NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A

Consultation Paper*

on

SUPERIOR JUDICIARY

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Advisory Panel

on

Strengtheningof the institutions of Parliamentary Democracy;

(Workingof the Legislature, Executive and Judiciary;

theiraccountability; problems of Administrative,

Socialand Economic Cost of Political

Instability;Exploring the possibilities

ofstability within the discipline

ofParliamentary Democracy)

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1. INTRODUCTION

1.1 This Consultation Paper deals with appointment, age of retirement, transfer, removal for "misbehaviour" and deviant behaviour not amounting to "misbehaviour" of the judges of the Supreme Court and the High Courts. The object behind this paper is to strengthen the superior judiciary and not to criticise it; wherever we have criticised it, it is with a concern for its image and independence.

1.2 The superior judiciary in India has performed exceedingly well over the last five decades and has contributed significantly to the advancement of public good and good governance. It has succeeded in preserving, protecting and promoting the Fundamental Rights of the citizens and vulnerable groups of citizens against the "innovations of exerted democracy" and for that purpose it has drawn substantially upon the Directive Principles of State Policy enshrined in Part IV. It has upheld the balance between the Union and the States, effectively enforced the rule of law and has advanced the cause of human rights. This has proved possible because of many a strong, independent and learned judges, of whom any nation can be justly proud of. Courts have not been infallible. They have made mistakes. They have at times "run counter to the deliberate and better judgments of the community". But, over all, the final judgment of the community will unquestionably be that the judiciary has performed well and that they have furnished the highest example of adequate results of any branch of Government. Over the last decade or two, however, certain weaknesses in the system have come to light, regarding which every Indian feels concerned. Indeed judiciary itself has been grappling with these problems which has ultimately led to the judiciary practically taking over the function of appointing and transferring the members of judiciary in as much as a proper selection of judges lies at the heart of all the problems facing the judiciary. The question of removal for 'proved misbehaviour and of measures to check deviant behaviour not amounting to 'misbehaviour' of judges of the High Courts and the Supreme Court is equally an important aspect.

1.3 Independence of judiciary is the cornerstone of our Constitution. It has been held to be a basic feature of our Constitution. For ensuring judicial independence, our Constitution has made a deliberate and conscious departure from other constitutions of the world – indeed, even from the Government of India Act, 1935. The appointment, transfer, discipline and all other service conditions of the subordinate judiciary was placed entirely in the hands of the judiciary; the executive was expected to make or issue formal orders only. So far as superior judiciary is concerned, the power of appointment was vested in the President but it was conditioned by the requirement of consultation with judiciary. A convention was developed according to which the recommendation always and invariably emanated from the Chief Justice of the High Court (in the case of appointment to High Court) and from the Chief Justice of India (in the case of the Supreme Court of India). While preparing this Consultation paper, we have kept in mind the necessity of preserving and promoting the concept of judicial independence and the all-pervading fact that independence of judiciary is a basic feature of our Constitution. We have also dealt with the oft-debated concept of a National Judicial Commission and the parameters within which such a commission, if one is thought advisable, should be constituted and composed.

1.4 Our concern has been that while in the matter of appointment, one can countenance a role for the executive, no such role can be countenanced in the matter of removal, transfer or in case of remedies for deviant behaviour not amounting to "misbehaviour". In all such matters it is the judgment of the peers that is given due recognition.

1.5 Our concern has been to effectively deal with and rectify instances of deviant behaviour among members of the superior judiciary to safeguard the fair name of judiciary, its independence and its image. A few unworthy elements here and there are sullying the image of the judiciary. It has to be checked. For judiciary, its image and its reputation is all important; if that is tarnished, nothing remains. It is equally necessary to create mechanisms which serve to enhance the image and effectiveness of Superior Judiciary.

1.6 This Consultation Paper is intended to promote a debate within the aforesaid parameters and to introduce measures to enhance the public confidence in the Judicial Administration, so essential for promoting public good.

2. Background

2.1 **Constitutional provisions relating to the Judiciary**:

Judiciary is one of the three wings of the State. Though under the Constitution the polity is dual the judiciary is integrated which can interpret and adjudicate upon both the Central and State laws. The structure of the judiciary in the country is pyramidical in nature. At the apex, is the Supreme Court. Most of the States have a High Court of their own. Some States have a common High Court.

The appointment of Judges of the Supreme Court and their removal are governed by Article 124 of the Constitution of India. Articles 125 to 129 provide for certain incidental matters. The appointment and removal of the Judges of the High Courts are governed by Article 217. Articles 218 to 221 and 223 to 224A provide for certain matters incidental thereto. Article 222 provides for transfer of Judges from one High Court to another.

So far as the subordinate judiciary is concerned, the constitutional provisions relating thereto are contained in Articles 233 to 237. These provisions are, of course, supplemented by the rules made by the respective Governors of the States under the proviso to Article 309 of the Constitution.

2.2 **Jurisdiction of the Supreme Court**: The jurisdiction of the Supreme Court and the High Courts is truly extensive. The Supreme Court is clothed with the power to issue writs for enforcement of Fundamental Rights mentioned in Part III of the Constitution (Article 32). It also acts as the appellate court in civil, revenue, taxation and many other matters over the High Courts and other Tribunals. The powers of the Supreme Court are set out in Articles 131 to 140. The law declared by the Supreme Court is binding on all courts within the territory of India (Article 141) and it is the duty of every person and authority in the country to act in aid of and render necessary assistance for the enforcement of the orders

of the Supreme Court (Article 144). The President has the power to seek the opinion of the Supreme Court on such questions of public importance as he thinks necessary (Article 143).

2.3 **Jurisdiction of High Courts**: The jurisdiction of the High Courts is equally extensive, if not more. Under Article 226, the High Court is invested with power to issue writs throughout the territory over which it exercises jurisdiction for the enforcement of the Fundamental Rights mentioned in Part III or for any other purpose. Every High Court exercises power of superintendence and control over all the Tribunals and Courts within its jurisdiction. It exercises appellate, revisional and reference powers over the decisions of the Courts, Tribunals and other authorities within its jurisdiction.

2.4 **Vesting of Governmental power in the judiciary**: The conferment of the power to issue writs to any authority in the country/state and the steady expansion of that power at the hands of our Supreme Court has come to vest governmental power in the judiciary. Administrative and quasi-judicial functions performed by the Government or any other authority are subject to judicial review by High Court and Supreme Court. The liberal interpretation placed on Articles 21 and 14 has brought every aspect of governance within the scrutiny of the courts. Indeed, it is no longer true to say – as was said by Alexander Hamilton more than two hundred years ago – that "the judiciary is beyond comparison the weakest of the three departments". It may have become as strong as the other two wings of the State, if not stronger.

2.5 **Subordinate Judiciary**: The civil and criminal courts below the High Court which may be referred to as subordinate judiciary are empowered to entertain and adjudicate upon all civil disputes and all kinds of criminal cases (except those which have been excluded from their jurisdiction). The higher-level officers, namely, district judges, exercise appellate power in both civil and criminal matters over the orders of Munsiffs and Magistrates. The structure of subordinate judiciary varies from State to State since it is within the power of the State to organize the subordinate judiciary in an appropriate manner. Broadly speaking, however, at the base of the pyramid, on the civil side, is the munsiff (or by what other name he is called). His jurisdiction is limited not only by territory but also by monetary limit. His orders are amenable to appeal. In between munsiff and district judge, there is a layer which may broadly be called subordinate judge. He exercises original civil jurisdiction on all matters and very often appeal against his order lies to the High Court. On the criminal side, the First Class Magistrate is at the base of the pyramid. He can try offences punishable with three years or less. Against his order an appeal lies to the sessions judge (who is called district judge on the civil side). In between these two officers, there is the Assistant Sessions Judge. He tries session cases punishable up to ten years. Generally speaking, an appeal against his order lies to the High Court.

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

3. Appointment of Judges to the Supreme Court

3.1 **Article 124(2)**: Clause (2) of Article 124 *inter alia* says that:

> "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:
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> Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

3.2 Under our constitutional scheme, the President is the constitutional head. In exercise of the powers vested in him by the Constitution, he acts upon the aid and advice of Union Council of Ministers. So far as the executive power of the Union is concerned, it is exercised by the Union Council of Ministers in the name of the President.

3.3 Clause (2) of Article 124 speaks of 'consultation', whether it be with the Chief Justice of India, Judges of the Supreme Court or with the Judges of the High Court. The expression is not "concurrence". The Constituent Assembly debates show that when it was suggested by some of the members that the expression should be 'concurrence' and not 'consultation', it was not agreed to.Ψ Similarly, the suggestion to provide for approval of Parliament or its upper House - probably inspired by the U.S. Constitution – was also not agreed to by Dr. Ambedkar (see his speech in Constituent Assembly debates Vol.8 p.258).

3.4 **Practice followed till 1981**: A practice had developed over the last several decades according to which the Chief Justice of India initiated the proposal, very often in consultation with his senior colleagues and his recommendation was considered by the President (in the sense explained hereinabove) and, if agreed to, the appointment was made. By and large, this was the position till 1981.

3.5 **Collegium of judges**: In a decision rendered by a seven-judge Constitution Bench in *S.P. Gupta vs. Union of India* (AIR 1982 SC 149), the majority held that 'consultation' does not mean 'concurrence' and ruled further that the concept of primacy of the Chief Justice of India is not really to be found in the Constitution. It was held that proposal for appointment to High Court can emanate from any of the four constitutional functionaries mentioned in Article 217 – and not necessarily from the Chief Justice of the High Court. This decision had the effect of unsettling the balance till then obtaining between the executive and judiciary in the matter of appointment. The balance tilted in favour of the executive. Not only the

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Ψ See in this connection the Memorandum of the Judges of the Federal Court and the Chief Justices of the High Courts with respect to the provisions of the draft Constitution concerning the judiciary, wherein "concurrence" of the Chief Justice of India was suggested. (B. Shiva Rao: The Framing of India's Constitution Vol. 4 at 193).

office of the Chief Justice of India got diminished in importance, the role of judiciary as a whole in the matter of appointments became less and less. After this judgment, certain appointments were made by the Executive over-ruling the advice of the Chief Justice of India. Naturally, this state of affairs developed its own backlash. In 1993, a nine-Judge Constitution Bench of the Supreme Court in *Supreme Court Advocates-on-Record Association Vs. Union of India* (1993 (4) SCC. 441) over-ruled the decision in S.P.Gupta. The nine-Judge Bench (with majority of seven) not only overruled S.P. Gupta's case but also devised a specific procedure for appointment of Judges of the Supreme Court in the interest of "protecting the integrity and guarding the independence of the judiciary." For the same reason, the primacy of the Chief Justice of India was held to be essential. It held that the recommendation in that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive. Elaborate reasons were are recorded in support of the proposition that selection of judges must be in the hands of the judiciary in this country and how the systems prevailing in other countries are alien to our constitutional system. One of the judges relied upon Article 50 of the Constitution which speaks of separation of judiciary and executive and excluded any executive say in the matter of appointment to safeguard the "cherished concept of independence." It held at the same time that it was open to the executive to ask the Chief Justice of India and his two colleagues to reconsider the matter, if they have any objection to the name recommended but if, on such reconsideration, the Chief Justice of India and his two colleagues reiterated the recommendation, the executive was bound to make the appointment. Reaction to this judicial assertion of power have not been uniform∗.

3.6 In short, the power of appointment passed into the hands of judiciary and the role of the executive became merely formal. The 1993 decision was reaffirmed in 1998 [1998 (7) SCC 739] in a unanimous

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∗ Lord Templeman, a member of the Jud. Committee of the House of Lords has this to say with respect to this judgment: " – having regard to the earlier experience in India of attempts by the Executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary and having regard to the unfortunate results of the appointment of Supreme Court Judges of the United States by the President subject to approval by Congress, the majority decision of the Supreme Court of India in the Advocates-on-Record case marks a welcome assertion of independence of Judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow with advantage". (See the article 'The Supreme Court and the Constitution' by Lord Templeman – published in 'Supreme but not infallible' on the occasion of the Golden Jubilee Celebrations of the Supreme Court.) There is, of course, the other view voiced by Sir Robin Cooke, former Chief Justice of New Zealand, who has in his two articles "Making the Angels weep" (Law and Justice Vol. I page 109) and "Where Angels far to tread" (published in "Supreme but not infallible" page 97, Edition 2000) criticized the said two judgments. In the first article he said refereeing to the reasoning of the judgment that "when forgoing reasons are placed alongwith ordinary meaning of Consultation, many lawyers and many ordinary readers would probably not see them as adequate to change the meaning of that word to 'Concurrence'." He, however, concluded : "However vulnerable in detail it will surely be always seen as a dramatic event in the international history of jurisprudence." In the second article, he opined : "Rather than underling the primacy of the Chief Justice, the opinion (the third judges' case) thus appears to have shifted power, to a significant extent, to a small number of Supreme Court Judges other than the Chief Justice. This may be a far cry from anything envisaged by the framers of the Constitution of 1949 …….. All in all, the opinion of the Supreme Court in the third Judges' case must be one of the most remarkable rulings ever issued by a Supreme National Appellate Court in the Common law world."

opinion rendered by a nine-Judge Bench of the Supreme Court on a reference being made by the President under Article 143 of the Constitution. All the basic conclusions of the majority in the 1993 decision were reaffirmed. There was, however, some variation. It was held that the recommendation should be made by the Chief Justice of India and his four senior-most colleagues (instead of the Chief Justice of India and his two senior-most colleagues) and further that Judges of the Supreme Court hailing from the High Court to which the proposed name comes from must also be consulted. In fact, the Chief Justice of India and his four senior-most colleagues are now generally referred to as the 'Collegium' for the purpose of appointment of Judges to the Supreme Court.

3.7 **Seniority to be followed in appointment of Chief Justice of India**: So far as the appointment of the Chief Justice of the Supreme Court of India is concerned, both the 1993 decision and the 1998 opinion lay down that the senior-most judge should always be appointed as the Chief Justice of India.

4. Appointment of Judges to High Courts

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4.1 **Procedure for appointment of Judges of High Courts**: The procedure for appointment of Judges of the High Courts is slightly different from the one concerning the appointment of Judges of the Supreme Court. Clause (1) of Article 217 says that "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 Article 224, and in any other case, until he attains the age of sixty-two years". A reading of this clause shows that while the appointment is made by the President, it has to be made after consultation with three authorities, namely, the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. (Of course, in the matter of appointment of Chief Justice, the consultation with the Chief Justice is not required). Just as the President is the constitutional head, so are the Governors. However, according to the practice, which had developed over the last several decades and which was in vogue till the aforementioned 1981 decision of the Supreme Court (S.P.Gupta), the Chief Justice of the High Court used to make the recommendation which was considered by the Governor of the State (Council of Ministers headed by the Chief Minister) who offered his comments for or against the recommendation. The matter then went to the Central Government. At that stage, the opinion of the Chief Justice was sought and based upon such advice, the appointment was either made or declined, as the case may be. It may be noted that even clause (1) of Article 217 uses the expression 'consultation' and not 'concurrence'. The decision of the Supreme Court in S.P. Gupta on the meaning of 'consultation' applied equally to this Article. After the decision in S.P. Gupta, the executive made quite a few appointments to the High Courts which gave rise to a good amount of dissatisfaction among the relevant sections including the Bar leading to the nine-Judge Constitution Bench decision of the Supreme Court in 1993 aforementioned. The decision laid down that the recommendation for appointment to the High Court shall be made by the Chief Justice of the concerned High Court in consultation with his two senior-most colleagues. The opinion of the Chief Justice of India was given primacy in the matter and was to prevail over that of the Governor of the State or even that of the High Court, if inconsistent with his view. The President was of course to make the formal appointment just as in the case of a Judge of the Supreme Court. This position was affirmed in the Third Judges case (1998 (7) SCC 139).

5. The significance of "consultation" provided by Articles 124 and 217

5.1 '**Consultation' and the concept of independence of judiciary**: None of the Constitutionsβ of the Commonwealth countries, nor the Constitution of U.S.A. (not even the Swiss and Japanese Constitutions), provides for "consultation" with the head of the judiciary or any other member of the judiciary in the matter of appointment of Judges. Only our Constitution does – and it could not have been without a purpose. Many of the leading members of the Constituent Assembly were lawyers of great repute. They knew the conditions in India – not only in the world of law but also public life. They held eminent positions in public life. Apart from Dr. Ambedkar, Alladi Krishnaswami Ayyar and K.M. Munshi, the great political leaders like Jawaharlal Nehru and Sardar Patel were also lawyers. The question arises why did they depart from other countries and provided this innovative procedure, when even the Government of India Act, 1935 [S.220 (2) concerning the appointment of Judges of High Courts] did not provide for such consultation? There can be no explanation for this innovation except that they were anxious to and concerned seriously with the concept of independence of judiciary. This provision is attributable to their conviction that at our stage of development and having regard to the propensities of the Executive (to control every organ of State and every institution of governance) they cannot be vested with the sole power of appointment to judiciary, a co-equal wing of government. True it is that the draft prepared by Sir B.N. Rao sought to import the U.S. model – as explained later in this paper – but there was practically no support for this model. The requirement of consultation with not only the Chief Justice of India but with certain other Judges at the Supreme Court and High Court level in Article 124 is an added indication of the concern the founding fathers had with the independence of the judiciary. They had before them the U.K., Australian, Canadian, Irish and other Constitutions which did not provide for any such consultation with the head of Judiciary either at federal or provincial level – much less with other judges, but yet chose this particular formulation. Evidently, they did not trust the Executive in India to make proper appointments and hence 'entrenched' the requirement of 'consultation' in the Constitution itself expressly. It is, therefore, perfectly consistent with the Constitution, for the Supreme Court to say, in its 1993 and 1998 decisions referred to hereinbefore, that the Chief Justice of India occupies a pre-eminent position and that the "consultation" contemplated by the said Articles should be a real and full consultation and further that since the Judges would be in a better position to judge the competence and character of the prospective candidates, their opinion should prevail in the matter of appointment. Indeed, as pointed out hereinafter, this is also the policy adopted by the Constitution with respect to the appointment of members of the subordinate judiciary. They are selected by the High Court; only the formal orders of appointment are issued by the Governor/ Government.

β In U.K., judges of High Court and the Appeal Court (Supreme Court) are appointed by the Crown, on the advice of the Lord Chancellor. The Lord Chancellor occupies a position peculiar to that country, he is the head of the Judiciary, a member of the Cabinet and the Speaker of the House of Lords. In Australia, S.72 of the Constitution of Commonwealth of Australia provides merely that justices of the High Court (the Highest Court) shall be appointed by the Governor-General in Council in consultation with the Attorney-General (as provided by S.6 of the High Court of Australia Act, 1979) while judges of the State Supreme Courts are appointed by the Governors on the advice of the government wherein the Attorney-General of the States play an important role. In Canada, judges are appointed by the Cabinet (either federal or provincial) with a major role played by the Minister of Justice/the Attorney-General. In Ireland, judges are appointed by the President on the advice of the government. In Japan, by Emperor as designated by the Cabinet, in Switzerland, judges are elected by the Federal Legislature. In USA, as is well known, the President appoints them subject to confirmation by Senate. There is no uniformity in the procedures followed in different countries. The procedure in each country appears to have evolved over the years having regard to the peculiar constitutional development of each country.

5.2 There is indeed another way of looking at the problem: The Constitution confers upon the President several powers – as distinguished from the executive power of the Union which is carried on in the name of the President. Article 74 says that "in exercise of his functions" (the President) shall "act in accordance with such advice" i.e. advice tendered to him by the Council of Ministers with the Prime Minister at its head. Even after its amendment by the Constitution (Forty-second Amendment) Act, 1976, the said requirement (to "act in accordance with" the advice) is not all pervading. There are certain areas where the President can act without, or even contrary to, such advice. For example, when the President has to choose a Prime Minister after a general election (or whenever such an occasion arises), the President has to act in his own discretion; the advice of the Union Council of Ministers with the Prime Minister at its head has, and can have, no application to such a situation; indeed he cannot act in this matter on the advice of the outgoing Council of Ministers. Similarly, where a Prime Minister suffers a no-confidence motion and thereupon advises the President to dissolve the House, the President is not bound by such advice. If the President finds that a viable alternative government can be formed, he is entitled to reject the advice of the Prime Minister, refuse to dissolve the House and swear in the alternative Prime Minister/Council of Ministers. It is thus clear that the requirement of acting on the advice of the Council of Ministers with the Prime Minister at its head cannot be said to admit no exceptions. It is the general rule but there can be exceptions. Articles 124 and 217, it is submitted, constitute yet another exception to the 'requirement' in Article 74 both because of the express language employed therein and also because of the concept of judicial independence which must necessarily be implied therein. It is well established that the over-arching concept of judicial independence calls for an interpretation of the Constitution consistent with the said concept. See the decision of the Supreme Court in *Chief Justice of A.P. Vs. L.V.Deekshitulu* (A.I.R 1979 SC 193)Ψ. Let us take Article 124 first. It says that "every judge of the Supreme Court shall be appointed by the President….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 Chief Justice of India has necessarily to be consulted in case of appointment of a judge. (Article 217 is similar, with the difference that the consultation is with the Chief Justice of India, the Governor of the State and

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Ψ The facts and the ratio of these case are highly relevant and instructive. The President of India had constituted an Administrative Tribunal for Andhra Pradesh to adjudicate upon the service disputes of employees of the State. The Tribunal was vested with exclusive jurisdiction with respect to appointment, promotion and all other service conditions of persons holding "posts in the Civil Services of the State" among others. The question was whether employees of High Court are not persons holding "posts in the Civil Services of the State". The Court held that though in its ordinary connotation, the employees of the High Court and members of subordinate judiciary can be said to hold "posts in the Civil Services of the State", the other provisions of the Constitution concerning judiciary and the underlying concept of judicial independence must lead us to construe those words narrowly so as to exclude the employees of the High Court, members of the subordinate judiciary and employees in various courts under the control of the High Court. The Constitution Bench speaking through Sarkaria J. referred to Articles 229 to 235 and to the provisions in Chapters V and VI of the Constitution and held that the expression "Civil Services of the State" in Article 371 – D should be construed and understood in the light of the said Articles and the underlying scheme of the said Chapters. In this connection, the Constitution Bench quoted an earlier judgment of the Court saying that "while interpreting words in a solemn document like the Constitution, one must look at them not in a school-masterly fashion, not with the cold eye of the lexicographer but with the realization that they occur in 'a single, complex instrument in which one part may throw light on the other' so that the Constitution must hold a balance between all its parts". The court concluded by saying "In sum, the entire scheme of Chapters V and VI in Part VI epitomized in Articles 229 and 235 has been assiduously designed by the Founding fathers to ensure independence of the High Court and the subordinate judiciary". (Para 42).

the Chief Justice of the High Court. If it is a case of appointment of the Chief Justice of the High Court, the consultation with the Chief Justice of the High Court is not necessary). If one reads Article 124/217 in the light of the principle of independence of judiciary (which is a basic feature of the Constitution and the concern with which is more than evident from the several provisions of the Constitution), giving full effect to the language used therein, it would follow that Article 74 has no application to Articles 124 and 217 and that under these articles, the President has to act in consultation with the authorities named in those articles alone. If the independence of judiciary (which means independence from the executive as well) is a basic feature of the Constitution, as held in several decisions of the Supreme Court including SCAORA, it follows by necessary implication that Articles 124 and 217 must be read consistent with the said concept i.e. so as to exclude executive influence therefrom. Articles 124 and 217 must be read as exhaustive on the subject. In other words, in the matter of appointment of judges of the Supreme Court and High Courts, the President has to act in consultation with only the authorities named in the said articles. The context excludes application of Article 74. It may also be a case of special (Articles 124 and 217) excluding the general (Article 74). L.V.Deekshitulu's case is an authority for the proposition that literal interpretation has to be discarded if such interpretation has the effect of eroding the concept of judicial independence. The ill-effects of political domination in the appointment of judges has been amply and poignantly illustrated by the recent decisions of the U.S. Supreme Court and the Florida Supreme Court in the disputes relating to counting of votes and other alleged irregularities in the conduct of elections to the office of the President of U.S.A (2000-2001). Let us avoid political influence altogether in the matter of appointment of judges of Supreme Court and High Courts.

5.3 This aspect has to be borne in mind in any discussion concerning the appointment of Judges of the High Courts and the Supreme Court.

6. Appointment to the Subordinate Judiciary

6.1 **Subordinate judiciary**: The appointment to subordinate judiciary is governed by Articles 233 to 237 of the Constitution and the rules made under the proviso to Article 309. The district judges, who are at the highest rung of the subordinate judiciary, are appointed both by direct recruitment and by promotion. The selection of direct recruit district judges is made by the High Court. On the basis of the recommendation of the High Court, the Governor appoints them. So far as promotion to the post of district judge is concerned, it is also made by the High Court alone, formal orders being issued by the Governor. So far as the appointment of munsiffs and magistrates (the lowest rung in the subordinate judiciary) is concerned, their selection is made by the Public Service Commission and the High Court. The practice in many States is that a Judge of the High Court nominated by the Chief Justice of that Court sits with the Public Service Commission for the purpose of selection. In some States, the power of selection is vested exclusively in the High Court. Here again the appointment is made by the Governor on the basis of the recommendation made by the designated judge and the Public Service Commission or by the High Court, as the case may be. So far as promotion from munsiff/magistrate to the intermediate higher level of subordinate judge /assistant sessions judge is concerned, it is made by the High Court itself. In short, in the matter of selection for appointment, promotion and postings of subordinate judiciary, the High Court is the real authority and the role of the State Government is formal in character. Indeed, with respect to subordinate judiciary, the disciplinary jurisdiction also vests in the High Court, on whose recommendation, formal orders are issued by the Governor. In all other service conditions, High Court is the competent authority, subject, of course, to the rules, if any, made under the proviso to article 309 of the Constitution.

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7. The Controversy

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7.1 While the method of selection (appointment by Government being a mere formality) to subordinate judiciary has not evoked any controversy, the method of appointment to and more particularly the actual manner in which appointments were made to the High Courts and the Supreme Court has been a subject matter of good amount of controversy, whether before the decision in S.P. Gupta or thereafter and even after the 1993 decision of the Supreme Court in Supreme Court Advocates-on-Record Association. While the decision in the S.P. Gupta was criticized for upsetting the existing situation by vesting the power of appointment in the executive and by diminishing the importance of the Chief Justice of India and the judiciary, the 1993 decision in SCAORA is criticized for precisely the opposite reasons. It is said by the critics of the 1993 decision that in a democracy, accountability is an important consideration and the authority or authorities making such appointments should be accountable to the people. A distinction is made between appointment and functioning. While in the matter of functioning, the executive can have no say, it is said, the executive must be necessarily involved in the process of appointment. The argument is that someone must be responsible for the appointment made and since Chief Justice of India or his colleagues are not accountable to the people, the concentration of power of appointment in them is undemocratic. The argument further is that the executive is accountable to the Legislature, which in truth represents the will of the people – the consumers of justice - and that involvement of Executive is the only way of infusing the element of democracy and accountability in the process relating to the appointment of judges of the High Courts and Supreme Court. The contrary argument in support of the existing method (ordained by the decisions of the Supreme Court in 1993 and 1998 aforementioned) is that in Indian conditions and culture, entrusting this power to, or involvement of the Executive in the appointment process is bound to prove detrimental to the independence and integrity of the judiciary, as the experience during the years 1973 to 1977 and again during the period 1982 to 1993 (period during which S.P. Gupta held the field) shows. The supersessions, arbitrary and motivated transfer of Judges of High Court, the manner in which additional Judges in High Courts were dealt with (either by extensions for short periods or by not confirming them), the several attempts at muzzling the judiciary during the period 1973 to 1977 (including the supersession of senor-most judges of the Supreme Court in the matter of appointment of Chief Justice of India) and the manner in which several appointments were made during 1981 to 1993 are all said to furnish proof of the fact that in our present stage of development, the domination or involvement of the executive in this process is not desirable. It is said that democratic culture has not yet taken root in our country and that feudal tendencies are very much part of our thought and action. The attempt to control every institution, personalized rule, refusal to see the merit of diffusion of power of governance (a basic feature of democracy) are propensities which are not conducive to an independent and efficient judiciary. If the vesting of the power of selection of subordinate judiciary in the High Courts exclusively is not bad, how does the selection of Judges of High Courts and the Supreme Court become bad – goes the argument. It is further pointed out by the proponents of this point of view that today executive is the biggest litigant and the power vested in the Supreme Court and the High Courts by Articles 32 and 226 respectively is intended to act as a check upon the executive and that today the major portion of the work in every High Court and the Supreme Court is under these provisions; if so vesting the power of appointment, whether wholly or partially, in the executive is bound to prove prejudicial to this constitutional perspective. The U.K. example, it is said, is not relevant to this country at the present stage of development and in so far as U.S.A. is concerned, it cannot and ought not to be emulated in this country, more particularly after the recent episode (the un-edifying manner in which the judiciary in that country acted in the Bush-Gore election controversy). Incidentally, the American experience reinforces the inadvisability of executive's role in the matter of appointment.

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8. Past proposals – since 1945

8.1 **Introduction**: For a proper appreciation of the problem dealt with herein, it is relevant to notice the several suggestions put forward and attempts at reform tried in last several years in this behalf. This paper being only a Consultation Paper, we do not wish to make it very voluminous. They are, briefly, as follows:

8.2 **Recommendations of Sapru Committee**: In the year 1945, the Sapru Committee (constituted to look into this aspect in view of the impending independence of the country) recommended that "Justices of the Supreme Court and the High Courts should be appointed by the head of State in consultation with the Chief Justice of Supreme Court, and, in the case of High Court Judges, in consultation additionally with the High Court Chief Justice and the head of the unit concerned."

8.3 **Recommendations of the High Powered Committee appointed by the Constituent Assembly**: The Constituent Assembly appointed a high-powered ad hoc committee consisting of outstanding jurists of the country for recommending the best method of selecting Judges for the Supreme Court. The committee submitted a unanimous report opining that it would not be desirable to leave the power of appointing Judges of the Supreme Court with the President alone. It recommended two alternative methods in that behalf, namely, (i) the President should, in consultation with the Chief Justice of the Supreme Court (so far as appointment of puisne Judge is concerned), nominate a person whom he considers fit to be appointed as Judge of the Supreme Court and the nomination should be confirmed by a majority of at least seven out of a panel of eleven (composed of some of the Chief Justices of the High Courts, some members of both the Houses of Central legislature and some of the law officers of the Union); (ii) the said panel of eleven should recommend three names out of which the President, in consultation with the Chief Justice, may select a Judge for appointment. The same procedure should be followed for the appointment of Chief Justice of the Supreme Court except of course that in his case there should be no consultation with the Chief Justice. [B. Shiva Rao : The Framing of India's Constitution. Vol.2 at p. 590].

8.4 **Suggestion of Shri B.N. Rao**: In his Memorandum on the Union Constitution, Shri B.N. Rao, the Constitutional Advisor suggested that appointment of judges should be made by the President with the approval of at least two-thirds of the Members of the Council of States, which was proposed to be constituted to advise the President in exercise of his discretionary functions and of which the Chief Justice of the Supreme Court was to be an ex-officio member.

8.5 **Recommendations of Federal Court**: The draft Constitution was forwarded to the Federal Court for its views. In March, 1948 a conference of Judges of the Federal Court (including its Chief Justice) and Chief Justices of the High Courts was held to consider the proposals in the draft Constitution concerning the judiciary. The Memorandum submitted by the conference recommended that the appointment of the Judges of the High Court should be made by the President on the recommendation of the Chief Justice of the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India.

8.6 **Basis adopted in articles 124 and 217**: Perhaps, the several proposals mentioned above (except the one by Shri B.N. Rao) constitute the basis for the method of appointment devised by Articles 124 and 217. At the same time, the Constituent Assembly chose to employ the expression "consultation" in preference to the expression "concurrence".

8.7 **Fourteenth Report of the Law Commission of India**: In its Fourteenth Report (1958), the First Law Commission of India, headed by very distinguished jurist and first Attorney General of India, Shri M.C. Setalvad, and composed of some very distinguished personalities of the time, examined this issue at length. In its concluding observations it observed: "the almost universal chorus of comment is that the selections are unsatisfactory and that they have been induced by executive influence. It has been said that these selections appear to have proceeded on no recognizable principle and seem to have been made out of considerations of political expediency or regional or communal sentiments……..". After noticing that the appointments made have not always been on merit, the Report observed: "It is widely felt that communal and regional considerations have prevailed in making the selection of judges……..What perhaps is still more to be regretted is the general impression that now and again executive influence exerted from the highest quarters has been responsible for some appointments to the Bench…….". The report recommended that every appointment to the High Court and the Supreme Court should be made with the concurrence of the Chief Justice of India. In effect, this report sought to revive the idea of 'concurrence', which was not accepted by the Constituent Assembly. Of course, this recommendation was not implemented.

8.8 **Administrative Reforms Commission**: The Study Team on Centre-State Relations of the Administrative Reforms Commission also went into the question relating to appointment of Judges. It agreed with and affirmed the recommendation made by the Law Commission in its Fourteenth Report.

8.9 **Recommendations of High Court Arrears Committee**: In 1970s, the High Court Arrears Committee also went into this question though it did not deal with the format of the mechanism for appointment. It suggested that the exercise for filling the vacancy must start well in advance so that the selection can be finalized by the time the vacancy occurs. It recommended that if the recommendation made by the Chief Justice of the High Court is not dealt with within one month from the date of its receipt, the State Government must be deemed to have accepted the recommendation and action must be taken by the Central Government for expeditious disposal of the proposal. This recommendation pertains to appointment to the High Courts only.

8.10 **Appointment mechanism suggested by the Convention of the Bar**: Following the controversy arising from the supersession of three senior-most Judges of the Supreme Court in the matter of appointment to the office of the Chief Justice of India in 1973, a Convention of the Bar of the whole country was held on 11-12 August, 1973. It unanimously adopted a resolution on the criteria, machinery, and procedure for appointment of Chief Justice and Judges. The resolution recommended, *inter alia*, that the appointment of the High Court Judges should be made on the recommendation of a Committee of three senior-most Judges of the High Court (including the Chief Justice) and two senior advocates nominated for the purpose by the Association of the High Court Bar. Initiative in making a recommendation should also be with this Committee and not with any executive authority. In fact, this is the first occasion when the Bar was sought to be brought into the appointment mechanism.

8.11 **Observations of the Supreme Court in Shamsher Singh's Case**: In its judgment in *Shamsher Singh v. State of Punjab* (AIR 1974 S.C. 2192), the Constitution Bench of the Supreme Court dealt with the appointment of Judges. The Bench observed: "In all conceivable cases, consultation with highest dignitary of Indian justice will and should be accepted by the Government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice, the last word in such sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." A most emphatic statement regarding the role of Chief Justice of India in all such matters.

8.12 **80th Report of the Law Commission of India**: In the year1977, at the instance of the then Prime Minister of India, the Ministry of Law, Justice and Company Affairs requested the Law Commission to examine the question of appointment of Judges of High Court and Supreme Court and to submit a report. The Law Commission headed by Shri H. R. Khanna J. went into the matter at length and recommended (by the time of submission of the Report Shri H.R.Khanna J. resigned and hence it was sent by a Member of the Commission) that while making a recommendation for appointment of a Judge of a High Court, the Chief Justice of the High Court should consult his two senior-most colleagues and while forwarding the recommendation should incorporate therein the fact of such consultation and indicate the views of the two colleagues. The unanimous recommendation of this body, it was recommended, should normally be accepted by the executive [80th Report on Method of Appointment of Judges, (1979)]. Interestingly, the Commission had proposed in its questionnaire, constitution of a high level panel (a consultative panel, called "Judges Appointment Commission") consisting of persons known for their integrity, independence and judicial background to ensure dispassionate scrutiny and to eliminate extraneous considerations in the matter of these appointments (the panel was to consist of Chief Justice of India, Minister for Law and Justice and three persons each of whom has been the Chief Justice or a Judge of the Supreme Court) but it dropped the proposal in view of the opposition by most of the High Courts. The Law Commission also recorded its views on transfer of High Court Judges, appointment of senior-most puisne Judge as Chief Justice and so on – all of which need not be set out herein.

8.13 **79th Report of the Law Commission of India**: In the Seventy-ninth Report of the Law Commission of India (on Delay and Arrears in High Courts and other Appellate Courts [1979]), it was recommended that in the matter of appointment of Judges of the Supreme Court, the Chief Justice of India should consult his three senior most colleagues and should, in the communication incorporating his recommendation, specify the result of such consultation and reproduce the views of each of his colleagues so consulted. It appears that this procedure was followed between 1977 and 1979 but given up thereafter. Though the said recommendation applies equally in the matter of appointment to the High Courts, there is no material before us to show whether the said recommendation was ever followed and if so, for what period.

8.14 **Bar Council's 1979 Opinion**: Reference may also be made to an opinion expressed by the Bar Council of India in 1979 that of all the segments of the society, the members of the Bar are preeminently suited to judge persons who should be appointed as Judges of the High Court and Supreme Court and, therefore, any reform or modification in the model for selection and appointment of Judges of the High Court and Supreme Court must provide for adequate representation of the organized bar in the mechanism.

8.15 **Majority view in S.P. Gupta's case**: In S.P. Gupta's case (1981) Justice Bhagwati (who was in the majority) did not accept the concept of the primacy of the Chief Justice of India. He opined that proposal for appointment can emanate either from Chief Justice of India or from any of the other three constitutional functionaries (in the case of appointment to High Court) and that it was open to the Central Government to override the opinion of Chief Justice of India or the other two constitutional functionaries. He said that opinion of all the three functionaries to be consulted (Article 217) stands on equal footing. He added, quite significantly, that if the opinion of Chief Justice of India and Chief Justice of the High Court is unanimous, the Government should ordinarily accept it. In the course of his opinion, the learned Judge also referred to the desirability of a collegium to make recommendation to the President in regard to appointment of Supreme Court and High Court Judges. He thought that such a collegium should be broad-based and should make the recommendation in consultation with wider interests. He referred to the fact that in countries like Australia and New Zealand the idea of a Judicial Commission has been gaining ground.

8.16 **Recommendations of Bar Council of India for Collegium**: The Bar Council of India organized a national seminar of lawyers at Ahmedabad on 17th October, 1981. It opined that the role of executive in the matter of appointment to High Court and Supreme Court should only be formal and minimal. The initiative in the matter of selection and appointment of Judges should invariably rest with the Chief Justice of India. For appointment to the Supreme Court, it recommended a collegium consisting of (1) the Chief Justice of India, (2) five senior Judges of the Supreme Court, and (3) two representatives of the Bar representing the Bar Council of India and the Supreme Court Bar Association. The recommendation of such collegium should be binding on the President though it would be open him to ask for reconsideration of specific cases on stated grounds. In the matter of appointment to the High Court, it was recommended, the collegium should consist of the Chief Justice of the High Court and his two senior-most colleagues and two leading advocates to be nominated by the Bar Association of the High Court as its representatives.

8.17 **121st Report of Law Commission of India for Constitution of a National Judicial Service Commission**: The Law Commission again went into this matter at great length in the year 1987. Its recommendations are contained in the One Hundred Twenty-first Report on a New Forum for Judicial Appointments submitted in July, 1987. After noticing the several recommendations made earlier and the developing trends in other countries, the Law Commission recommended the constitution of a National Judicial Service Commission. It opined "a broad based National Judicial Service Commission representing various interests with pre-eminent position in favour of the judiciary is the demand of the times." The Report recommended that the Judicial Service Commission should be composed of eleven persons, namely, the Chief Justice of India and three senior most Judges of the Supreme Court, the immediate predecessor in office of the Chief Justice of India, three senior most Chief Justices of the High Courts, Minister for Law and Justice, the Attorney General of India and an outstanding law academic. The report further opined that it must be left to such Commission to devise its own procedure for initiation of proposal for recommending individuals for appointment and that no hard and fast rule can be laid down in that behalf. It was observed that recommendation of such a Commission should be binding upon the President but it shall be open to the President to refer the recommendation back to the Commission in any given case along with information in his possession regarding the suitability of the candidate. If, however, after reconsideration, the Commission reiterates its recommendation, the President shall be bound to make the appointment. It was also recommended that the Chief Justice of the High Court, to which appointment is proposed to be made, should be co-opted as a member of the Commission. Besides the Chief Justice of the High Court, the Chief Minister of the State (wherein the High Court is situated) was also recommended to be co-opted. (This was on the premise that Governor is only a constitutional head who has to act upon the advice of the Chief Minister). It is evident that the Law Commission had in mind the appointment to High Courts only. It does not appear to have dealt with appointment to Supreme Court in this Report.

8.18 **Proposals for Constitution of a National Judicial Commission contained in the lapsed Constitution (67th Amendment) Bill, 1990**: In the year 1990, Shri Dinesh Goswami, the then Minister for Law and Justice introduced in Lok Sabha (on 18th May, 1990) a Bill [The Constitution (Sixty-seventh Amendment) Bill, 1990] providing for the constitution of a National Judicial Commission and making appointments to the Supreme Court and the High Court on the basis of its recommendation. The object and reasons appended to the Bill stated the object of the said amendment was to obviate the criticisms of arbitrariness on the part of executive in such appointments and transfers and also to make such a appointments without any delay. The Bill proposed introduction of Part XIIIA (apart from amending Articles 124, 217, 222 and 231) in the Constitution containing Article 307. The proposed Article read thus:

"PART XIIIA

NATIONAL JUDICIAL COMMISSION

307. (1) The President shall by order constitute a Commission, referred to in this Constitution as the National Judicial Commission. Constitution of National Judicial Commission and its functions.

(2) The National Judicial Commission shall make recommendations to the President as to the appointment of a Judge of the Supreme Court (other than the Chief Justice of India), a Judge of a High Court and as to the transfer of a Judge from one High Court to any other High Court.

(3) The National Judicial Commission shall, -

(a) for making recommendation as to the appointment of a Judge of the Supreme Court (other than the Chief Justice of India), a Chief Justice of a High Court and as to

the transfer of a Judge from one High Court to any other High Court, consist of -

1. the Chief Justice of India, who shall be the Chairperson of the Commission; and

2. two other Judges of the Supreme Court next to the Chief Justice of India in seniority;

(b) for making recommendation as to the appointment of a Judge of any High Court, consist of –

(i) the Chief Justice of India, who shall be the Chairperson of the Commission;

(ii) the Chief Minister of the concerned State or if a Proclamation under article 356 is in operation in that State the Governor of that State;

(iii) one other Judge of the Supreme Court next to the Chief Justice of India in seniority;

(iv) the Chief Justice of the High Court, and

(v) one other Judge of the High Court next to the Chief Justice of that High Court in seniority.

(4) Subject to the provisions of any law made by Parliament, the procedure to be followed by the National Judicial Commission in the transaction of its business shall be such as the President may, in consultation with the Chief Justice of India, by rule determine.

(5) The National Judicial Commission shall have a separate secretarial staff and their conditions of service shall be such as the President may, in consultation with the Chief Justice of India, by rule determine.".

8.19 Articles 124, 217, 222 and 231 were proposed to be amended accordingly. One such amendment to Article 124(2) is addition of a proviso to the said clause. It read : "provided that where the recommendations of the National Judicial Commission is not accepted, the reasons therefore shall be recorded in writing." The Explanation appended to the said clause provided further that no person shall be appointed thereunder unless recommended by the National Judicial Commission. A reading of the several provisions of the Bill show an attempt to shift the power of selection of judges of Supreme Court and High Courts to Judiciary in the main. However, the Bill lapsed with the dissolution of that Lok Sabha.

8.19.1 **Arrears Committee**: In the year 1989, the Government of India appointed, on the basis of the recommendation made by the Chief Justices Conference, a Committee of three Chief Justices of the High Courts to go into the question of large arrears in the High Courts and to suggest measures to reduce them. In that connection, the Committee (Justice V.S. Malimath, C.J. Kerala, Justice P.D. Desai, C.J. Calcutta and Dr.A.S. Anand, C.J. Madras) constituted by the Government of India on the recommendation of the Chief Justices Conference, went into and examined the method of appointment of Judges (Chapter VI, Volume II). In Chapter VII of the said Volume, the Committee also considered the merits and demerits of the Constitution (Sixty-seventh Amendment) Bill, 1990 proposing constitution of the National Judicial Commission. Having regard to the high level of the Committee and the elaborate study they made of the subject, it would be appropriate to notice their views.

8.19.2 **Views of Arrears Committee**: In Chapter VI of Volume II, the Committee` noticed the method of appointment of High Court Judges under the Government of India Act, 1919, Government of India Act, 1935, Expert Committee Report of 1947, recommendations of the Judges Conference 1948, the Constituent Assembly debates, the purport of Article 217 of the Constitution, the principles contained in S.P. Gupta's case and the non-observance of the Memorandum of Procedure and observed as follows in paras 6.10 and 6.11:

"6.10 The fact situation aforesaid has led to a loss of credibility and a serious threat to the independence of the judiciary. Alarmed by this development, the Law Commission, jurists, academicians, lawyers, etc. bestowed serious thought upon the matter. An almost unanimous voice came to be echoed to minimize the executive's say and to vest the last word in the matter of appointment of judges in the Chief Justice of India.

6.11 The present system of appointment of Judges to the High Courts has been in vogue for about four decades. It functioned satisfactorily as long as the well-established conventions were honoured and followed. The gradual, but systematic violation and virtual annihilation of the conventions over the past two decades or so is essentially responsible for the present unfortunate situation.

Has the system, therefore, failed or have the concerned failed the system is an all important question. It is apparent that the system has not failed, but all those concerned with operating the system have failed it by allowing it to be perverted."

8.19.3 **Recommendations of the Arrears Committee**: The Committee then noticed the 80th Report of the Law Commission (which affirmed the correctness of the existing procedure) submitted in 1979 as well as the 121st Report of the Law Commission (which suggested the constitution of the National Judicial Service Commission). The Committee also referred to Bhagwati J's opinion in S.P. Gupta, views expressed at the seminar organized by Bar Council of India Trust at Ahmedabad in October 1980 and to the views expressed by Justice Y.V. Chandrachud, then Chief Justice of India in 1983 regarding the constitution of a collegium. After examining the aforesaid material in extenso the Committee made the following recommendation:

"6.19 One common thread which passes through the various suggestions is that the role of the executive in the matter of appointment of Judges should be diluted and that the cause for most of the ills in the functioning of the present system could be traced back to the veto power of the executive. This, indeed, is capable of being remedied by making certain amendments to Article 217 providing for concurrence of the Chief Justice of India, instead of consultation with him, in the matter of appointment of Judges of the High courts. The Committee is conscious of the fact that the recommendation of the joint Conference of the Judges of the Federal Court and Chief Justice of the High Courts, convened by the Chief Justice of the Federal Court, and also a specific amendment moved to Draft Article 193 (corresponding to Article 217 of the Constitution), providing for concurrence of the Chief Justice of India came to be rejected, when the articles concerning the judiciary came up for debate, in the Constituent Assembly. However, it cannot be overlooked that Dr. Ambedkar had expressed the view that the provision regarding consultation with the President of India and the Chief Justice of India was "sufficient for the moment". The experience of the working of Article 217 for the last about two decades has belied the hope and belief expressed by Dr. Ambedkar. A time has come to revive the proposal with regard to the concurrence of the Chief Justice being made a pre-requisite to the appointment of Judges. The Satish Chandra Committee had also expressed a similar view. The misgivings and apprehensions which weighed in rejecting the proposed amendment during the debate in the Constituent Assembly can be allayed by providing that the Chief Justice of India should consult such of the senior Judges of the Supreme Court as he deems necessary, besides the Chief Justice of the High Court concerned before giving his concurrence.

6.20 In the light of the foregoing discussion, the Committee proposes that the main portion of clause (1) of Article 217 be substituted as follows:

"217. (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with 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 with the concurrence of the Chief Justice of India, and shall hold office until he attains the age of sixty-two years:

Provided that the Chief Justice of India shall give concurrence after consultation with such of the Judges of the Supreme Court as he deems necessary and the Chief Justice of the High Court concerned."

The Committee further recommends that in the existing proviso to clause (1) of article 217, the word "further" be added in between the words "provided" and "that". In view of the recommendation of the Committee regarding deletion of Article 224, the expression "in the case of an additional or acting judge, as provided in Article 224, and in any other case" has not been incorporated in the amendment proposed above."

(The Committee also examined the issue of transfer of High Court Judges and after an elaborate discussion, recommended amendment of Article 222 making the consent of the concerned Judge a condition for his transfer).

8.19.4 **Views of Arrears Committee against Constitution of a National Judicial Commission**: In Chapter VII of their Report, the Arrears Committee examined the Constitution (Sixty-seventh Amendment) Bill, 1990. The Committee first noticed the unanimous resolution of the Chief Justices Conference held on October 10-11, 1988 opposing the concept of a National Judicial Service Commission as recommended in the 121st Report of the Law Commission. The Resolution said that such a Commission was "neither necessary nor expedient". It then added: "The strain to which the system has been put in the recent past on account of erosion of the primacy of the judiciary in the matter of appointment to the higher judiciary is capable of being rectified by drawing suitable ways and means within the existing constitutional framework and appropriate measures in that direction being taken expeditiously."

8.19.5 The Committee then noticed the proposed Article 307 (in Part XIIIA) and strongly opposed the inclusion of the Chief Minister in the Commission for appointment of High Court Judges. It observed:

"Instead of removing the vice of executive interference, which has vitiated the working of the present system, the presence of the Chief Minister on the recommendatory body actually elevates him from the status of a mere consultee to the position of an equal participant in the selection process of the recommendatory body. By making the Chief Minister as an equal party, when he is not equipped to offer any view in regard to the merit, ability, competency, integrity and suitability of the candidates for appointment, the scope of executive interference is enhanced." In para 7.11, the Committee recommended a different composition of the Commission. It suggested that besides the Chief Justice of India and two senior-most Judges, two more members be appointed by the President on the recommendation of the Chief Justice of India from out of the sitting Judges of the Supreme Court. In para 7.13, the Committee set out the

procedure to be followed under Article 307 (4) (proposed). Having regard to its relevance it bears reproduction of the said para here. It reads:

"7.13 Article 307(4) provides that the procedure to be followed in the transaction of business by the Commission shall be regulated by the law made by the Parliament and until then, in accordance with the rules made by the President, in consultation with the Chief Justice of India. The procedure to be followed in the matter of initiating recommendation for appointment of Judges and about their consideration by the Commission are matters of vital importance. A wrong and imperfect procedure without necessary safeguards may virtually nullify the object of the Constitutional provision. It is an unsatisfactory situation that till the procedure is regulated by any law made by the Parliament, the same can be prescribed by the President in consultation with the Chief Justice of India. The President would act on the advice of his Council of Ministers. He is only required to consult the Chief Justice of India and consultation is not the same as concurrence. There is, thus, scope for the executive to prescribe by rules a procedure which may not be conducive to the attainment of the object of the proposed amendment. In the opinion of the Committee, the procedure should be prescribed along with the enactment of Article 307 and the amendment of other articles and it should be annexed as a Schedule to the Constitution. That would almost ensure that the prescribed procedure then cannot be amended by a simple majority and the possibility of tinkering with it is minimized. Such procedure should *inter alia* provide for full and formal record of the deliberations of the Commission being maintained which alone would constitute the official record of the transaction of the business of the Commission."

8.19.6 The Committee then analysed the proposed article 124(2) and noticed that according to it, the recommendation of the Commission is not binding upon the President and then referred to the several situations that may arise in that behalf. Accordingly, the Committee made the following recommendations in para 7.18:

"7.18 In the light of the foregoing discussion, the Committee recommends:

(1) That the reasons recorded for not accepting the recommendation of the Commission regarding appointment of a Judge of the Supreme Court shall be communicated to the Commission to enable it to reconsider the matter in the light of such recorded reasons.

(2) That in case the Commission on reconsideration affirms its earlier recommendation, it shall be made obligatory on the President to make the appointment in accordance with such recommendation.

(3) That the reasons should also be required to be recorded in case the appointment is proposed to be made by varying the order in which the names are recommended by the Commission; such reasons should be communicated to the Commission to enable it to reconsider the matter and in case the Commission, after reconsideration, reaffirms the order in which the recommendations had been made, the appointments shall be made in that order.

(4) A reasonable time limit shall be fixed within which the President to take a decision on the recommendation of the Commission."

8.19.6.1 With respect to the appointment of Chief Justice of India dealt with by Article 124(2), the Committee made the following recommendation in para 7.20:

"7.20 The Committee, therefore, recommends that the second proviso to Article 124(2) be deleted and an appropriate proviso be substituted to the effect that the seniormost Judge of the Supreme Court shall ordinarily be appointed as the Chief Justice of India. However, in case he is not proposed to be appointed as Chief Justice of India, reasons therefor shall be recorded in writing and the appointment shall then to be made in consultation with the seven Judges next in order of seniority to the seniormost Judge, after communicating to them the recorded reasons."

8.19.6.2 With respect to Article 217 (appointment of High Court Judges), the recommendations of the Committee, in para 7.22, are similar to those relating to appointment of Supreme Court Judges.

(The Committee also examined Article 222 as proposed to be amended by the said Amendment Act and recorded its recommendations in that behalf).

8.20 **Purpose of 67th Amendment Bill served by the judgement in SCAORA**: We have set out hereinabove the several methods of appointment (to Supreme Court and High Courts) suggested by the various bodies, committees and organizations. We have also set out the method and procedure of appointment devised by the 1993 decision of the Supreme Court in SCAORA and in the 1998 opinion rendered under Article 143. It would be evident therefrom that the 1993 decision gives effect to the substance of the Constitution (Sixty-seventh Amendment) Bill, without of course calling it a 'National Judicial Commission', and without the necessity of amending the Constitution as suggested by the said Amendment Bill. Indeed, it carries forward the object underlying the Amendment Bill by making the recommendations of the Chief Justice of India and his colleagues binding on the President. The 1998 opinion indeed enlarges the 'collegium'. In this sense, the purpose of the said Amendment Bill evidenced by the proviso to Article 124(2) and the Explanation appended thereto, is served, speaking broadly. The method of appointment evolved by these decisions has indeed been hailed by several jurists and is held out as a precedent worthy of emulation by U.K. and others. (See the opinion of Lord Templeman, a

member of the House of Lords, cited hereinabove.) The said decisions lay down the proposition that the "consultation" contemplated by Articles 124 and 217 should be a real and effective consultation and that having regard to the concept of Judicial independence, which is a basic feature of the Constitution, the opinion rendered by the Chief Justice of India (after consulting his colleagues) shall be binding upon the Executive. In this view of the matter, much of the expectations from a National Judicial Commission (N.J.C) have been met. The said Constitution Amendment Bill was, it would appear, prepared after a wide and elaborate consultation with all the political parties and other stakeholders. However, the aspect disciplinary jurisdiction remains unanswered. We may however discuss the concept of an N.J.C. which may cover both appointments and matters of discipline.

9. The Concept of National Judicial Commission

9.1 **The Constitution (67th Amendment) Bill, regarding National Judicial Commission**: The concept of National Judicial Commission has been widely debated in our country. The Constitution (67th Amendment) Bill, 1990 (since lapsed) spoke of a National Judicial Commission. Many other Organizations too have put forward their own versions.

9.2 **Significance of the Composition of National Judicial Commission**: When we talk of a National Judicial Commission, what is fundamentally important is its composition. Its composition should not be such as to affect directly or indirectly the independence of the judiciary and the power of judicial review both of which have been held to be the basic features of our Constitution.

9.3 Our Constitutional system comprises the written Constitution, the conventions which have been developed and are being followed and the interpretation of the Constitution by the Supreme Court. Though Articles 124 and 217 speak of a Judge of the Supreme Court and of the High Court being appointed by the President in consultation with the Chief Justice of India and certain other specified authorities, a convention has evolved over the last 50 years where under the proposal for appointment is initiated by and emanates only from the Chief Justice of the High Court (in the case of appointment to the High Court) and the Chief Justice of India (in the case of appointment to the Supreme Court). The exceptions to this rule have been very few, may be not more than a handful over the last fifty one years. Even where the executive thought of some persons for appointment, the suggestion was put to the concerned Chief Justice and if the latter agreed with it, he sent up the proposal. It can, therefore, be said that a convention that every proposal should emanate and originate from the Chief Justice is firmly established in this country.

9.4 The meaning and ambit of the 'consultation' contemplated under Articles 124 and 217 has been thoroughly debated and pronounced upon by the Supreme Court. Even though a particular interpretation was placed thereon in S.P. Gupta (1981), which was indeed at variance with the aforesaid convention, it was over-ruled promptly by a larger Bench in SCAORA (1993). (The ratio of the said two decisions has already been referred to hereinabove) Indeed even during the period 1981 to 1993, the aforesaid convention was followed, may be with three or four aberrations. What is further significant is that when

the question relating to the meaning of 'consultation' contemplated by the said Articles arose for consideration again in the Presidential reference (1998), the Government of India was asked to clarify its stand with respect to the decision in SCAORA. The learned Attorney General stated, on instructions, - a statement which is recorded in the judgment of the court that the Government of India was not seeking a review or reconsideration of the majority decision in SCAORA and further that the Union of India would accept and treat as binding the answers of the Supreme Court on the nine questions referred to it. The opinion rendered on the Presidential reference has reaffirmed the interpretation of the said expression placed in SCAORA with a slight improvement i.e., the collegium in the Supreme Court was to comprise the Chief Justice of India and four senior judges instead of the Chief Justice of India and two seniormost judges as provided by SCAORA.

9.5 It must, therefore, follow that under our constitutional system, the proposal for appointment of a judge to the Supreme Court or to the High Court should emanate and originate from the Chief Justice of India (and his colleagues, as clarified in SCAORA) or the Chief Justice of High Court (and his colleagues), as the case may be, and from no other quarter. Even if the executive has someone in mind, they must suggest it to the Chief Justice and it is for the latter to decide whether to propose that name or not. Secondly, the consultation contemplated by the said Articles should be a full and effective consultation and the opinion of the Chief Justice of India is entitled to primacy, whether the appointment is to the Supreme Court or to a High Court. The collegium and the procedure indicated in the said two decisions of the Supreme Court must be read into Articles 124 and 217 – or rather the said Articles must be understood as interpreted in the said two decisions. Both these aspects are but facets of the independence of judiciary – nay, its essential components.

9.6 **Independence of Judiciary constitutes a basic feature**: Independence of judiciary has been repeatedly held by the Supreme Court to be a basic feature of the Constitution (See SCAORA – para 331 at page 647, para 421 at page 680 (of 1993 (4) SCC 441), *Shri Kumar Padma Prasad V. Union of India* 1992 (2) SCC 428 at 456 and *High Court of Bombay V. Sri Kumar* 1997 (b) SCC 339 para 13 at page 355). Similarly the power of judicial review vesting in the Supreme Court and High Courts has also been held to be a basic feature (See *L. Chandra Kumar V. U.O.I* (AIR 1997 SC 1125).

9.7 **Composition of the National Judicial Commission to be consistent with the concept of independence of judiciary**: Since the independence of judiciary constitutes a basic feature it cannot be taken away or curtailed in any manner by an amendment to the Constitution, it can neither be done directly nor can it be done indirectly. In other words, the independence of the judiciary cannot be affected or curtailed by so changing the method of appointment of judges of the Supreme Court and High Court as to impinge upon their independence. For example, if Article 124 and 217 are amended to take away the consultation with the Chief Justice of India, it would vitally affect the independence of the judiciary. In such a case the appointment would in fact be made by the executive acting alone in the case of Supreme Court and in the case of the High Court the element of executive would predominate and the concept of primacy of Chief Justice of India would disappear. The convention that the proposal should emanate from the Chief Justice of India (in the case of Supreme Court) would also come to naught. Similarly, if tomorrow a National Judicial Commission is created and it is so constituted that the executive dominates it, it would equally be violative of the basic structure of independence of the judiciary of our Constitution. It is equally essential that the Commission be presided over by the Chief Justice of Indian and by none else. The composition of the Commission should not also be such that the predominance of judiciary is diluted. Any such measure would be violative of the principle of independence of judiciary which has been accepted and affirmed as a basic feature of the Constitution. Rightly, therefore, the Constitution 67th Amendment Bill provided for a National Judicial Commission, which in the case of appointment to

the Supreme Court, consisted exclusively of the Judges (Chief Justice of India and two seniormost judges of the Supreme Court) and in the case of appointment to the High Court, the Chief Justice of India, the next seniormost judge of the Supreme Court, Chief Justice of the High Court and the Chief Minister of the concerned State. It must also be remembered that the inclusion of the Chief Minister in the National Judicial Commission in so far as the appointment to the High Court was criticized by the Arrears Committee constituted by the Government of India on the recommendation of the Chief Justices' Conference. By introducing a proviso and an Explanation in Article 124(2), pointed out hereinabove, the role of the executive in the matter of appointment was substantially diluted. Not only was the President precluded from appointing any person not recommended by NJC, the President (Council of Ministers) has to record reasons in writing for not accepting a recommendation made by the NJC.

9.8 **Position in the United Kingdom**: In this connection, It would be relevant to notice the following facts : In U.K., the Justice sub-committee on Judiciary under the Chairmanship of Peter Welster Q.C. submitted a proposal, in 1972, that while the Lord Chancellor should make the final proposal to the Queen, he should be assisted by an Advisory Appointments Committee comprising lawyers, Judges and lay members. The proposal was later dropped. Some years later, a proposal to create a Judicial Commission was mooted and debated but this too was dropped. In his reply to a question, the Lord Chancellor Irvine of Lairg stated in the House of Commons, on 15th October, 1997:

> "I earlier announced (official report, 23rd June, 1997 Col. W.A. 145) that I proposed to consult on the merits of establishing a Judicial Appointments Commission. However, in the light of the reasons that I have listed above …….. I have decided not to proceed with further work on a possible Commission".

9.8.1 The reasons given by the Lord Chancellor for dropping the said proposals are the following :

> "It is essential in public interest that the judiciary at every level is of the highest possible quality. Appointments will continue to be made strictly on merit, after the independent views of the judiciary and the Legal profession have been taken into consideration by the Lord Chancellor."

9.8.2 Indeed, the proposal for the constitution of a judicial commission was also criticized severely in England [for example see London Time, 27th May, 1997 and an article on the subject in the Australian Law Journal, Vol.71, Page 582 (1997)].

9.9 **Position in Australia**: In Australia, where the appointments are made by the Executive on the advice of the Attorney General, there have been complaints of political considerations (see Attacks on Judges, CIJL yearbook 1996-97 pages 30-31 and an article by Michal Kirby in the book "Judicial Independence, contemporary debate, 1986", edited by Shimon Shetrut).

9.10 **Position in Canada**: In Canada too, there is widespread dissatisfaction with the method of appointment there (by the Cabinet on the advice of Law Minister and Attorney General). Reference may be had to the Report of the Canadian Bar Association dated August 20, 1985 on the Appointments of Judges of Canada. The Report speaks of political patronage in the matter of these appointments.

9.11 **National Judicial Commission, if constituted, should be on the lines suggested in the Constitution (67th Amendment) Bill**: We must, therefore, emphasise the importance of the composition of the National Judicial Commission if one is thought of. The proper course may be to constitute a National Judicial Commission on the lines of the 67th Amendment Bill and if any departure is to be made therefrom, it should be within the parameters indicated above in the sense that the judicial element should preponderate and the proposal for appointment should originate either from the Chief Justice of India or the Chief Justice of the concerned High Court, as the case may be.

10. The position in certain other countries

10.1 **Position in Japan, American States, Israel and the United Kingdom**: In this connection it would be relevant to mention the following facts which emphasize and illustrate the position obtaining in different countries, evidently the result of a historical process peculiar to each of those countries:

(i) In Japan although the appointment of the Chief Judge of the Supreme Court is made by the Emperor as designated by the Cabinet, and other judges are appointed by the Cabinet, every appointment is made only in consultation with the Chief Judge of Japan. (See page 109 of the article "Independence of the Judiciary in Japan : Theory and Practice" by Japan Federation of Bar Association, in the CIJL Year Book 1992, published by CIJL (Centre for the independence of Judges and Lawyers).

(ii) The American States which are trying to escape from the ills and excesses of the system of 'election' of judges, are contemplating what is called 'Missouri Plan' which means a judicial commission pre-eminently composed of judges and lawyers.

(iii) In Israel, judges are selected by the Judicial Selection Committee. On the basis of their recommendation, the judges are appointed by the President. The Appointment Committee comprises nine members including three judges of the Supreme Court, two lawyers elected by the Bar Association, two members of the Knesset and two Ministers of the Government, one of them being the Minister of Justice, who chairs the Committee. (See pages 174 and 651 of the book "Judicial Independence : Contemporary Debate" by Simon Shetreet and J Deschanes).

(iv) Even in UK, where the appointment is made by the Lord Chancellor - who is invariably a leading lawyer of England and of course a member of the Cabinet - the selection of judges is made in consultation with the head of the division to which the appointment is proposed to be made. In other words, if the vacancy occurs in the Queens Bench Division (QBD), the appointment is made in consultation with the learned Chief Justice. In the case of Family Division, the President of the Family Division and in the case of Chancery Division, the Vice Chancellor, is consulted. If the vacancy occurs in the Court of Appeal, the appointment is made in consultation with the Master of Rolls.

10.2 **Observations of Sir Henry Gibbs**: Having noticed the method of selection in several countries, we may conclude this aspect with the words of Sir Henry Gibbs, Chief Justice of Australia, who observed, in an article in (1987) Australian Law Journal pages 7 and 11, that: "Judicial Commissions, advisory Committees and procedures for consultation will all be useless unless there exists, among the politicians of all parties, a realization that the interest of the community requires that neither political nor personal patronage nor a desire to placate any section of a society, should play any part in making judicial appointments."

10.3 **Executive should have no role in transfer or disciplinary aspect of judges**: So far as the transfer or disciplinary aspect is concerned there is a unanimity of opinion among the jurists that the executive should have no say in the matter; may be Parliament, but certainly not the executive. Once a person is appointed as a judge and takes the prescribed oath, his independence or his conduct cannot be questioned by the executive which is very often the main litigant before the Courts.

10.4 Keeping the above discussion in mind, we suggest two alternative compositions of the National Judicial Commission, if one is thought necessary:-

A

(a) The Chief Justice of India.
(b) Four senior-most Judges of the Supreme Court next to the Chief Justice.
(c) The Union Minister for Law and Justice.

B

(a) The Chief Justice of India.
(b) Four senior-most Judges of the Supreme Court, next to the Chief Justice.
(c) The Union Minister for Law and Justice, and
(d) Two eminent persons (such as former Presidents, Vice-Presidents, former Chief Justices/Judges of the Supreme Court or eminent

jurists, etc.) to be nominated by the President of India, in consultation with the Prime Minister of India and the Chief Justice of India.

Part II : Age of Retirement

1. Age of retirement

11. By virtue of the Fifteenth Amendment to the Constitution effected in 1963, the age of retirement for the judges of the High Courts is 62 whereas it is 65 for the judges of the Supreme Court. A number of members of the judicial family are of the opinion that the age of retirement for the Supreme Court and High Court judges should be the same. The reason given in support of this view is that some judges/chief justices of High Courts, who are about to retire, seek to be elevated to the Supreme Court lured by the attraction of three more years in office; that they hardly have sufficient time to make a contribution. If, however, the reasoning proceeds, the age of retirement is made the same for both the High Courts and the Supreme Court, only those judges, who really wish to work with devotion, would like to come to Supreme Court. It is also pointed out that in U .K., the age of retirement for the judges of the High Court and the Court of Appeal is the same, namely, 75. In India, the uniform age of superannuation can be 65.

11.1 There is of course the contrary opinion that in India, the age of retirement for High Courts and Supreme Court has always been different. Before the Fifteenth Amendment, it was 60 and 62 and now it is 62 and 65. There are no good reasons, according to this viewpoint, to do away with this distinction. It is pointed out that even with this different ages of superannuation, the Supreme Court has produced some very excellent judges.

11.2 Of the two viewpoints mentioned above, the first viewpoint (in favour of identical age of superannuation for the judges of the High Courts as well as the Supreme Court) appears to be more reasonable and acceptable. Be that as it may, we are only putting forward these ideas to generate a debate and to elicit the opinion of concerned and enlightened members of the judicial family and public.

2. Post-retirement assignments

12 A number of enactments passed by Parliament and the State Legislatures have created a number of tribunals, commissions and other similar bodies to which the persons who have been the judges/chief justices of the High Courts and the judges/chief justices of Supreme Court of India, are made eligible. Indeed, there are certain non-statutory commissions like Law Commission of India, to which also retired judges/chief justices of the Supreme Court and retired judges/chief justices of the High Courts are appointed. While in the case of certain appointments like chairperson and the members of the National Human Right Commission and the Chairperson of the Press Council of India, the statute itself provides

for the selection being made by a panel of very high officials, in most other cases the selection and appointment lies within the choice of the Central Government or State Government, as the case may be.

12.1 The question raised herein is whether the Central Government or State Government is bound to consult the Chief Justice of India or the Chief Justice of concerned High Court where the retired judge of that court is sought to be appointed to a tribunal, commission or other similar body. Of course, this question arises only where the concerned statute does not provide a particular mode of selection/appointment or does not provide for consultation with the chief justices as a matter of law.

12.2 The apprehension expressed in several quarters is that where the selection/appointment of a retired High Court judge to a commission, tribunal or other such body lies within the exclusive discretion of the Central Government or the State Government and if consultation with the chief justice of the Supreme Court or High Court is not insisted upon, there is a likelihood of the government playing the game of favourites which would indirectly affect the independence and integrity of the judiciary. We have come across instances where such appointments have been made on considerations other than merit and quite often on political considerations. To eliminate room for any such irrelevant considerations, it would be appropriate to provide as a matter of law that where a retired judge is sought to be appointed to a tribunal, commission or other similar body, such appointment should be made in consultation with the concerned Chief Justice -which means that in the case of the retired judge/chief justice of the Supreme Court, the Chief Justice of India will be the consulted and in the case of appointment of a judge/chief justice of the High Court, the chief justice of that Court should be consulted. Such a course would help eliminate irrelevant considerations and would also facilitate appointment of appropriate persons to these bodies.

12.3 In this context, it would not be out of place to refer to a judgment of the Supreme Court in State of A.P. v. K. Mohanlal (1998 (5) SCC). The decision was rendered in an appeal against a judgment and order of the Andhra Pradesh High Court. The matter related to the appointment of judicial and revenue members to the Special Court constituted under section 7 of the A.P. Land-grabbing (Prohibition) Act, 1982. The State enactment provided that the chairman of the Special Court shall be appointed "after consultation with the chief justice of the High Court concerned" (in case of a retired judge of the High Court) and "after nomination by the chief justice of the High Court concerned, after the concurrence of the Chief Justice of India" (in case of the sitting judge of the High Court). However, no such consultation was provided in the matter of appointment of the judicial members and revenue members. Even if a retired district judge was to be appointed as a member of the special court, no such consultation was required. A contention was urged before the court that appointment of members of the tribunal without consulting the chief justice of the High Court concerned, renders the Act unconstitutional. The Supreme Court rejected the contention. Reversing the view taken by the A.P. High Court, the Supreme Court held that absence of consultation with the Chief Justice of the High Court in the matter of appointment of judicial and revenue members does not affect the validity of the Act. They held further that even where a retired district judge is sought to be appointed as a member of the tribunal, no such consultation is necessary. They, no doubt, clarified that a sitting district judge can be appointed as a member of the Tribunal only with the concurrence of the High Court as provided in Article 235. The decision, it must be remembered, was concerned only with the constitutional validity of enactment and not with the desirability of such consultation, whereas here we are concerned with the desirability of such a course. In the interest of independence of judiciary , the desirability whereof was emphasized even in the aforesaid decision, we are of the provisional opinion that such consultation should be made mandatory even where retired judges or judicial officers are sought to be appointed to tribunals, commissions and similar bodies.

Part III: Transfer of Judges of the High Courts

13. **Policy of transfer of Judges of the High Courts**: The transfer of Judges of High Court from one High Court to another otherwise than by way of disciplinary action has been a knotty issue. A Full Bench of the Gujarat High Court held in S.H. Seth V. Union of India (1976 (17) Guj. L. R. 1017) that no judge can be transferred without his consent. It was, however, reversed by the Supreme Court in Union of India v. S.H.Seth (1977 S.C. 2328). This issue was prominently discussed and the principles governing the issue laid down in the 1993 decision of the Supreme Court in SCAORA, and supplemented in Ashok Reddy v. Union of India (1994 (2) S.C.C. 303, making a departure from the principles enunciated in S.P. Gupta on this issue. These decisions have, of course, to be understood in the light of the Transfer Policy devised by the Government of India in 1980-81. Mercifully, this policy has now been given up except in the case of Chief Justices of High Courts. In this view of the matter, it is not necessary to refer to the ratio of S.H. Seth or S.P. Gupta in this behalf. The law laid down in 1993 decision of the Supreme Court in SCAORA supplemented as it is by Ashok Reddy is adequate to meet the situation. So far as the transfer of the Chief Justices is concerned, it is an altogether different matter and governed by different considerations. Even so, a few observations on the issue of transfer may not be out of place.

13.1 **Merits and demerits of the policy of transfer**: While on the question of transfer, it is time now to evaluate the merits and demerits of the policy of transfer. In its 14th Report on Reform of Judicial Administration, the Law Commission of India had opposed the transfer of High Court Judges as a matter of policy. It said that Judges are recruited mainly from Bar and that the argument of local connections and prejudices "has not much force". It opined that it would be "unjust to treat members of the Bar or the service appointed to the High Court judiciary as suspects who need to be moved from place to place to keep them to correct standards". While referring to the idea of a "unified cadre of High Court Judges with free transfers all over the country", the Law Commission opined that such a system would lead to difficulties in the way of leading members of the Bar accepting the office.

13.2 **Inconsistent policy of transfer of judges**: In spite of the said opinion of the Law Commission, the Government of India evolved a general policy of transfer of High Court Judges contained in the Press Note issued on January 28, 1983. Several transfers were effected thereafter which have been criticized by the Satish Chandra Committee as not in keeping with the principles enunciated in the said Press Note. Furthermore, experience shows that barring some exceptions, the transferred Judges, even the efficient among them, have lost interest in judicial work. Many of them felt that they have been unjustly and arbitrarily picked out for transfer. They point out that the transfers have not been effected with an even hand. Self discipline has indeed suffered on account of these transfers. As a matter of fact, no consistent policy was followed in this matter. Judges appointed during a particular period were, as a rule, transferred, while Judges appointed later were not. In short, the transfer policy as a whole has produced its own defects and anomalies.

13.3 **Adverse effects of appointing outsider as Chief Justice of a High Court**: In the recent Conference of Chief Justices, it is reported, a decision has been taken to discontinue the policy of transfer of Judges of the High Courts. However, the policy regarding having an outsider as Chief Justice in every High Court has been left untouched. The experience shows that in the matter of appointments of judges to the High Court the outside Chief Justices suffer, as they do, by lack of knowledge as to ability,

character and performance of the members of the Bar and therefore do, and do have to, rely upon the advice of some of the local judges who may not necessarily be the senior-most. In the matter of recommending members of the Bar for appointment to High Court, he goes by the opinion of such judges. It is indeed not possible for any outside Chief Justice to know of all the leading members of the Bar, practicing in various jurisdictions, within a few months, more particularly in the bigger High Courts. Moreover, it is seen that some of the transferred Chief Justices did not evince sufficient interest and commitment to the court to take requisite interest in the administration of the State judiciary as a whole and are also not inclined to undertake effective and sometimes unpleasant decisions to maintain discipline and promote efficiency at all levels. May be it is necessary now to reconsider this policy too.

13.4 It may perhaps be necessary to clarify that none of the statements made herein affect the scope or relevance of Article 222 of the Constitution. We were concerned with transfer as a matter of policy. The power under Article 222 and its exercise in appropriate cases shall remain untouched.

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Part IV: Procedure for checking deviant behaviour and removal of the judges of the High Court and the Supreme Court

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14. Procedure relating to removal of judges: Clause (4) of Article 124 provides that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, has been presented to the President in the same session, for such removal on the ground of proved misbehaviour or incapacity. By virtue of Article 218, the said clause in Article 124 applies equally to the Judges of the High Courts. It is true that in other democratic Constitutions too, this appears to be the procedure. For example, under the U.S. Constitution, Judges of the Supreme Court are removable only by a process of impeachment. In England, Judges are removable by the Crown only on a joint address moved by both Houses of Parliament. This is also the procedure provided by the U.K. Supreme Court Act, 1981. The provisions of Canadian and Australian Constitutions are identical. So is the Irish Constitution.

14.1 But this fact should not deter us from exploring new methods appropriate to our conditions. Just as in the matter of appointment of Judges of High Court and Supreme Court we have not followed the model provided by the aforesaid Constitutions, we need not adhere to their model in the matter of removal. It is also to be noted that apart from providing for removal of Judges of Supreme Court and High Courts in the aforesaid manner, the Constitution does not provide for deviant behaviour not amounting to proved misbehaviour. Firstly, the expression “proved misbehaviour” is not defined. It is left to the Parliament to decide from case to case. Experience of United States of America: Under the U.S. Constitution, Judges (Federal) are to serve for life during “good behaviour” (Article I). Judges in USA, it is not disputed, are removable by impeachment but impeachment can only be for “treason, bribery or other high crimes and misdemeanours” [Article II (4)]. Since these expressions are also not defined, a controversy has arisen there whether any bad behaviour not amounting to “high crimes and misdemeanour” can furnish a ground for disciplining the Judges otherwise than by removal through impeachment process. This problem has been met in two ways : (a) in 1973, the judiciary passed the Code of Conduct for U.S. Judges and (b) in 1980, the Congress passed the Judicial Councils Reform and Judicial conduct and Disability Act. The said Act gives to the federal judiciary a charter to devise its own

self disciplinary framework. The Act provides for any person filing a complaint that a federal judge "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or …… is unable to discharge all the duties of office by reason of mental or physical disability." Since 1990, the chief judge may also act without a formal complaint upon information that suggests that action is appropriate. After considering the complaint, the chief judge may dismiss it by a written order stating reasons, if it does not comply with the Act's requirements or if it is directly related to the merits or substantive decision in a case or if it is founded to be frivolous. If, however, the chief judge does not dismiss the complaint, he will appoint a special committee to investigate the complaint and file a written report with the circuit judicial council (created by the Congress in 1939). The Council may itself conduct additional investigation. On conclusion of such investigation, the council may report that a judge retire, impose a freeze on assignment of cases to the judge, or issue a private or public reprimand. The Act of course does not empower the council to remove a judge from office; in such an event, it has to refer the matter to the Judicial Conference which may, if it agrees with the findings of the Council, refer the matter to the House of Representative for impeachment. Removal can be effected only by impeachment. It would be appropriate now to quote the relevant portions of section 372 of the aforesaid Act.

"Sec.372. Retirement for disability; substitute judge on failure to retire; judicial discipline:

(a) Omitted.

(b) Omitted.

(c) (1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may-

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events. The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly –

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph. A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371 (a) l of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council –

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behaviour whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behaviour voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behaviour, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7) (A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that judge appointed to hold office during good behavior may have engaged in conduct –

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of

any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8) (A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration or impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

14.2 A reading of the above provisions makes it evident that the system evolved in the US is a fairly elaborate one, involving several layers/stages in the process viz., (a) Chief Judge of the Circuit, (b) a Special Committee comprising the Chief Judge of the Circuit and equal number of Judges from Circuit and District Judges (c) Judicial Council of the Circuit and (d) the Judicial Conference. The Judicial Council can order several measures (short of removal), as may be found appropriate. If, however, the facts and circumstances call for removal, the Judicial Council has to refer the matter to the Judicial Conference, which will examine the matter again and if it concurs with the findings of the Judicial Council, send the matter to the House of Representatives for initiating impeachment proceedings. At each stage, the matter is considered afresh. This procedure thus is full of safeguards and ensures that there is no failure of Justice. Of course, it is obvious that the solution evolved in U.S.A. is peculiar to their judicial system but it certainly helps us in evolving a solution consistent with our constitutional system and the ground realities. The above procedure, it is evident, is not applicable to the Judges of the Supreme Court but only to Circuit and District Judges and Magistrates in the federal judiciary.

14.3 Performance of higher judiciary in India:

Coming to the higher judiciary in India, its performance over the last 50 years and more has been extremely gratifying and admirable. It has evoked the admiration and appreciation of the world community in general and of judicial institutions in particular. It has succeeded in protecting and promoting the public good by effectuating and expanding the horizon of the fundamental rights and by enhancing the sanctity and relevance of the Directive Principles of State Policy. It has produced some very brilliant and extraordinary judges – known for their learning, integrity and devotion to law as a means of enhancing public good –whom any nation can be justly proud . But there have been some exceptions too and in the recent years more such exceptions are coming to light. There has been, of late, public concern over judges note observing working hours, being away from court-work even without seeking leave, unduly delaying judgments and otherwise conducting themselves in an un-judge like manner. It is these few persons whose conduct calls for disciplinary system so as to preserve the fair name of the judiciary. Such a system will protect those unjustly accused. That apart, the very existence of the system will be a deterrent and will obviate the need to use it.

14.4 **Uncertainty as to the of meaning of "proved misbehaviour"**: In India, a question may arise, what is "proved misbehaviour" contemplated by Article 124(4) and whether there is any remedy against undesirable behaviour not amounting to "proved misbehaviour". Indeed, this is not an easy question. Since the expression is not defined by the Constitution or by any law made by Parliament and it is left to the Parliament alone to apply its interpretation as to what it means in a given case, we are left in a very uncertain situation. For example, whether not observing the court hours and holding the court at one's own pleasure or not delivering judgments for years together amounts to "misbehaviour" within the meaning of Article 124(4)? Similarly, whether reserving judgments for years together and leaving them un-disposed of till their retirement or transfer, as the case may be, amounts to misbehaviour? It is difficult to answer these questions. But one thing can be stated with certainty : bribery, misappropriation, commission of serious crimes or crimes involving moral turpitude while in office and acts of treason do certainly constitute "misbehaviour" within the meaning of Article 124(4). In the light of this uncertainty and also because the impeachment process has practically become unrealistic, we have to evolve standards to determine "proved misbehaviour" in Article 124(4) so as to enable us to appreciate what is undesirable behaviour not amounting to "proved misbehaviour".

14.5 **Need to evolve effective measures to deal with bad behaviour or deviant behaviour not amounting to "misbehaviour"**: Subject to taking a final view at a later stage i.e. after considering the responses received, we may say, for the purposes of this Consultation Paper that "proved misbehaviour" in Article 124(4) means (a) committing an act which could be an offence set out in the Prevention of Corruption Act, 1988 (b) committing an act which amount to an offence involving moral turpitude (c) committing an act which may amount to any of the offences under Sections 121 to 124-A, 153-A and 153-B of Indian Penal Code. For these acts, removal shall be the normal punishment. Other undesirable acts and conduct inconsistent with the dignity of the office of a Judge of High Court shall be treated as 'conduct unbecoming of a judge' but not amounting to "misbehaviour". The next question is what is sanction against conduct unbecoming of a judge not amounting to "misbehaviour" as defined hereinabove. It cannot be denied that it has become necessary to prescribe some procedure for this kind of bad behaviour or deviant behaviour. None exists as at present. For example, going by reports

emanating from respectable quarters, a few Judges of the High Court do not come to Court at the appointed hour and do not sit till the hour they are supposed to sit. They come at their own sweet will and rise also at their will. Judgments are not delivered promptly. Cause-lists are manipulated in the sense that heavy matters are directed to be placed at the bottom of the list and light matters taken up. Lawyers refer to a practice of some Judges directing the listing of particular cases before them without reference to the Chief Justice – and the Chief Justices (who are invariably from another High Court) are quietly acquiescing in the practice because they do not wish to offend any Judge and invite or provoke controversy. A few Judges, with an eye on populism showing injudicious liberalism in admitting almost all cases and liberally granting interim relief. This not only contributes enormously to the work load in the High Courts but also causes grave prejudice to public interest and administration of justice. In such a situation, it will be unreasonable to be astonished if affected parties, be they private litigants or public bodies raising eye brows and even voicing muted suspicion on judicial motives. There are some complaints that some judges even Chief Justice are not seen to keep a distance from centres of political powers which would be conducive to the image of the neutrality. It is well to remember that judiciary ceases to be an effective instrument if its image and reputation for integrity and independence suffers. There cannot be a greater disaster to our polity than this. A few among the Judges have conveniently forgot the qualities required of a Judge. When Justice Frankfurter retired from the U.S. Supreme Court, New York Times wrote an editorial, saying *inter-alia*: "History will find greatness in Felix Frankfurter as a Justice, not because of the result he reached but because of his attitude towards the process of decision. His guiding lights were detachment, rigorous integrity in dealing with the facts of a case, refusal to resort to unworthy means, no matter how noble the end, and dedication to Court as an institution." The result of not adhering to the standards is that in spite of increasing the Judge strength, the arrears are rising in several High Courts. We do not intend to create an impression that everyone or all the Judges in the High Courts, are doing this. A few may be doing it but that is affecting the work culture of the Court and is tarnishing the image of the High Courts. Lack of self-discipline and commitment to work among some of the Judges is leading to their disinterest in judicial work. Judges are supposed to work not for salary but to take the office as an honour and as a call of national duty, unconcerned with any other considerations. Though there are not many cases of deviant behaviour, few that are fouling the atmosphere. The Supreme Court did hold that Judges can be prosecuted under the Prevention of Corruption Act subject to the rider that in the case of a sitting Judge, permission of the Chief Justice shall be obtained before taking proceedings against him under the Act. Vide *Veeraswami vs Union of India* (1991 (3) S.C.C. 655]. The exercise of the power to punish for contempt of court increasingly been seen as a means of suppressing all criticism. Justice Frankfurter had said about such criticism - no doubt in the context of the First Amendment to the U.S. Constitution: "Judges as person or courts as institution are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice, they may forget their common human frailness and fallibilities. There have sometimes been martinets upon the Bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they call their dignity. Therefore, judges must be kept mindful of their limitations and of their ultimate responsibility by a vigorous stream of criticism expressed with candor however blunt". (*Bridges v. California* (314 U.S. 252 at 289-1941). Judges were expected to be "a body of men who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be as free, impartial and independent as the lot of humanity will admit. So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. …..That is what courts are for". (*U.S. v. United Mine Workers of America* 330 U.S. 258 at 308-9).

14.6 **Need for effective measures to deal with misbehaviour of judges**: It has become imperative to check undesirable and unhealthy tendencies in the judiciary. The present procedure of impeachment is totally inadequate and for various reasons is impractical. According to some legislators/Parliamentarians and other holders of high executive offices, a "nice" Judge is one who can be approached by them in matters of their interest.

14.6.1 After a great deal of cogitation and with anguish in our hearts, we suggest that some effective measures ought be evolved to rectify the above mentioned situation. One measure suggested is the following:

14.7 **How complaints of deviant behaviour should be dealt with**: A committee comprising the Chief Justice of India and four senior-most Judges of the Supreme Court should examine complaints of deviant behaviour of all kinds and complaints of misbehaviour and incapacity$^{\varphi}$. Their scrutiny at this stage would be confined to ascertain whether (a) there is no substance in the complaint or (b) there is a prima facie case calling for a fuller investigation and enquiry or (c) whether it would be sufficient to issue a warning to the erring Judge or give other directions to the concerned Chief Justice regarding allotment of work to such Judge or to transfer him to some other court. If, however, they find that the matter is serious and that it calls for a fuller investigation or enquiry, they will refer the matter for a full enquiry to the committee (constituted under the Judges' Inquiry Act, 1968). The committee shall be a permanent committee and not one constituted for a particular case or from case to case, as is the present position under Section 3(2) of the Act. The committee shall be constituted by the President on the advice of the Chief Justice of India. Their term and other conditions of service shall be such as may be specified in the notification constituting the committee. The committee shall enquire into the allegation against the Judge in accordance with the procedure prescribed by the said Act, i.e. in accordance with sub-sections (3) to (8) of Section 3 and sub-section (1) of Section 4 of the said Act and submit their report to the Chief Justice of India.

14.8 The question then arises as to who should take appropriate action on the basis of the report submitted by the enquiry committee. The two suggestions for consideration are:

(i) The present method of removal by Parliament, in accordance with the existing relevant provisions of the Constitution; or

(ii) The report should be considered by the full court of the Supreme Court. The full court shall take a decision whether (a) the Judge concerned ought to be exonerated of the charge or the charges levelled against him or (b) whether any charge or charges are established against him and if so, whether the charges held proved are so serious as to call for his removal (misbehaviour) or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court (deviant behaviour not amounting to misbehaviour). If the decision of the full court of the Supreme Court is to remove the Judge, the recommendation to that effect shall be made by the Supreme Court to the President of India who shall pass orders accordingly. The decision of the Full Court of the Supreme Court means the decision arrived at by two-thirds of the Judges of the Supreme Court present and voting and a simple majority of the total effective strength (and not sanctioned strength) of the Supreme Court. This procedure shall equally apply in case of Judges of the Supreme Court as well with this qualification that the judge against whom complaint is received or enquiry is ordered, shall not participate in any proceeding affecting him.

φ (Every complaint should be supported by an affidavit and should clearly disclose the name, designation and address of the informant/complainant. Complaints not adhering to the said requirements shall not be entertained).

14.9 One would be inclined to think that ordinarily speaking, a Judge with any decency in him, and any one with self-respect, would resign, once the Judges' Committee records a finding against him on any charge/allegation and that ordinarily speaking again, there would be no occasion for imposing any corrective measures or for recommending his removal.

14.10 **Pros and cons of the methodology suggested herein**: Of course, it is equally possible that some people may think that the present mechanism for removal of a Judge of a High Court or Supreme Court is adequate and that it does not require any change. They may believe that the procedure proposed herein seriously undermines the independence and status of the Judges of the High Court and Supreme Court. They may also say that by this procedure, the Supreme Court would become an administrative superior exercising disciplinary jurisdiction over the High Court Judges which was never contemplated by the Constitution; by conferring the appellate jurisdiction on Supreme Court, it does not become an administrative superior to High Courts and so on. Of course, the contrary argument would be that by conferring such jurisdiction, the Supreme Court does not become an administrative superior, just as the Parliament is not constituted the administrative superior of the High Courts and the Supreme Court by empowering it to remove the judges by the process of impeachment; indeed, it may be better to vest the power to recommend removal and the power to make other appropriate directions in a judicial body (highest court in the judicial family) rather than vesting it in a political body like Parliament; the procedure evolved in U.S.A similar to the one suggested here has not compromised the independence of the federal judiciary. The present solution – wherein the only and extreme remedy of removal has practically become impractical besides being a purely political process. It is not also in the larger interest of the judiciary.

14.11 We have pondered over all these contending arguments. We are of the provisional opinion that some procedure akin to the one obtaining in the U.S.A. may be necessary to deal with the few deviant elements in the judicial family. Indeed, we wish to be instructed in this behalf by public opinion. Can you find another or a better procedure? In suggesting a change in the mechanism relating to removal of a Judge of a High Court or of Supreme Court and in suggesting other measures in that behalf, the Commission is actuated by a concern for preserving, protecting and promoting the independence of judiciary – the corner stone of our Constitutional system - its reputation, its image and its integrity. It cannot be denied that procedure for removal of a Judge is one of the facets of the independence of judiciary. The Commission is keenly aware of the need to strengthen and enhance such independence. At the same time, the commission cannot but take notice of rising trend of public opinion as to the perceived propensity towards deviant behaviour among a few members of judicial family. Independence of judiciary and the security of tenure is not a licence for deviant or capricious behaviour – a total misunderstanding of the very concept of judicial independence. The aforesaid suggestions are made not with a view to cast stones at the judiciary but out of a concern for preserving and enhancing its independence and reputation. It is because of what experience has taught us that we have suggested that the power to deal with deviant behaviour should rest in the apex court and in apex court alone. We have also suggested retention of the procedure for conducting enquiry into such charges, devised by the Judges' Inquiry Act, 1968, as well as the mechanism created by the said Act; indeed we have tried to make it permanent. The Commission has consciously excluded any role for the executive or any member of the executive in this mechanism – as it ought to be. There may be room for executive say in the matter of appointment but it is totally impermissible in the matter of removal or in disciplinary matters. Once appointed, the judge is supposed to be totally independent which includes independence from executive influence.

14.11.1 The Commission is of the opinion that the mere creation and existence of a mechanism as suggested herein should itself operate as a check against deviant behaviour. Where, however, deviance occurs, it is necessary that it is dealt with appropriately.

14.11.2 It is clear that if any of the above proposals is to be implemented, the relevant provisions of Article 124 may have to be amended appropriately – may be, certain new provisions may also have to be inserted.

QUESTIONNAIRE

on

SUPERIOR JUDICIARY

Part I: Procedure for appointment of Judges of the Supreme Court and the High Court

1. Should the pre-S.P. Gupta situation be revived – which means the primacy of the Chief Justice of India and no obligation to consult other Judges, though, as a matter of fact, such consultation was done in every case?

Yes ☐ No ☐

2. Should the position adumbrated in S.P. Gupta be restored – which means 'no primacy' of Chief Justice of India – and, of course, no collegium.

Yes ☐ No ☐

3. (a) Whether the collegium proposed to be created by the Constitution (Sixty-seventh Amendment) Bill, 1990 is the appropriate one?

Yes ☐ No ☐

(b) And if yes, what is your opinion regarding the changes suggested in it by the Arrears Committee (1990)?

Yes ☐ No ☐

4. (a) Whether, in your opinion, the 'collegium' suggested by the 1993 and 1998 opinions of the Supreme Court – (the 'collegium' created by the 1998 opinion is indeed more broad-based than

the one suggested in the 1990 Amendment Bill) – is adequate to meet and satisfy the requirements of a competent and independent judiciary or does it require to be modified?

Yes ☐ No ☐

Suggestions:

(Not more than 200 words)

(b) If the existing mechanism is to be modified, what should be the alternate mechanism?

(Not more than 200 words)

5. (a) Should a National Judicial Commission (NJC) be constituted?

Yes ☐ No ☐

(b) If your answer to the above is YES, then suggest the composition of NJC:

(c) Should the composition of NJC be the same as contemplated by the Constitution (Sixty-seventh Amendment) Bill, 1990?

Yes ☐ No ☐

(d) If not, whether its composition be changed to include the Union Minister of Law and Justice and/or one or two other members?

Yes ☐ No ☐

Note: (1) Two alternative models of National Judicial Commission (apart from the one suggested in the Sixty-seventh Amendment Bill and the 1993 and 1998 decisions of the Supreme Court) based upon the theory of predominance of judiciary, are set out hereinafter to enable you to indicate your choice. They are:

A

(a) The Chief Justice of India.
(b) Four senior-most Judges of the Supreme Court next to the Chief Justice.
(c) The Union Minister for Law and Justice.

B

(a) The Chief Justice of India.
(b) Four senior-most Judges of the Supreme Court, next to the Chief Justice.
(c) The Union Minister for Law and Justice, and
(d) Two individuals (former Chief Justices/Judges of the Supreme Court, eminent jurists or former Chief Justices of the High Courts) to be nominated by the President of India in consultation with the Prime Minister of India and the Chief Justice of India.

(2) In the matter of appointment to the High Courts, the composition of the National Judicial Commission shall be the same, except that the Chief Justice of the concerned High Court shall be an invitee while considering appointment to that High Court.

6. (a) Whether the proposal for a National Judicial Commission [as indicated in Question Nos. 5 above, i.e. with the involvement of Executive and/or certain nominees] is an improvement over the existing methodology?

Yes ☐ No ☐

(b) Or would it be a retrograde step?

Yes ☐ No ☐

(c) In this connection, it may be remembered that members of the subordinate judiciary are selected by the High Court (appointment orders being issued formally by the Government/ Governor) as pointed out hereinbefore. Under the 1993 and 1998 decisions of the Supreme Court, selection of Judges of Supreme Court and High Courts has also been vested in judiciary alone. Should not this methodology be given some more time before judging its merit?

Yes ☐ No ☐

(d) Are frequent changes in the methodology of appointment process advisable?

Yes ☐ No ☐

7. (a) So far as the initiation of proposals is concerned, should the proposals emanate only from the Chief Justice of India in the case of appointment to Supreme Court?

Yes ☐ No ☐

(b) In the case of High court, should the proposal be initiated only by the Chief Justice of the Court or by the Chief Justice in consultation with the two senior-most Judges of that Court?

Yes ☐ No ☐

Note: A distinction in the case of the High Court may be called for in as much as in the proposed National Judicial Commission, only the Chief Justice of the High Court would be an invitee and no other Judge. Hence, it would be more appropriate to provide that in the case of High Court, the name should be initiated by the Chief Justice and two senior-most Judges of the High Court. This question is relevant only in case a National Judicial Commission (with whatever composition) is constituted.

(c) Whether every member of the Commission be entitled to initiate proposals?

Yes ☐ No ☐

8. (a) Is it to be provided that the National Judicial Commission will consider the recommendation so made as provided in the note below Question No. 7 and shall render their advice to the President and that the President shall make the appointment accordingly?

Yes ☐ No ☐

(b) Should it be provided that it shall however be open to the President to ask for reconsideration of a particular name along with reasons, if any, in support of his view and that if on such reconsideration, the National Judicial Commission reiterates its recommendation, the President shall be bound to make the appointment?

Yes ☐ No ☐

9. Do you wish to make any other suggestions relating to procedure of appointment of judges? If so, give details hereunder.

(Not more than 200 words)

Part II: Age of Retirement

10. In the United Kingdom, the age of retirement for Judges of the High Court and the Court of Appeal is the same, namely, 75 years. In India, however, the age of retirement of a Judge of the Supreme Court is 65 years whereas the age of retirement of a Judge of the High Courts is 62 years. In order to attract Judges of the High Court who really wish to work with devotion in the Supreme Court, it is felt that it would be reasonable to prescribe a uniform age of retirement, say 65 years, for both the Judges of the Supreme Court and of the High Courts. Do you agree with this suggestion?

Yes ☐ No ☐

11. Now-a-days, retired Judges/Chief Justices of the High Courts/ Supreme Court are appointed to various tribunals and other statutory/non-statutory bodies. In order to eliminate irrelevant considerations and favouritism as also to safeguard the independence and integrity of the judiciary, it is suggested that, while making appointment of retired Judges/Chief Justices of the Supreme Court, the Chief Justice of India should be consulted and in the case of appointment of a retired Judge or Chief Justice of the High Court, the Chief Justice of that High Court should be consulted.

(a) Do you agree with the above suggestion?

Yes ☐ No ☐

(b) In case the answer to part (a) is in the negative, please state the specific reasons for such disagreement.

(Not more than 200 words)

12. Should consultation with the Chief Justice of the High Court/Chief Justice of India be made mandatory where retired judges/judicial officers are sought to be appointed to tribunals/statutory and non-statutory bodies?

Yes ☐ No ☐

13. Do you wish to make any other suggestions relating to the age of retirement of Judges of the Supreme Court and of the High Courts? If so, please give details.

(Not more than 200 words)

14. Do you wish to make any other suggestions relating to the appointment of retired judges/judicial officers who are sought to be appointed to tribunals/statutory and non-statutory bodies. please give details.

(Not more than 200 words)

Part III: Transfer of Judges of the High Courts

15. (a) Whether the policy of transfer of High Court Judges needs to be reviewed?

Yes ☐ No ☐

(b) If not, should the present policy continue?

Yes ☐ No ☐

16. (a) Whether the policy of having a Chief Justice of High Court from outside the State should be continued?

Yes ☐ No ☐

(b) If not, should this policy also be discontinued?

Yes ☐ No ☐

17. Whether the principles enunciated in SCAORA v. Union of India (1993(4)S.C.C. 441), as supplemented by Ashok Reddy v. Union of India (1994 (2) S.C.C. 303) be reviewed?

Yes ☐ No ☐

18. Do you wish to make any other suggestions relating to transfer of judges of the High Courts? If so, please give details.

(Not more than 200 words)

Part IV: Procedure for checking deviant behaviour and removal of the judges of the High Court and the Supreme Court

19. (a) Whether there is need for creating a new mechanism to check deviant behaviour among Judges or whether the present dispensation should continue?

New mechanism needed ☐ Present dispensation should continue ☐

(b) Whether, the only sanction, in case of deviant behaviour or incapacity, should be removal alone or whether other types of measures, not amounting to removal, should be introduced?

Removal alone ☐ Other measures ☐

(c) If new measures are to be evolved, should the power to impose those measures be vested exclusively in the Supreme Court as suggested above?

Yes ☐ No ☐

20. Are you in favour of creating a new mechanism (to remove the Judges of High Court) and vesting it in the Supreme Court, as suggested hereinabove? (This means exclusion of Parliament altogether from the procedure for removal of Judges)

Yes ☐ No ☐

21. Should the recommendation of the Supreme Court, whether it be for removal, exoneration or any other kind of punishment, be binding upon the President?

Yes ☐ No ☐

22. If you wish to make any other suggestions relating to procedure for checking deviant behaviour and removal of the judges of the High Court and the Supreme Court, give details hereunder.

(Not more than 200 words)

Ψ See in this connection the Memorandum of the Judges of the Federal Court and the Chief Justices of the High Courts with respect to the provisions of the draft Constitution concerning the judiciary, wherein "concurrence" of the Chief Justice of India was suggested. (B. Shiva Rao: The Framing of India's Constitution Vol. 4 at 193).

∗ Lord Templeman, a member of the Jud. Committee of the House of Lords has this to say with respect to this judgment: " – having regard to the earlier experience in India of attempts by the Executive to influence the personalities and attitudes of members of the judiciary, and having regard to the successful attempts made in Pakistan to control the judiciary and having regard to the unfortunate results of the appointment of Supreme Court Judges of the United States by the President subject to approval by Congress, the majority decision of the Supreme Court of India in the Advocates-on-Record case marks a welcome assertion of independence of Judiciary and is the best method of obtaining appointments of integrity and quality, a precedent method which the British could follow with advantage". (See the article 'The Supreme Court and the Constitution' by Lord Templeman – published in 'Supreme but not infallible' on the occasion of the Golden Jubilee Celebrations of the Supreme Court.) There is, of course, the other view voiced by Sir Robin Cooke, former Chief Justice of New Zealand, who has in his two articles "Making the Angels weep" (Law and Justice Vol. I page 109) and "Where Angels far to tread" (published in "Supreme but not infallible" page 97, Edition 2000) criticized the said two judgments. In the first article he said refereeing to the reasoning of the judgment that "when forgoing reasons are placed alongwith ordinary meaning of Consultation, many lawyers and many ordinary readers would probably not see them as adequate to change the meaning of that word to 'Concurrence'." He, however, concluded : "However vulnerable in detail it will surely be always seen as a dramatic event in the international history of jurisprudence." In the second

article, he opined : "Rather than underling the primacy of the Chief Justice, the opinion (the third judges' case) thus appears to have shifted power, to a significant extent, to a small number of Supreme Court Judges other than the Chief Justice. This may be a far cry from anything envisaged by the framers of the Constitution of 1949 …….. All in all, the opinion of the Supreme Court in the third Judges' case must be one of the most remarkable rulings ever issued by a Supreme National Appellate Court in the Common law world."

β In U.K., judges of High Court and the Appeal Court (Supreme Court) are appointed by the Crown, on the advice of the Lord Chancellor. The Lord Chancellor occupies a position peculiar to that country, he is the head of the Judiciary, a member of the Cabinet and the Speaker of the House of Lords. In Australia, S.72 of the Constitution of Commonwealth of Australia provides merely that justices of the High Court (the Highest Court) shall be appointed by the Governor-General in Council in consultation with the Attorney-General (as provided by S.6 of the High Court of Australia Act, 1979) while judges of the State Supreme Courts are appointed by the Governors on the advice of the government wherein the Attorney-General of the States play an important role. In Canada, judges are appointed by the Cabinet (either federal or provincial) with a major role played by the Minister of Justice/the Attorney-General. In Ireland, judges are appointed by the President on the advice of the government. In Japan, by Emperor as designated by the Cabinet, in Switzerland, judges are elected by the Federal Legislature. In USA, as is well known, the President appoints them subject to confirmation by Senate. There is no uniformity in the procedures followed in different countries. The procedure in each country appears to have evolved over the years having regard to the peculiar constitutional development of each country.

Ψ The facts and the ratio of these case are highly relevant and instructive. The President of India had constituted an Administrative Tribunal for Andhra Pradesh to adjudicate upon the service disputes of employees of the State. The Tribunal was vested with exclusive jurisdiction with respect to appointment, promotion and all other service conditions of persons holding "posts in the Civil Services of the State" among others. The question was whether employees of High Court are not persons holding "posts in the Civil Services of the State". The Court held that though in its ordinary connotation, the employees of the High Court and members of subordinate judiciary can be said to hold "posts in the Civil Services of the State", the other provisions of the Constitution concerning judiciary and the underlying concept of judicial independence must lead us to construe those words narrowly so as to exclude the employees of the High Court, members of the subordinate judiciary and employees in various courts under the control of the High Court. The Constitution Bench speaking through Sarkaria J. referred to Articles 229 to 235 and to the provisions in Chapters V and VI of the Constitution and held that the expression "Civil Services of the State" in Article 371 – D should be construed and understood in the light of the said Articles and the underlying scheme of the said Chapters. In this connection, the Constitution Bench quoted an earlier judgment of the Court saying that "while interpreting words in a solemn document like the Constitution, one must look at them not in a school-masterly fashion, not with the cold eye of the lexicographer but with the realization that they occur in 'a single, complex instrument in which one part may throw light on the other' so that the Constitution must hold a

balance between all its parts". The court concluded by saying "In sum, the entire scheme of Chapters V and VI in Part VI epitomized in Articles 229 and 235 has been assiduously designed by the Founding fathers to ensure independence of the High Court and the subordinate judiciary". (Para 42).

φ (Every complaint should be supported by an affidavit and should clearly disclose the name, designation and address of the informant/complainant. Complaints not adhering to the said requirements shall not be entertained).