer, the scope of judicial review is very limited. Judicial review is limited to a case where a Judge has been transferred without obtaining the views of reacting the decision as mentioned above. It was contended that since judicial review is a basic structure of Constitution, exclusion of judicial review in the matter of transfer cannot be considered as correct. Rejecting the contention, the Supreme Court held; “Every power vested in a public authority is to subserve a public purpose and must invariably be exercised to promote public interest. This guideline is inherent in every such provision and so also in Art. 222. The provision requiring exercise of power by the President only after consultation with CJI and the absence of the requirement of consultation

\textsuperscript{125} Dalpat Raj Bhandari v. Union of India, 1995 (Supp-1) SCC 682 : (1994) 2 Scale 390.
with any other functionary, is clearly indicative of the determinative nature, not mere primacy of the Chief Justice of India’s opinion in the matter”. 126 It was held therein that there is no complete exclusion of judicial review, instead only area of justifiability.

(f) Onus

The transfer of a Judge from one High Court to another being an extraordinary power, the onus is on the State to justify the transfer by showing that the conditions of Art. 222(1) have been satisfied (para. 911). 127

Art. 223. Appointment of acting Chief Justice-

When the office of Chief Justice of a High Court 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 a purpose.

128 | Art. 224. Appointment of additional and acting Judges-

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

128 Sub. By the Constitution (Seventh Amendment) Act, 1956, Sec. 15, for Art. 224.
(2) when any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily 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.

(3) no person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of [sixty-two years].

(E) Mechanism for selection and appointment of judges: an appraisal

The service rendered by judges demands the highest qualities of learning, training and character. For insuring these qualitative standards in the administration of justice, it is of utmost importance that the judicial institutions are manned by wise and brilliant men of high integrity and character of, “stern stuff and tough fiber, unbending before power, economic or political.”

Hence, the quality of judges in any system depends to a very great extent on the method of their selection and appointment and the standards applied by the appointing authorities in the process of selection of judges. In fact, the criteria of selection of judges has a direct bearing on their integrity and independence. Therefore it becomes imperative that all those persons who play a decisive role in the selection of judges exercise a high degree of care and caution. The question is: do we have any prescribed procedure for selection and appointment of judges? What actually is the criteria for selection of Supreme Court and High Court judge? Who are the various persons or authorities associated with the process of selection and appointment of judges? How to determine the eligibility of the persons aspiring for

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129 Sub. By the Constitution (Fifteenth Amendment Act, 1963, Sec. 6, for the words “sixty years”.

130 Bhagwati, J. in S.P. Gupta v. President of India, AIR 1982 SC 149 AT 198.
judgeship? Do we have any defined criteria for determining the comparative merit of those who qualify for appointment?

The judiciary has, by and large, retained its image as one of the few institutions of the country, which is still above the rot that prevails in most organs of governance. And yet, past few years have not been easy on the image of the judiciary. Whispered accusations to full-blown scandals of the late 80s and 90s have shown the seeds of doubt even in the minds of the most ardent believers in the integrity of judiciary, including senior members of the bar, former members of the bench, the Parliamentarians as also the common man on the streets. The consequent demand for accountability from all sections has given rise to a raging debate between supporters of judicial self-discipline on one hand and voices for external, independent mechanisms on the other.\(^{131}\)

More than 30 years ago (on 13 December 1985) the UN General Assembly adopted, without a dissenting vote, a set of basic principles on the independence of the Judiciary. How the judges should be appointed was left to the Constitution of individual states—the only safeguard being that the independence of the Judiciary had to be guaranteed by the state, and enshrined in the Constitution or the laws of the country. Persons selected for judicial office had to be individuals of integrity and ability with appropriate training or qualifications in law, and any method of selection (no particular method being prescribed or recommended) had to safeguard against judicial appointments being made ‘for improper motives’. It was also provided that judges whether appointed or elected shall have guaranteed tenure until the mandatory age of retirement.

In respect of judges of the Supreme Court of India, Article 124(2) provided:

(2) 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) provided:

(1) Every judge of the 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; and shall hold office in the case of an additional or acting Judge as provided in Article 224, and in any other case until he attains the age of sixty-two years.

The prescribed mode of appointments worked well, but only during the first decade after 1950. Between January 1950 and November 1959, 19 judges were appointed to India’s Supreme Court and every one of them was appointed on the recommendation of the Chief Justice of India. As for as high courts were concerned, 211 appointments were made in the same period since 1950 and out of these all except one – 210 out of 211 – were made on the advice and with the consent and concurrence of the
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. 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 decision, 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 at naught the Government’s avowed policy of abolishing the old zamindaris 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.

It was felt in the highest echelons of the government that judges of the Supreme Court had become ‘property-minded’, out of turn with society, and that it would be appropriate if there were henceforth appointed on the highest court ‘forward-looking’ judges--- judges who subscribed to the economic policies of the government. The government at the time was a majoritarian government composed of members of the single largest party in parliament (the Congress) --- a party that commanded a majority sufficient to secure the passage of almost any constitutional amendment.

It was at this time that the country witnessed the sorry spectacle of what were then known as the ‘Band – Wagon- Judge’, who were craving

132 Govind Vallabh Pant said so when replying to the debate in the Rajya Sabha on the 14th Report of the Law Commission.
attention of the Executive, asserting in speeches and even in their judicial pronouncements that they were extremely ‘forward looking’! Even some Chief Justices of high courts were not averse to falling in the line with governments’ views at to the suitability or unsuitability of particular names for judicial appointment. A climate of ‘Executive compliance’ prevailed – so much so that the law secretary of the Union of India could quite truthfully say in sworn affidavit filed in the Second Judges case (1994) that in the ten years from 1983 to 1993, out of a total of 547 appointments of judges made to the high courts, only seven were not in consonance with the views expressed by the Chief Justice of India!

Alas, some (fortunately, not many) of these Chief Justices were like that Lady of Kent (in the old limerick)--- ‘who said she would not go but she went’. In other words, these personages, after saying at first that they would not go along with the appointees suggested by the government, ultimately did so or were persuaded to do so.

Sri Fali S. Nariman said that I was not privy to the confabulations that took place during these years between the succession of Chief Justices on the one hand and the Executive on the other. But one thing was clear – the constitutional ‘consultations’ that took place in the 1970s and 1980s was definitely not according to the convention which prevailed in the 1950s: which was that the Executive implicitly accepted the ‘advice’ of the Chief Justice of India as to the persons who should be appointed judges in the higher Judiciary.\(^{133}\)

Then, in 1981, a bench of seven judges of Supreme Court of India

said in *S.P. Gupta’s case*¹³⁴ (a case which later came to be popularly known, or un-popularly known – depending on your point of view – as the *First Judges case*) that the recommendation of the Chief Justice of India in the matter of the appointment of judges of the higher Judiciary was not constitutionally binding on the government of India. This was the opinion of a narrow majority (4:3). In the majority were: Justices P.N. Bhagwati, Fazal Ali, D.A. Desai and E.A. Venkataramiah, and in the minority were: Justice A.C. Gupta, V.D. Tulzapurkar and R.S. Pathak. The majority decision may have been constitutionally correct, but it was definitely not in accordance with constitutional convention.

The majority said:

“Where there is difference of the opinion amongst the constitutional functionaries in regard to appointment of a judge in a high court, the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion it should accept in deciding whether or not to appoint the particular person as a Judge. So also where a Judge of the Supreme Court is not to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India though it is entitled to great weight as the opinion of the head of the Indian Judiciary. The ultimate power of appointment rests with the Central Government and that is in accord with the constitutional practice prevailing in all democratic countries.”

But the majority also said:

“But even with this provision (Art. 124 (2)), we do not think that the safeguard is adequate because it is left to the Central Government to select any one or more of the Judges of the Supreme Court and of the High Courts for the purpose of consultation. We would rather suggest that there must be a collegium to make recommendations to the President in regard to appointment of a Supreme Court or high court judge. The recommending authority should be more broad-based and there should be consultation with wider interests. If the collegiums is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential – it would go a long way towards securing the right kind of judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be judicial commission for appointment of the higher Judiciary. As recently as July 1977 the Chief Justice of Australia publicly stated that the time had come for such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr. Justice Beattle, who has now become the Governor-General of New Zealand, recommended that judicial commission should consider all judicial appointments including appointments of high court Judges. This is a matter which may well receive serious attention of the Government of India.”

No attention was given by GOI to the latter quote. The decision in
the *First Judge’s case* proved to be a disaster for ‘judicial independence’. Since the first quote was given undue emphasis by the government it enable successive governments to ‘manipulate’ appointments. As for instance in the case of appointment of a judge to a high court, when in the case of some names recommended by the Executive, the Chief Justice of India stood firmly against them, the central government attempted to persuade the Chief Justice of the concerned high court to fall in line with the government’s choice. As also in the case of an appointment of a judge to the Supreme Court, the government would ‘consult’ with other judges of the Supreme Court whose views differed from the views of the incumbent Chief Justice of India and proceed to appoint persons recommended by the other justices. This created a rift in the echelons of the higher Judiciary.

The citadel never falls except from within, and the reason why it nearly fell from within was because of that ‘unfortunate’, though otherwise constitutionally correct, decision in the *First Judges case* (1981).

When Justice P.N. Bhagwati, who delivered the majority judgment in the *First Judges case*, became Chief Justice of India in July 1985 (the next senior most judge in the Supreme Court being invariably appointed Chief Justice of India),\(^{135}\) his recommendation of names of judges to be appointed in the highest court (and in high courts) was not accepted by the GOI. The government relied on his own (Bhagwati’s) majority judgment in the *First Judges case*! At the end of his tenure, Chief Justice Bhagwati chafed quite a bit at the government’s refusal to accept the

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\(^{135}\) The two exceptions were (i) the appointment in 1973 of A.N. Ray of CJI over his senior colleagues Hegde J. Shelat J, and Grover J who promptly resigned; and (ii) the appointment in 1977 of M.H. Beg (no. 3 in seniority) as CJI over Justices H.R. Khanna (no.2 in seniority); he too promptly resigned. They were the two great (or infamous) supersessions in our judicial history.
names proposed by him – names that were otherwise deserving.

After several years of the government’s reaction to the majority judgment in the *First Judges case*, new appointees on the Supreme Court resolved to take a fresh look at the relevant articles of the Constitution. The new appointees were: Justices S. Ratnavel Pandian, A.M. Ahmadi, Kuldip Singh, J.S. Verma, M.M. Punchhi, Yogeshwar Dayal, G.N. Ray, Dr. A.S. Anand and S.P. Bharucha. These justices came to the conclusion that it was time to review the correctness of the ratio of majority decision in the *First Judges case*.

This is where I\textsuperscript{136} come in. I had led the main argument on behalf of the petitioner, Supreme Court Advocate-on-Record Association, in the *Second Judges case*,\textsuperscript{137} most ably assisted by the then Advocate-on-Record, Mukul Mudgal (later judge of the Delhi High Court and now Chief Justice of Punjab and Haryana). We ultimately succeeded, but the fallout was not at all we had expected.\textsuperscript{138}

What the *Second Judges case* decided in 1993 (by a majority of 7:2) was not the status quo ante before 1981, but it was – as the Americans would call it – an entirely new ‘ball game’! Primacy of the Chief Justice of India, on which the whole edifice of an independent Judiciary under our Constitution had rested, had proved disastrous during the Internal Emergency of June 1975 to January 1977 – during which period Chief Justice A.N. Ray had directed transfers of judges from one high court to another, not on the basis of exigencies of work in one high court (or the other), but solely because these judges had decided certain

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\textsuperscript{137} *Supreme Court Advocates-on-record Association – ors v. Union of India*, (1993) 4 SCC 441.

\textsuperscript{138} Santosh Paul (ed.), *Choosing Hammurabi: Debates on Judicial Appointments*, p. 34 (LexisNexis, Haryana, 2013).
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important cases which had political overtures against the central government or the relevant state government. They were and became known as ‘punitive’ transfers.

It was in this background that the majority in the Second Judges case said that they would not endorse the prevailing doctrine of the primacy of the Chief Justice of India alone. The spectre of the Chief Justice Ray’s appointments and transfers (particularly transfers) lay heavily on the consciences of the judges. So the bench ‘evolved’ – or more appropriately ‘innovated’ – a new doctrine.

Justice Verma\(^{139}\) said (in the Second Judges case) that the reason given by the majority in S.P. Gupta’s case (First Judges case) could not be supported, and was not in accordance with existing practice, and that the doctrine of primacy would henceforth mean the opinion of the Chief Justice of India after taking into account the views of his two senior colleagues required to be consulted by him for formation of a collegiate opinion. The opinion of a collectivity of judges was to be preferred to the opinion of the first among equals, the CJI. In the Second Judges case, the idea of a ‘collegium’ (initially projected in the First Judges case) was given effect to – with one caveat: if the government did not accept the recommendation of the ‘collegium’ it would be presumed that the government had not acted bonafide!

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 Art.124 (and Art.217) by the

\(^{139}\) He succeeded Justice Ahmadi in March 1997 as CJI.
majority in the Second Judges case was neither ‘contextual’ nor ‘purposive’. 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.

Art. 124 and Art. 217 were, by judicial diktat, remoulded closer to the heart’s desire of the judges.

The decision in the Second Judge’s case was adversely commented upon, not only in India. The trenchant (but guarded) title of a speech in Delhi by Lord Robin Cooks on the subject, ‘Where Angels fear to Tread’ was taken from a famous line of an eighteenth-century English poet, Alexander Pope which read: ‘For fools rush in where angels fear to tread’. Robin Cooke contented himself with repeating only the latter half Pope’s line hoping that most people in India (ignorant of Alexander Pope or his writings) would not be affronted at the jibe against the judges!

Even after the judgment in the Second Judge’s case (1993) which reconstructed Art.124(2) in the guise of interpreting it, it is now no secret that selections could not be implemented in the spirit in which the new doctrine was propounded. This time only because the collegiate of three highest constitutional functionaries (the senior most judges on the court) could not always see eye to eye in matters of appointments of judges!

In one case, for instance, where a Chief Justice of a high court was recommended for appointment to the Supreme Court of India by two in the triumvirate (of the judicial collegiums), the CJI (re-asserting the old notion of primacy of the CJI) said no, supporting his negative answer

with written opinions of two other junior colleagues of his own on the court (an expedient not contemplated in the Second Judges case!) this actually happened.

The truth is that, although good, competent, honest men and women have been appointed to the superior Judiciary under this judge-evolved doctrine (alas, women have been too few – not even a handful – in 60 years), many able, competent persons (of like unimpeachable integrity) have been passed over for wholly unknown reasons simply because there is no institutionalized system for making recommendations; no database or referral record of high court judges who are considered suitable for appointment as judges of the Supreme Court.

When Justice Punchhi became Chief Justice of India in January 1998, and suggested, with the concurrence of his two senior most colleagues (the collegiums), that a particular list of five named persons be appointed in the vacancies to the highest court (all strictly in accordance with the methodology laid down in the Second Judges case), the government, having genuine reasons to doubt the suitability of one or two of the names in that list, dragged its feet. Other disinterested but knowledgeable persons were alarmed at one or two of the names recommended by the CJI for appointment to the apex court.

The Government of India then suggested to the CJI that some of the names suggested by him could be accepted but not all. However, the

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141 It was with immense pleasure that I read in the front page of Time of India (25 December 2009) the following news item supplied by the Times legal correspondent, Dhananjay Mahapatra: Prez pushes for woman judges in SC – New Delhi: The Supreme Court has a sanctioned strength of 30 judges, but not even one woman judge at present. However, that could change soon, with President Pratibha Patil arguing in favour of appointment of a woman judge to the apex court. Patil recently made a nothing in the file for the collegiums headed by Chief Justice of India, K.G. Balakrishnan, suggesting that it was time a woman judge was appointed to the SC…
Chief Justice was adamant. He said, ‘No – it is all or nothing.’ There were apprehensions of possible ‘contempt’ proceedings being initiated suo motu against the Executive if the CJI’s en bloc proposal was not accepted!

Ultimately, simply to avoid a possible ugly situation from developing a reference was filed by the government in the name of the President of India for an advisory opinion of the Supreme Court, under the provisions of Art.143 of the Constitution of India\(^{142}\) for ‘clarification’ of some dicta in the *Second Judge’s case* (it was one of the most futile presidential references ever filed by the Government of India). It was what I might describe – without meaning any discourtesy to any one of the actors in the drama that followed – plainly an ‘Anti-Justice Punchhi reference’! Just as the first amongst equals could not always be trusted to make the right choice, it now appeared to us that even the first three could not always be trusted as well!\(^{143}\)

At the hearing of the presidential reference in this, the *Third Judges case* – before a bench of nine Judges\(^{144}\) the government of the day expressly stated to the court that it was not asking for a re-consideration of the decision of the majority in the *Second Judges case*. In other words, it was not asking that there should be a National Judicial Commission for appointment of judges of the higher Judiciary, nor was it laying any claim to disagree or disapprove names selected for appointment by the collegiate consisting of the Chief Justice of India and his senior most

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\(^{142}\) Art. 143 – Power of President to consult Supreme Court:
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, he may refer the question to that Court for consideration and the Court may, after such bearing as it thinks fit, report to the President its opinion thereon.


colleagues.

In the result, noting great was achieved in the presidential reference. A few ‘creases’ were ironed out and the collegium was enlarged (by judicial fiat) from three to five of the senior most justices on the highest court on the (somewhat dubious) principle that there was greater safety in larger numbers! Meanwhile, Justice Punchhi had retired at age 65 and the successor CJI (with four of his colleagues) recommended suitable names that were acceptable to all.

The criticism of the Third Judges case (1998) has been that the system of recommendation for appointments by a collegiums of five senior most judges (like that of three that went before) has also not been institutionalized. No mechanism has been evolved (by the collegiums itself), nor has any criteria been laid down as to who amongst the high court judges (who must retire at 62) – all aspirants to a place in the Supreme Court – should be recommended. I don’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. I see 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 judges of the Supreme Court. I 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 one. They consult no one but themselves. This has been the pattern of functioning for years. In sharp contrast, Chief Justice J.S. Verma (who had structured and authored the decision in the Second Judges case) frequently consulted senior advocates (including myself) as to appointments that the collegiums headed by him would like to
recommend and took account their views (though he did not necessarily accept them). In fact, he later told me that he had recorded our views on the files. This is what he had always intended Chief Justice to do when he gave (in the Second Judges case) the collegiums, headed by the Chief Justice, vast powers of selection. I would suggest that if there is to be a collegial appointment (as under the present system) – and I am afraid that, like the poor, the system will be with us for a long, long time it must be after a broad consensus from amongst all judges of the Supreme Court, and whoever else the CJI considers it appropriate to consult. There must be far more inputs from outside the select coterie of five judges.\footnote{Santosh Paul (ed.), Choosing Hammurabi: Debates on Judicial Appointments, p. 39 (LexisNexis, Haryana, 2013).}

As I have mentioned before, it is not that good judges were not, or are not, appointed to the Supreme Court under the present ‘collegium’ system – they invariably are. But sometimes better judges are overlooked or ignored.\footnote{Ibid.}

Without mincing words, let me illustrate this by an instance from Bombay itself. I have said this before and I have written about this as well. Without naming names, instances are not worth mentioning. Justice M.L. Pendse of the Bombay High Court, transferred for a while as CJ of Karnataka, who resigned office in March 1996, was a fine judge; he delivered justice without delaying it.\footnote{Ibid.}

Justice Manoj Kumar Mukherjee, when he was a sitting judge in the Supreme Court, told me (on more than one occasion) when I mentioned to him the name of Pendse as a fit person to be brought to the apex court that Pendse was (in his opinion) the best high court judge in

\footnote{Ibid.}
the country. I told him, ‘Please mention this to the Chief Justice.’ He told me that he had already done so! Yet – I regret to say that Pendse had been successfully prevented from coming to the Supreme Court, for what I regard as petty reasons\textsuperscript{148}:

First, because he was ‘disobedient’, since when he was first asked to go from Bombay to Karnataka as Chief Justice he declined (for personal reasons), incurring the displeasure of the then Chief Justice of India (he went only when he was sternly told to accept the order of transfer); and second, because of the ‘Bombay Lobby’ which was against his elevation. By the ‘Bombay Lobby’ I mean the judges from Bombay then in the Supreme Court. The Chief Justice of India can always ask his colleagues on the bench of the Supreme Court colleagues from Calcutta, Bombay, Allahabad or other high courts – as to the merit or demerit of someone from that high court being considered for elevation. But my plea is (and always has been), ‘Please, Chief Justice, do not rely implicitly on the assessment of your colleagues who hail from that high court’. The assessment could be (and often is) warped or tainted – sometimes when you know a person too well, you are apt to give an exaggerated opinion of some of his/her qualities – good or bad, more often, bad!

So, over the years, my assessment is that although 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 (in the opinion of many) positively ‘bad’ – ‘should never have been made’. I am afraid that this is the result of the collegiums not doing its homework. ‘Homework’ is most important when picking judges for the highest court. So, nothing has worked well –

\textsuperscript{148} Ibid.
neither the system of appointments between 1981 and 1992 (where
government had the veto), nor the post 1993 system of appointments
(where three and late five senior-most judges of the court had the right to
recommend judges for appointment).

But then, is the National Judicial Commission the right answer? I
sincerely hope so. Will there not be more confusion in even greater
numbers? Perhaps, there will be or perhaps no – only time and
experimentation will tell. The idea of a National Judicial Commission is
an excellent one, but it has somehow not passed muster with Parliament
on three separate occasions\(^{149}\):

First, when the 67\(^{th}\) Constitution (Amendment) Bill of 1990 was
introduced by Law Minister Dinesh Goswami on 18 August 1990 in the
Lok Sabha, pursuant to the recommendations of the 121\(^{st}\) Law
Commission Report. But the idea of a National Judicial Commission
which the Bill envisaged could not be pursued since the government of
Prime Minister V.P. Singh resigned in November 1990.

Second, when during the regime of the successor government of
Chandrasekhar – Constitution Amendment Bill (Bill No 54 of 1990) was
prepared by Law Minister, Ram Jethmalani (also making provision for a
National Judicial Commission); it could not even be introduced in the
Upper House since Prime Minister, Chandrasekhar prematurely by the
Congress party, and fresh elections were called soon after.

Third, an attempt was made by the Constitution 98\(^{th}\) Amendment
Bill, 2003 (prepared by Law Minister, Arun Jaitley), again seeking to
amend Arts. 124 and 217 of the Constitution to introduce the concept of a

\(^{149}\) Ibid at 40.
National Judicial Commission, but this Bill lapsed with the dissolution of the 13th Lok Sabha in the year 2004. In that bastion of judicial conservativeness (the United Kingdom) when the last lord chancellor of England had mooted proposals for greater ‘people participation in the selection of judges, a question was raised as to who would be the ‘right’ people? Selection on merit to the higher Judiciary in England is no longer restricted to persons who are invited to accept; posts of judges of the higher Judiciary are now advertised, to be responded to by written applications by persons who are desirous of being appointed high court judges.

I believe the answer, in this country, to the question concerning the ideal system of appointment lies not necessarily in the number or type of persons who select (or recommend), nor in the range of persons entitled to select (or recommend). What is important is that there must be greater transparency in the method and procedure of appointment of judges to the higher Judiciary. There must be much greater care bestowed in making recommendations to the highest court, as under our Constitution it is the Supreme Court of India that is the final interpreter of the constitution and all laws.

Transparency in the method and procedure, I do not imply that there should be publicity. Once systems are in place and the method and procedure of appointment is known, the confabulations within the Judiciary must be left to the justices without the intruding eyes of members of the public or the media. The problem today – as also the problem that was there yesterday and the days before – is that not enough attention is given by successive collegiums to the important task recommending judges for appointment to the Supreme Court, simply
because the five judges at the top are too busy deciding cases that come before them. 150

I recall that much greater care used to be adopted in the past of selecting judges. In the late 1970s when I (as private counsel) had gone to argue an appeal before a bench of the Kerala High Court, I had to make several trips. The presiding judge was Justice V. Balakrishna Eradi. Ultimately, he decided the case (that I was appearing in) against my client. However, I was at that time impressed by his acumen and competence, and I came back to Delhi and told Justice N.L. Untwalia, a sitting judge of the Supreme Court, about him. He promptly went and told Chief Justice, Y.V. Chandrachud, who requested Untwalia to go to Kerala in the ensuing Diwali vacation and make discreet inquiries from judges and from members of the Bar. The collectivity of the Bar is the best judge about who deserves to be appointed to the Supreme Court – just as the collectivity of judges are the best judges about the competence and skill of practicing lawyers. When Justice Untwalia returned he agreed with my assessment. Chief Justice Chandrachud (this was in the era of ‘primacy of the Chief Justice’) then recommended Eradi’s name to the government and he was promptly appointed. Justice Eradi, for several months after he moved to Delhi, told all and sundry that that ‘it was Nariman who got me appointed to the Supreme Court’! I say this not in order to flaunt my (wrongly) presumed influence with the powers-that-be (I had none and have none), but only to stress that the most important consideration for appointment of any person as judge of the Supreme Court is to make all possible inquiries (from all possible sources) and then, and only then,

150 Ibid at pp.41-42.
recommend his/her name.  

I also recall that Chief Justice R.S. Pathak (Chief Justice from 1986 to 1989 during the era of ‘primacy of the Chief Justice’) took his role of recommending names to the Supreme Court bench very seriously. On his frequent travel to various cities, he would assess the work and worth of individual judges who were reputed to be bright and competent for appointment to the highest court. On one such occasion when he went to Bangalore (in 1987), he made it a point to speak with members of the bar and of the high court bench. He then came back with the name of M.N. Venkatachaliah (then only third in seniority in the High Court of Karnataka). Venkatachaliah was promptly appointed to the Supreme Court, and he made good, although he had a short tenure of only 20 months as CJI. Venkatachaliah became one of our finest and most respected Chief Justices in recent times. Alas, this care and concern in the appointment of judges is seen to be lacking nowadays.

All this will tell you why I have been so greatly disappointed after winning the Second Judges case. Today, I can only express my extreme anguish at the current state of ground realities in the matter of appointment of judges.  

The Supreme Court of India, where I continuously practiced for over 37 years (since May 1972), has lost much (very much) of its former prestige, not because cases are not decided fairly or to the satisfaction of the litigating public, far from it – its decisions by and large have been good and are respected. And we can hold our heads high and say so. But the extra-curricular task (imposed upon five senior most judges by a
judgment 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 adhocism and no consistent and transparent process of selection. As a result, the image of the court has gravely suffered.\textsuperscript{154}

The NDA Government in an abrupt and sudden move notified the Constitution 99\textsuperscript{th} Amendment Act, 2014 and the National Judicial Appointments Commission Act 40 of 2014 on 13 April 2015. The two Acts were brought into force, two days before the five judge Constitution Bench of the Supreme Court was slated to hear the constitutional validity of these enactments. With one stroke, the notification of the two Acts, of questionable constitutionality destroyed the Collegium system of appointments. Much of the criticism of the Collegium system of appointments was that nobody really never knew how these appointments came to be made, what considerations were taken into account, how the talent was identified, who constituted the talent pool, how character, integrity and performance were assessed and determined, how and which agencies were involved in the decision-making process. The Collegium system in place for over two decades, for all its faults had even to its worst critics secured an independent judiciary.

In the chapter to follow, it is proposed to examine in detail the constitutional plan and practice regarding accountability of the judges of higher judiciary in India.

\textsuperscript{154} Ibid at p. 43.