

SECURING THE INDEPENDENCE OF THE JUDICIARY—THE INDIAN EXPERIENCE

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We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence.¹

There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured.²

I. INTRODUCTION

An independent judiciary is necessary for a free society and a constitutional democracy. It ensures the rule of law and realization of human rights and also the prosperity and stability of a society.³ The independence of the judiciary is normally assured through the constitution but it may also be assured through legislation, conventions, and other suitable norms and practices. Following the Constitution of the United States, almost all constitutions lay down at least the foundations, if not the entire edifices, of an

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1. Dr. Rajendra Prasad, President of the Constituent Assembly and later President of India, Speech to the Constituent Assembly of India preceding the motion to adopt the Constitution (Nov. 29, 1949), in 11 CONSTITUENT ASSEMBLY DEBATES 498.

2. Dr. B. R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly and later Law Minister of India Reply to the debate on the draft provisions of the Constitution on the Supreme Court, (May 24, 1949), in CONSTITUENT ASSEMBLY DEBATES, vol. VIII, 258.

3. See Philip S. Anderson, *Foreword to Symposium, Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 1, 2 (Summer 1998); Stephen G. Breyer, Comment, *Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3 (Summer 1998); see also K. T. Shah, CONSTITUENT ASSEMBLY DEBATES, vol. VIII, 218-19; preamble to UN Basic Principles on the Independence of the Judiciary; para. 1 of the Draft Universal Declaration on the Independence of the Justice, reprinted in *CIJL Bulletin*, No. 25-26, at 17, 39 (Apr.-Oct. 1990); ABIMBOLA A. OLOWOFOYEKU, *SUING JUDGES* 3 (1993); THE FEDERALIST, No. 78, at 505 (Alexander Hamilton); Archibald Cox, *The Independence of Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 566 (1996); cf. G. N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369, 398 (1992).

independent judiciary. The constitutions or the foundational laws on judiciary are, however, only the starting point in the process of securing judicial independence. Ultimately the independence of the judiciary depends on the totality of a favorable environment created and backed by all state organs, including the judiciary and the public opinion. The independence of the judiciary also needs to be constantly guarded against the unexpected events and changing social, political, and economic conditions;⁴ it is too fragile to be left unguarded.⁵

India has given to itself a liberal constitution in the Euro-American traditions which aims at establishing a free and democratic society. It also aims at the prosperity and stability of the society. Its makers believed that such a society could be created through the guarantee of fundamental rights and an independent judiciary to guard and enforce those rights. Therefore, the framers of India's Constitution dealt with these two aspects with maximum and identical idealism.⁶

A. *Meaning of the Independence of the Judiciary*

The independence of the judiciary is not a new concept but its meaning is still imprecise.⁷ The starting and the central point of the concept is

4. See SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 4 (1994) [hereinafter SHETREET, *JUSTICE IN ISRAEL*]. The independence of the judiciary and the protection of its constitutional position is not achieved in an instant act, but rather over a period of time by a continuous struggle which takes place within the framework of an ongoing and dynamic process. The judiciary, and the social forces which support it, must always be on guard to maintain the independence of the judiciary in the face of unexpected events and changing social, economic, or political circumstances. See *id.*

5. On the fragility of the independence of the judiciary see the recent controversy that arose in the United States on the judgment of Judge Harold Brier in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated on reconsideration*, *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). Among many legal writings on the episode, see Steven Lubet, *Judicial Independence and Independent Judges*, 25 HOFSTRA L. REV. 745 (1997); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges: A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729 (1997). For more instances see, Robert Stevens, *A Loss of Innocence?: Judicial Independence and the Separation of Powers*, 19 OXFORD J. LEGAL STUD. 365 & n.1 (1999) [hereinafter Stevens, *A Loss of Innocence*].

6. See GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 26, 164. See also Mahendra P. Singh, *Constitutionality of Market Economy*, in *LEGAL DIMENSIONS OF MARKET ECONOMY* 1 (M.P. Singh et al. eds., 1997); H. M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 2484, 2944 (4th ed. 1991-96).

7. "While there is widespread concerns on the obvious importance of the judiciary, the literature on it is meagre, and the concept itself has never been fully unpacked." ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY* 3 (1993) [hereinafter STEVENS, *THE INDEPENDENCE OF THE JUDICIARY*]. See also ERIC BARENDT, *AN INTRODUCTION TO CONSTITUTIONAL LAW* 129 (1998) ("But it is unclear what independence of the judiciary really

apparently the doctrine of the separation of powers.⁸ Therefore, primarily it means the independence of the judiciary from the executive and the legislature. But that amounts to only the independence of the judiciary as an institution from the other two institutions of the state without regard to the independence of judges in the exercise of their functions as judges. In that case it does not achieve much. The independence of the judiciary does not mean just the creation of an autonomous institution free from the control and influence of the executive and the legislature. The underlying purpose of the independence of the judiciary is that judges must be able to decide a dispute before them according to law, uninfluenced by any other factor. For that reason the independence of the judiciary is the independence of each and every judge. But whether such independence will be ensured to the judge only as a member of an institution or irrespective of it is one of the important considerations in determining and understanding the meaning of the independence of the judiciary.⁹

In a comprehensive analysis based on the contributions of leading jurists and international bodies on the independence of the judiciary, Shetreet takes into account all of these considerations.¹⁰ Explaining the expression "independence" and "judiciary" separately, he says that the judiciary is "the

means."); Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 74 (Summer 1998) ("It may well turn out that judicial independence is easier to protect than to define.").

8. While the doctrine of separation of powers ensures liberty by preventing concentration of powers in one person or body and thereby puts a restraint on the executive and legislative, it also ensures the exercise of judicial power that is unhindered by the other two branches.

9. See Siracusa Draft Principles on the Independence of the Judiciary, reprinted in CIJL Bulletin No. 25-26, at 59 (Apr.-Oct. 1990), which read:

Independence of the judiciary means (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and (2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

Id. art 2. See also U.N. Basic Principles on the Independence of the Judiciary, paras. 1-7 and Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), paras. 2-8, reprinted in CIJL Bulletin No. 25-26, at 17, 38 (Apr.-Oct. 1990). For some other relevant literature see Pat Polden, *Judicial Independence and Executive Responsibilities: The Lord Chancellors Department and the Country Court Judges*, 25 ANGLO-AM. L. REV. 133 (1996); Cox, *supra* note 3, at 566; Rosenberg, *supra* note 3, at 377; Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996); Dorean M. Koenig, *Independence of the Judiciary in Civil Cases and Executive Branch Interference in the United States: Violations of International Standards Involving Prisoners and Other Designed Groups*, 21 U. DAYTON L. REV. 719, 722 (1996).

10. Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 594 (Shimon Shetreet & Jules Deschênes eds., 1985) [hereinafter Shetreet, *Judicial Independence*]. Much reliance has been placed on this source for the following discussion on this issue.

organ of government not forming part of the executive or the legislative, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication."¹¹ Dealing with "independence," after citing a few definitions with which he does not fully agree,¹² he differentiates between the independence of the individual judges and the collective independence of the judiciary as a body which together constitute "independence." To Shetreet, independence of the individual judge consists of the judge's substantive and personal independence. The former means subjection of the judge to no authority other than the law in the making of judicial decisions and exercising other official duties, while the latter means adequate security of the judicial terms of office and tenure.¹³ The independence of individual judges also includes independence from their judicial superiors and colleagues.¹⁴

Shetreet's treatment establishes that the independence of the judiciary means and includes the independence of the judiciary as a collective body or organ of the government from its two other organs as well as independence of each and every member of the judiciary—the judges—in the performance of their roles as judges. Without the former the latter cannot be secured and without the latter the former does not serve much purpose. Therefore, the two, even if separable, must be pursued together. A system which ignores one or the other cannot make much progress towards, much less achieve, the independence of the judiciary.

B. *Components of the Independence of the Judiciary*

"The independence of the judiciary and the protection of its constitutional position," contends Shetreet, "is not achieved in an instant act, but rather over a period of time by a continuous struggle which takes place within the framework of an ongoing and dynamic process."¹⁵ Therefore, it may not be possible to lay down all the conditions in advance, either in the constitution or otherwise, which will secure and ensure perpetual independence of the judiciary. Such conditions will have to be checked and

11. *Id.* at 597-98.

12. *Id.* at 594-95 ("[A] judiciary which dispenses justice according to law without regard to the policies and inclinations of the government of the day.")

[T]he organs administering justice can only be subordinate to the law, and that only the law can influence the contents of the decisions made by these organs. No other state authority, not even the highest, is allowed to influence the decisions made by the judicial organs. This judicial independence is a guarantee for the fulfilment of the legal security of the individual.

Id. at 594-95, 659 n.11 (quoting Erkki Juhani Taipale).

13. *See id.* at 598.

14. *See id.* at 599.

15. SHETREET, JUSTICE IN ISRAEL, *supra* note 4, at 4.

revised from time to time. A few of the conditions are, however, so basic to the independence of the judiciary that without them judicial independence cannot exist. Some of them may be assigned to the collective independence of the judiciary as an institution, while others may be assigned to the independence of individual judges.

The most important aspect in the independence of the judiciary is its constitutional position. Just as the constitution provides for the composition and powers of the executive and the legislature, it should also provide for the judiciary. If the constitution vests the judicial power in the judiciary, so much the better. Otherwise the constitution may provide for the composition of the courts and their jurisdiction, and for the appointment, terms of office, and tenure of the judges. The constitution must ensure a constitutional position of dignity to the judiciary. The constitution must also ensure administrative independence of the judiciary, such as supervision and control over administrative staff, preparation of its budget, and maintenance of court buildings. It must prohibit ad hoc tribunals and the diversion of cases from ordinary courts, ensure the natural judge principle, ordain respect for and enforcement by the other branches of the government of court decisions, provide for separation of judges from the civil services, and prohibit diminution of judges' service conditions.¹⁶ Some of these matters may be entrusted to legislation; however, there must be enough assurance in the Indian Constitution to that effect so that the judiciary is able to command respect in the eyes of the people and is able to attract the ablest persons as judges.

Again, judicial tenure and appointment must be beyond the control of the executive. The best tenure is for life, but it may also be up to a particular age without any possibility of its abrupt termination. Extension beyond retirement is also inconsistent with the independence of the judiciary. Probationary appointments should not be allowed; part-time, ad hoc, and temporary appointments should be avoided and must be restricted to emergency situations. Moreover, the procedure for such appointments must be the same as for regular appointments. Judicial salaries must be beyond the executive and legislative reach with provision for automatic upward revision with changes in the price index or at least regular and timely adjustment of salaries with the passage of time. Salaries should not be subject to any ad hoc cut except perhaps in emergencies. Transfer of judges without their consent

16. In this regard provisions of the German Basic Law are worth noting. Article 92 vests the judicial power in the judges. GRUNDGESETZ [Constitution] [GG] art. 92. Article 97 provides that the judges shall be independent and subject only to the law, *see id.* art. 97, and that any disciplinary action against the judges under article 97(2) be read with Article 98 and be subject to judicial decision. *See id.* art. 98. Article 101 prohibits extraordinary courts and removal of any one from the jurisdiction of his lawful judge. *See id.* art. 101.

should not be permitted and in no case should such power be with the executive. If transfer is permitted at all, it must be in the hands of the judiciary and must be exercised by a collegial body or at least by more than one person.

Further, impartiality and freedom from irrelevant pressures must be ensured to the judges in all aspects of adjudication. The judges must be and appear to be unbiased and, therefore, should not be members of either the executive or the legislature or of political parties or business organizations, and should not participate in political activities. Similarly the judge should be predetermined. The judges must also fairly reflect the society. They should give due deference to the other branches of the government and refrain from deciding issues which squarely fall within the exclusive domain of the legislature or the executive. It is, however, doubtful whether the judges should resort to the political questions doctrine to deny access to the courts, particularly in matters of fundamental rights.¹⁷

Judges must also be independent from directives, guidelines, or any kind of pressures from fellow judges. The dominant role of the judges in the matter of appointments and promotions, the hierarchy within the judiciary, and the lack of power to write dissents may also have an adverse impact on the independence of the judges. Although accountability of the judiciary is a delicate and controversial issue, it goes hand in hand with its independence.¹⁸

II. CONSTITUTIONAL PROVISIONS AND PRACTICE

A. *Constitutional Provisions*

The Constitution of India is the fundamental law of the land from which all other laws derive their authority and with which they must conform. All powers of the state and its different organs have their source in it and must be exercised subject to the conditions and limitation laid down in it. The constitution provides for the parliamentary form of government which lacks strict separation between the executive and the legislature but maintains clear separation between them and the judiciary. The Indian Constitution specifically directs the state "to separate the judiciary from the executive in

17. See Shetreet, *Judicial Independence*, *supra* note 10, at 636 (supporting the non-involvement of the courts in the political questions). *But see* BARENDT, *supra* note 7, at 147 (asserting a more active role for courts in deciding political questions).

18. "Accountability and independence are not mutually exclusive; most often we can have both." Lubet, *supra* note 5, at 65; Peter M. Shane, *Intrabranh Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 54; *see generally* Symposium, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS (Summer 1998) (conducting an in-depth examination of the interplay between judicial independence and accountability).

the public services of the State.”¹⁹ The Supreme Court has used this provision in support of separation between the judiciary and the other two branches of the state at all levels, from the lowest court to the Supreme Court.²⁰

Although the nature of the Indian Constitution—whether it is federal or unitary—is doubtful, basically it provides for a federal structure of government consisting of the Union and the States. The Union and the States have their distinct powers and organs of governance given in the constitution. While the Union and States have separate legislatures and executives, they do not have a separate judiciary.²¹ The judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts in the middle, and the Supreme Court at the top. For funding and some administrative purposes, the subordinate courts are subject to regulation by the respective States, but they are basically under the supervision of the High Courts.²² The High Courts are basically under the regulative powers of the Union, subject to some involvement of the States in the appointment of judges and other staff and in the finances.²³ The Supreme Court is exclusively under

19. INDIA CONST. art. 50.

20. *S.C. Advocates-on-Record Ass'n v. Union of India*, A.I.R. 1994 S.C. 268 [hereinafter *Second Judges Case*]. Seervai takes objection to the application of Article 50 to higher judiciary on the ground that the judges of the Supreme Court and High Courts are not members of public services. See SEERVAI, *supra* note 6, at 2930. While the objection may not appear to be baseless, the liberal interpretation for a laudable purpose taken by the Court is justified because in England, from where India derives much of the understanding of its law, the judiciary at all levels is treated as part of public service. See STEVENS, *THE INDEPENDENCE OF THE JUDICIARY*, *supra* note 7, at 179, 183-84. Even if Article 50 is confined to the lower or subordinate judiciary, provisions are made in the constitution to insulate higher judiciary from the legislature and the executive. Articles 102 and 191 specifically disqualify members of Parliament and State legislatures, respectively, from holding any office of profit under the Government of India or Government of any State, which will definitely include the office of a judge of the Supreme Court or of any High Court. See INDIA CONST. arts. 102, 191. Further, under Articles 75 and 164 members of the Union and the State executive, respectively, have to be members of Parliament or the State legislature; therefore, they cannot be judges. See *id.* arts. 75, 164. Again, perhaps with the sole exception of Justice Krishna Iyer who was a state legislator from 1952-56 and also a legislator and minister in another state from 1957-59 before he was appointed a judge of the Kerala High Court in 1968 and later of the Supreme Court in 1973, no other legislator or minister has ever been appointed a judge of a High Court or of the Supreme Court. It is notable that the constitution makers had rejected the proposal to bar the politicians from being appointed judges of the Supreme Court or of the High Courts. See 4 B. SHIVA RAO ET AL., *THE FRAMING OF INDIA'S CONSTITUTION* 144 (1968).

21. Although the Constitution includes the Supreme Court of India in the part dealing with the Union (entitled “The Union Judiciary”) and includes the High Courts and subordinate courts in the part dealing with the States which arrangement has also been followed by Seervai, who considers Constitution of India to be federal. See SEERVAI, *supra* note 6, at 283. The constitution does not make a clear division between the Union and the State judiciary as it does with respect to the other two organs of the State. No court is designated the Union or the State court.

22. INDIA CONST. arts. 233-35.

23. See *id.* art. 229, sched. VII.

the regulative powers of the Union.²⁴ Subject to territorial limitations, all courts are competent to entertain and decide disputes both under the Union and the State laws.

The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behavior and independence.²⁵

1. *The Supreme Court*

The Supreme Court of India consists of a Chief Justice of India and twenty-five other Judges.²⁶ The judges are appointed by the President of India "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."²⁷ For "the appointment of a Judge other than the Chief Justice, the Chief Justice of India [must] always be consulted."²⁸ Judges of the Supreme Court, including the Chief Justice, hold their offices until the age of sixty-five. They may resign or be removed from office earlier.²⁹ Removal can take place only on the grounds of proved misbehavior or incapacity of the judge or by an order of the President passed after a majority of the total membership and a majority of not less than two-thirds of the members present and voting in each House of Parliament present an address to the President in the same session for such removal.³⁰ The only attempt so far to remove a judge has been unsuccessful.³¹ Before entering office judges take an oath, to, among other things, perform their duties without fear or favor, affection or ill will, and to uphold the constitution and the laws.³²

Only a citizen of India who has been a judge of one or more High Courts for at least five years, or has been an advocate of one or more High Courts for at least ten years, or is a distinguished jurist in the opinion of the President, can be a judge of the Supreme Court.³³ Judges of the Supreme Court are

24. See *id.* art. 146, sched. VII.

25. See AUSTIN, *supra* note 6, at 184-85.

26. See INDIA CONST. art. 124, §1; Act 22 of 1986. Initially the Indian Constitution had fixed the number of puisne judges at seven.

27. *Id.* art. 124, § 2.

28. *Id.* proviso.

29. See *id.* proviso.

30. See *id.* art. 124, §§ 4 -5.

31. See Case of Justice V. Ramaswami in 1993. For details see MAHENDRA P. SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA 417 (9th ed. 1994). An earlier attempt to remove Justice J. C. Shah did not reach Parliament and could not even become public.

32. See INDIA CONST. art. 124, § 6 & sched. III.

33. See *id.* art. 124, § 3.

prohibited from pleading or acting in any court or before any authority in India after retirement.³⁴ Every judge is entitled to salary and other allowances and privileges specified in the constitution, subject to upward, but not downward, revision by Parliament.³⁵ The constitution also makes provisions for the appointment of the acting Chief Justice of India and ad hoc judges, and for attendance of retired judges at the sittings of the Supreme Court.³⁶

The Supreme Court is a court of record having, among other things, the power to punish for contempt.³⁷ It sits in Delhi though it may hold its sittings at other places.³⁸ It has incomparably wide original, appellate, and advisory jurisdictions.³⁹ The Supreme Court also has the following powers: to review its decisions; to make such order as is necessary for doing complete justice in any cause or matter; to enforce its decrees and orders; to order attendance, investigation, and discovery; to transfer cases to itself or from one High Court to another; and to regulate its practice and procedure.⁴⁰ Parliament may further enlarge the jurisdiction of the Supreme Court and may confer ancillary powers on it for more effective exercise of its jurisdiction.⁴¹ The law declared by the Court is binding on all courts in India.⁴² All civil and judicial authorities are required to act in its aid.⁴³

The judgments and opinions of the Court are given in the open and with the approval of the majority of judges. The differing judges may write dissenting or separate opinions.⁴⁴ Officers and servants of the Court are appointed by the Chief Justice of India and are subject to any law made by Parliament, and their service conditions are regulated by the Chief Justice as well.⁴⁵ All administrative expenses of the Court, including the salaries, allowances, and pensions of the judges and other staff are charged on the Consolidated Fund of India, free from variation or alteration by Parliament.⁴⁶

34. *See id.* § 7.

35. *See id.* art. 125 & sched. II; Supreme Court Judges (Conditions of Service) Act, 1958. Article 125 had to be amended by the Constitutional (54th Amendment) Act, 1986 because the original Article 125 did not provide for upward revision of salary. During a financial emergency the salaries of the judges may, however, be reduced. *See* INDIA CONST. art. 360, § 4(b).

36. *See* INDIA CONST. arts. 126, 128.

37. *See id.* art. 129.

38. *See id.* art. 130.

39. *See id.* arts. 32, 131-36, 143.

40. *See id.* arts. 137, 139A, 142, 145.

41. *See id.* arts. 138-140.

42. *See id.* art. 141.

43. *See id.* art. 144.

44. *See id.* art. 145, §§ 4-5.

45. *See id.* art. 166, §§ 1-2.

46. *See id.* arts. 112, § 3(d)(i), 146, § 3.

Parliament and State legislatures are prohibited from any discussion with respect to the conduct of any judges of the Supreme Court or of a High Court in the discharge of their duties.⁴⁷

2. *The High Courts*

The constitution provides for a High Court for each State, though Parliament is also authorized to establish a common High Court for two or more States or for two or more States and a Union Territory.⁴⁸ Every High Court is a court of record with power to punish for contempt.⁴⁹ The High Courts consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint.⁵⁰ High Court judges are appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court.⁵¹ Unless judges resign or are removed or appointed to the Supreme Court, they hold office until the age of sixty-two.⁵² They hold office during good behavior and can be removed only in the same manner as a judge of the Supreme Court.⁵³ Only a citizen of India who has held a judicial office for at least ten years or who has been an advocate for ten years can be appointed a judge.⁵⁴ Every judge of the High Court takes a similar oath as a judge of the Supreme Court.⁵⁵ High Court judges are prohibited from pleading or acting in any court or before any authority except the Supreme Court or a High Court in which they have not served.⁵⁶ The salaries, allowances, and other rights and privileges of the High Court judges are also specified in the constitution and are subject to only upward variation by Parliament.⁵⁷ The constitution also provides for the appointment of an acting Chief Justice, additional and acting judges, and retired judges at sittings of High Courts.⁵⁸

47. *See id.* art. 121.

48. *See id.* arts. 214, 231.

49. *See id.* art. 215.

50. *See id.* art. 216.

51. *See id.* art. 217(1).

52. *See id.* art. 217(1) & proviso. The age of retirement was raised from 60 to 62 years by the Constitutional (15th Amendment) Act, 1963.

53. *See* INDIA CONST. proviso & art. 218.

54. *See id.* art. 217, § 2.

55. *See id.* art. 219.

56. *See id.* art. 220.

57. *See id.* art. 221. Amended by the Constitutional (54th Amendment) Act, 1986 to provide for upward revision.

58. *See* INDIA CONST. arts. 223-224A. Article 224, providing for additional and acting judges, was introduced by the Constitutional (7th Amendment) Act, 1956 and the Constitution (15th Amendment) Act, 1963.

High Court judges may be transferred from one High Court to another.⁵⁹ The High Courts have wide original and appellate jurisdiction, including the jurisdiction to issue writs for the enforcement of the Fundamental Rights and for any other purpose.⁶⁰ Every High Court has power of superintendence over all courts and tribunals within its territorial jurisdiction⁶¹ and of withdrawal of cases involving substantial questions of law relating to the interpretation of the constitution.⁶² The Chief Justice of the High Court appoints officers and servants of the High Court and regulates their services.⁶³ The administrative expenses of the High Court, including the salaries and other allowances of the judges and other staff are charged on the Consolidated Fund of that State.⁶⁴

3. *The Subordinate Courts*

The highest subordinate court is the court of the district judge. The Governor of a State, in consultation with the High Court of that State, appoints the district judges.⁶⁵ Only a person who is either already in the legal service of the Union or of the State or has been an advocate for at least seven years and is recommended by the High Court can be appointed a district judge.⁶⁶ Appointments to judicial service of the State below the rank of district judge are made by the Governor in accordance with the rules made after consultation with the State Public Service Commission and the High Court.⁶⁷ The control of district courts and courts below them, including the posting, promotion, and grant of leave to members of the judicial service vests in the High Court. The Governor of a State may apply these provisions even to the magistrates in that State.⁶⁸

59. See INDIA CONST. art. 222.

60. See *id.* arts. 225-26.

61. See *id.* art. 227.

62. See *id.* art. 228.

63. See *id.* art. 229.

64. See *id.* arts. 202 (3) (d), 229(3).

65. See *id.* art. 233(1).

66. See *id.* art. 233(2).

67. See *id.* art. 234.

68. See *id.* art. 237. Then there are some supplemental provisions such as Article 39A which requires the State to "secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and . . . to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." *Id.* art. 39A. For examples of similar supplemental provisions, see also *id.* art 312 (outlining all India judicial service); *id.* arts. 323A-323B (providing for certain tribunals which to some extent derogate with the powers of the ordinary courts); *id.* sched. II (discussing the salaries, allowances, and other privileges of the Supreme Court and High Court judges). The Supreme Court has invalidated the constitutional amendment which introduced Articles 323A and 323B to the extent it excludes the jurisdiction of the High Courts under Article 226 over the tribunals. See Chandra Kumar v. Union of India, A.I.R. 1997 S.C. 1125.

B. *Constitutional Practice*

The constitutional provisions summarized above appear to be the most exhaustive in any constitution. The Indian Constitution makers believed that they had done everything to secure the independence of the judiciary and hoped that those who had to work with the constitution would make its operation successful.⁶⁹ Their hopes have not been belied but the course has not always been easy. As will be noted, some of the difficulties arose soon after the commencement of the constitution while others have arisen later. Some of them have been resolved amicably and, hopefully, for good, but others persist. Noteworthy, however, is that the above constitutional scheme has stood the test of time and survived without any significant changes.⁷⁰

The constitution assumes judicial review of legislative and executive acts and, therefore, from the initial litigation soon after the commencement of the constitution the courts started exercising it without anybody entertaining any doubts in this regard.⁷¹ At the same time, from the very beginning invalidation of legislative and executive acts by the courts in some matters, particularly in matters of property expropriation, was not viewed sympathetically by the government.⁷² Therefore, the constitution was frequently amended in its early stages.⁷³ This process was not healthy for the

69. See *supra* text accompanying note 1 for Dr. Rajendra Prasad's perspective. Dr. Prasad continued:

We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work there willingness to respect the viewpoints of others, capacity for compromise and accommodation. Many things, which cannot be written in a Constitution are done by convention. Let me hope that we shall show those capacities and develop those conventions.

Prasad, *supra* note 1.

70. The only aberration in this scheme brought by the controversial constitution, the 42d amendment during the emergency in 1976 that curtailed powers of the Supreme Court and the High Courts, was quickly removed by the constitution's 43d and 44th amendments in 1978. The other amendments in these provisions have rectified the situations not envisaged by the constitution makers, such as the conferment of power on Parliament for upward revision of the salaries of the Supreme Court and High Court Judges; restrictions on, as a matter of right, appeals to the Supreme Court; provision for the appointment of additional and acting judges in the High Court and raising of the age of retirement in High Courts from 60 to 62 years; provision for compensatory allowance to High Court Judges on transfer from one High Court to another, which in a way further strengthened the position of the judiciary to face the work load as well as to facilitate appointment of competent persons. Some incidental amendments were made on the reorganization of the States in 1956.

71. See *A.K. Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27; *Kameshwar Singh v. State of Bihar*, A.I.R. 1951 Pat. 91.

72. See *Kameshwar Singh*, A.I.R. 1951 Pat. 91; *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226.

73. See Constitution (1st Amendment) Act (1951) and subsequent amendments, particularly Article 31, since repealed. See INDIA CONST. art. 31. For the history of these amendments, see Singh, *supra* note 31, at 235.

independence of the judiciary because any of its decisions that were inconvenient to the government of the day could be easily overruled by constitutional amendment. In 1967 the Supreme Court restricted this trend by deciding that no amendment of the constitution could be made in the future which abridged or restricted the Fundamental Rights.⁷⁴ Later, in 1973, the Court overruled this decision and upheld the amendments abrogating it, but the Court laid down a much broader restriction on the power of amendment that the basic structure of the constitution could not be amended.⁷⁵ This continues to be the law and has been applied several times to invalidate amendments to the constitution.⁷⁶ The independence of the judiciary and judicial review have been held part of the basic structure or basic features of the Indian Constitution and, therefore, amendments which directly or even indirectly take away these features have been invalidated by the Court.⁷⁷ The Court has also invalidated a constitutional amendment which subjected the decision of a tribunal, which was not a court in the strict sense, to confirmation or rejection by the government.⁷⁸ Similarly, laws merely abrogating a judicial decision without retrospectively changing the legal basis of that decision have also been invalidated.⁷⁹ The courts have also expanded the scope of judicial review by liberalizing the requirement of *locus standi* and developing the concept of public interest litigation and by rejecting the concept of political questions.⁸⁰

Through public interest and other litigation the courts have been liberally expanding their jurisdiction to enforce the Fundamental and other rights through suitable and effective remedies. The courts have also created or recognized new rights for the common people, especially for the poor, oppressed, and neglected, a fact which has earned respect for the courts from

74. *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

75. *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461. On this see, Dieter Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 *Indian Yearbook of International Affairs*, 375 (1966-67); *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6-7 DELHI L. REV. 1 (1977-78); *Basic Structure of the Constitution and Constitutional Principles*, 3 LAW AND JUSTICE, 99 (1996) reprinted in DIETER CONRAD, *ZWISCHEN DEN TRADITIONEN: PROBLEME DES VERFASSUNGSRECHTS UND DER RECHTSKULTUR IN INDIEN UND PAKISTAN* (Jürgen Luett & Mahendra P. Singh, eds., 1999).

76. See *L. Chandra Kumar v. Union of India*, A.I.R. 1997 S.C. 1125; *Kihoto Hollohan v. Zachilhu*, A.I.R. 1993 S.C. 412; *P. Sambhamurthy v. State of Andhra Pradesh*, A.I.R. 1987 S.C. 663; *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789; *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299.

77. See *L. Chandra Kumar*, A.I.R. 1997 S.C. at 1125; see also *S.C. Advocates on Record Ass'n v. Union of India*, A.I.R. 1994 S.C. 268; *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149.

78. See *P. Sambhamurthy v. State of Andhra Pradesh*, A.I.R. 1987 S.C. 663.

79. See, e.g., *In the matter of Cauvery Water Disputes Tribunal*, A.I.R. 1992 S.C. 522.

80. See *S. P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149; *State of Rajasthan v. Union of India*, A.I.R. 1977 S.C. 1361.

a wide section of Indian society.⁸¹ The Supreme Court has also expanded its jurisdiction in undefined areas, such as its power to do "complete justice in any cause or matter pending before it."⁸² The courts have denied the claim of act of state to the government vis-à-vis the citizens⁸³ and have subjected the power of pardon to judicial review.⁸⁴

Judicial tenure stands on sound footing, and the only attempt to remove a Supreme Court judge against whom charges of corruption had been proved by a committee of judges failed.⁸⁵ Low salary and allowances of judges have been an issue because sometimes the best persons have not been available for the office of judge and sometimes even those who were appointed later resigned from it. From time to time, salaries have, however, been revised and even the constitution has been amended once to improve the situation.⁸⁶ Now salaries are considered to be at the satisfactory level with every possibility of upward revision.⁸⁷ Parliament and State legislatures abstain from discussing judicial behavior, though sometimes it is doubted whether the courts also show similar deference to the legislators in the exercise of their functions.⁸⁸

From the very beginning governments have also shown due concern for the judiciary. As early as 1955 the Union government instituted the Law Commission to review the system of judicial administration in all its aspects and to suggest ways and means for improving it and making it speedy and less expensive. In 1958 the Commission produced its famous *Fourteenth Report* with a comprehensive study of all courts, from the lowest to the Supreme Court, and with wide-ranging recommendations for ensuring the independence, efficiency, and efficacy of the judiciary at all levels.⁸⁹ Since

81. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S. C. 812; *Nilbati Behra v. State of Orissa*, A.I.R. 1993 S.C. 1960; *M. C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086; *Rudul Sah v. State of Bihar*, A.I.R. 1983 S.C. 1086.

82. INDIA CONST. art. 142. For cases interpreting Article 142, see *State of Punjab v. Bakshish Singh*, (1998) 8 S.C.C. 222; *Supreme Court Bar Ass'n v. Union of India*, (1998) 4 S.C.C. 409; *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241; *Delhi Judicial Service Ass'n v. State of Gujarat*, (1991) 4 S.C.C. 406; *Union Carbide Corp. v. Union of India*, (1991) 4 S.C.C. 584.

83. See *Jahangir M. Cursetji v. Secretary of State for India*, 6 Bom. I.L.R. 131 (1904).

84. See *Kehar Singh v. Union of India*, A.I.R. 1989 S.C. 653, 661.

85. See *Singh*, *supra* note 31, at 417. An effort seems to have been made earlier to impeach Justice J. S. Shah, but the effort never reached Parliament. See N. K. Palkhivala, *Judiciary in Turmoil: Public Confidence Rudely Shaken*, 26 CIV. & MIL. L.J. 176, 178 (1990).

86. See Constitution (54th Amendment) Act (1986); INDIA CONST. arts. 125, 221.

87. See Supreme Court Judges (Conditions of Service) Act (1958).

88. See the controversies over the courts and legislative privileges under Articles 105 & 194 and particularly, Special Reference No. 1 of 1964, A.I.R. 1965 S.C. 745. See also *P. V. Narsimha Rao v. State*, (1998) 4 S.C.C. 626; *Judges (Protection) Act, 1985* and the *Judicial Officers Protection Act, 1985*; P. C. Rao, *Use and Abuse of the Indian Constitution*, 58 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 799, 806 (1998).

89. See LAW COMMISSION OF INDIA, *FOURTEENTH REPORT: REFORMS OF JUDICIAL ADMINISTRATION* (1958).

then the exercise has been repeated several times concerning different aspects of administration of justice, including in particular appointment of judges and arrears in courts.⁹⁰ Unfortunately, not many of the results of these exercises have been put into practice.

The independence of the lower judiciary or subordinate courts has also been honored and strengthened. The lower judiciary has been separated from the executive almost all over the country and operates under administrative supervision of the High Court to which it is subordinate. Its supervision and control by the High Court vis-à-vis the executive has been expanded by holding that the district judges shall be appointed by the Governor of a state only from amongst the members of the judiciary and not from amongst the judicial officers who are part of the executive, and that they shall always be appointed only in consultation with the High Court and with no other body or authority.⁹¹ Similarly, disciplinary action against the members of the lower judiciary, such as suspension and removal from job and matters such as *inter se* seniority are determined and decided by the High Court. Through a notable ruling the independence of the lower judiciary has been substantially secured and enhanced by the Supreme Court. It has held that for purposes of their service conditions that the members of the judiciary, even at the lowest level, are comparable to the members of the other two branches of the government, namely, the legislative and the executive, and not to the civil servants or administrative staff of the government. Emphasizing the importance of the independence of the judiciary and its uniform service condition, the Court directed the Union of India and the States to take steps for the creation of an all India judicial service; to prescribe minimum qualifications for recruitment to the lower judiciary with the assistance of the High Court; to fix the uniform age of retirement at sixty; to provide for payment of a library allowance, provision for conveyance or conveyance allowance, provision for suitable residential accommodation, uniform and better service conditions, and provision for training of judges.⁹² In any case the salaries and allowances of

90. See, e.g., Report of the Study Team of the Administrative Reforms Commission on Centre-State Relations (1967); Administrative Reforms Commission Report (1969); High Courts Arrears Committee Report (1972); LAW COMMISSION OF INDIA: FIFTY-EIGHTH REPORT (1974); SEVENTY-SEVENTH REPORT (1978); SEVENTY-NINTH REPORT (1979); EIGHTIETH REPORT (1979); ONE HUNDRED-TWENTIETH—ONE HUNDRED TWENTY-SEVENTH REPORT (1987-1988).

91. See *State of Kerala v. Lakshmikutty*, A.I.R. 1987 S.C. 331; *M.M. Gupta v. State of J&K*, A.I.R. 1982 S.C. 1579; *Chandra Mohan v. State of U.P.*, A.I.R. 1966 S.C. 1987. Government Counsel, who are also advocates, are, however, not disqualified for appointment. See *Sushma Suri v. Govt. of National Capital Territory of Delhi*, (1999) 1 S.C.C. 330; *High Court of Rajasthan v. Ramesh Chand Paliwal*, A.I.R. 1998 S.C. 1079. See also *B. Sekar Hegde, Independence of the Judiciary and the Supreme Court*, 9 J. INDIAN L. INST. 638 (1967).

92. *All India Judges' Ass'n v. Union of India*, A.I.R. 1992 S.C. 165; *All India Judges' Ass'n v. Union of India*, A.I.R. 1993 S.C. 2493.

the members are increased from time to time with the increase of salaries and allowances of other civil servants. To protect the honor of the lower courts the Supreme Court has also extended its contempt power to cover the contempt of the lowest court.⁹³

From this description one, however, should not be led to form a rosy picture of the Indian judiciary all through and all over. The judiciary has been facing several serious problems, some of which have been indicated towards the end of this Article. But apart from those problems which are an indirect threat to the independence of the judiciary, a direct threat to it has been on the issues of appointment of the Supreme Court and High Court judges and the transfer of the latter from one High Court to another. These two issues have been persistently in the forefront of the debate on the independence of the judiciary. The following discussion concentrates on that debate.

III. CONTENTIOUS ISSUES: APPOINTMENT AND TRANSFER OF JUDGES

A. *The Background*

Appointment of judges to the higher judiciary has been the most recurrent theme in the history of the judiciary since independence and in the immediately preceding years. In view of the fact that before independence the British Crown, uninfluenced by the domestic politics, appointed judges to the higher judiciary, its exclusive discretion in such appointments was not questioned.⁹⁴ With independence it was apprehended that the situation would change, requiring remedial measures. Therefore, in 1945 the Sapru Committee recommended in its constitutional proposals that the "justices of the Supreme Court and the High Courts should be appointed by the head of state in consultation with the Chief Justice of the 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."⁹⁵ Soon after the Constituent Assembly started the process of constitution making at the beginning of 1947, the Ad Hoc Committee of the Union Constitution Committee of the Constituent Assembly, which was assigned the task of formulating the proposals on the Supreme Court, reported that it did not think it "expedient to

93. See *Income Tax Appellate Tribunal v. V. K. Aggarwal*, (1999) 1 S.C.C. 16; In *re Vinay Chandra Mishra*, (1995) 2 S.C.C. 584; *Delhi Judicial Service Ass'n v. State of Gujarat*, (1991) 4 S.C.C 406.

94. See sections 200 and 220 of the Government of India Act (1935). However, there is a reference to a convention that such appointments were also made after referring the matter to the Chief Justice of India and obtaining his concurrence. *Memorandum Representing the Views of the Federal Court and of the Chief Justices of the High Courts*, in 4 B. SHIVA RAO ET AL., *supra* note 20, at 196. See also SEERVAI, *supra* note 6, at 2956.

95. AUSTIN, *supra* note 6, at 176. For the text of the Committee Report see T. B. SAPRU ET AL., *CONSTITUTIONAL PROPOSALS OF THE SAPRU COMMITTEE* (2d ed. 1946).

leave the power of appointing judges . . . to the unfettered discretion of the President” and recommended two alternative methods. One of these methods authorized the President to nominate a person for appointment of a judge of the Supreme Court, other than the Chief Justice, in consultation with the Chief Justice. The nomination was to be confirmed by a panel of seven to eleven members comprising Chief Justices of High Courts, members of Parliament, and law officers of the Union. The other method was that the President would appoint in consultation with the Chief Justice one of the three persons recommended by the above panel of eleven. The same procedure was to be followed for the appointment of the Chief Justice except that the Chief Justice was not to be consulted.⁹⁶

In his memorandum on the Union Constitution, submitted a few days later, Sir B. N. Rau, the Constitutional Advisor, agreeing in principle, suggested that the appointment of judges should be made by the President with the approval of at least two-thirds of the Council of State which was proposed to advise the President in the exercise of the President’s discretionary powers and of which the Chief Justice of the Supreme Court was an ex-officio member.⁹⁷ The Union Constitution Committee also did not agree with the Ad Hoc Committee and recommended that “a judge of the Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Courts as may be necessary for the purpose.”⁹⁸ The Provincial Constitution Committee made a similar recommendation for the appointment of judges of the High Courts: “[J]udges should be appointed by the President in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court of the Province (except when the Chief Justice of the High Court himself is to be appointed).”⁹⁹ In the Assembly the Chairman of the Committee stressed that the Committee had paid special attention to the appointment of judges of the High Courts which it considered “very important” for keeping the judiciary above “suspicion” and “party influences.”¹⁰⁰ With incidental changes, these recommendations on the appointment of the Supreme Court and the High Court judges were

96. 2 B. SHIVA RAO ET AL., *supra* note 20, at 590 (1967).

97. See B. N. RAU, *INDIA’S CONSTITUTION IN THE MAKING* 72, 86 (1960). The report of the committee was submitted on May 21, 1947, while Rau’s Memorandum was submitted on May 30, 1947. See *id.*

98. 2 B. SHIVA RAO ET AL., *supra* note 20, at 600.

99. *Id.* at 662.

100. *Id.* at 666.

incorporated in the Draft Constitution prepared by the Constitutional Advisor.¹⁰¹ The recommendations were adopted as such in the Draft Constitution prepared by the Drafting Committee of the Assembly.¹⁰²

The first reaction to these provisions came from the then Chief Justice of the Federal Court, Justice H. J. Kania, who confined his comments to the independence of the judiciary from the executive and particularly emphasized that in the appointment of High Court judges "the Governor and the High Court Chief Justice should be in direct contact so that the provincial Home Ministry would not be an intermediary in the proceedings."¹⁰³ Chief Justice Kania thought that exclusion of influence of local politics in the selection of judges was necessary for the independence of the judiciary. Later, in a meeting of the judges of the Federal Court and the Chief Justices of the High Courts, the provisions of the Draft Constitution on the judiciary were thoroughly examined and a memorandum was prepared.¹⁰⁴ Emphasizing the importance of the independence of the judiciary, the memorandum expressed concern over the "political, communal and party considerations" in the appointment of High Court judges since independence¹⁰⁵ and therefore suggested an amendment to the relevant provision under which the President shall appoint a High Court judge "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."¹⁰⁶ Such amendment, it was expected, would exclude provincial executive interference in the appointment of judges. The memorandum stated that it should also apply "*mutatis mutandis* to the appointment of the judges of the Supreme Court" and recommended dropping the words from the relevant draft article which obliged the President to consult the judges of the Supreme Court and High Courts in addition to the Chief Justice of India in the appointment of judges of the Supreme Court.¹⁰⁷ The memorandum also suggested inclusion of a provision disqualifying a person from becoming a judge of the Supreme Court or of a High Court if such person had held the post of a minister either at the

101. 3 B. SHIVA RAO ET AL., *supra* note 20, at 36, 67 (1967). The Draft was prepared on the instructions of the Constituent Assembly and was based on the recommendations of various committees appointed by the Assembly and accepted by it. This Draft became the basis of the Draft Constitution prepared by the Drafting Committee of the Constituent Assembly that was chaired by Dr. B. R. Ambedkar.

102. *See id.* at 554, 584. The Draft Constitution was submitted to the President of the Assembly on February 21, 1948.

103. AUSTIN, *supra* note 6, at 179-80.

104. *See* 4 B. SHIVA RAO ET AL., *supra* note 20, at 193.

105. Independence came on August 15, 1947 and the meeting was held on May 26-27, 1948. So, within about six months improper executive conduct, which had been absent until then, could be felt.

106. 4 B. SHIVA RAO ET AL., *supra* note 20, at 195 (emphasis added).

107. *See id.* at 196.

Centre or in any State.¹⁰⁸ Similar suggestions on the Draft Constitution were received from other quarters but none of them was found convincing enough by the Drafting Committee for introducing any change in the Draft Constitution.¹⁰⁹ The changes suggested in the memorandum were not accepted, respectively, for the reasons that they did not provide for the contingency of difference of opinion between the Chief Justice of India and the Chief Justice of the High Court that wider consultation was obligatory to minimize the chances of improper appointments and that merit was the only consideration for the appointment of judges and, therefore, no constitutional ban should stand in the way of merit being recognized.¹¹⁰

The Drafting Committee itself had, however, decided to move an amendment replacing the existing procedure for the appointment of the Supreme Court and High Court judges by one provided in the proposed Instrument of Instructions to be issued to the President. The Instrument contemplated appointment of Supreme Court judges by the President on the advice of an Advisory Board consisting of not less than fifteen members of Parliament. The advice of the Board was to be sought in respect of proposed appointees selected by the President after consultation with all the judges of the Supreme Court and the Chief Justices of the High Courts. In the case of appointment of the Chief Justice of India, the Chief Justice of India was not to be consulted. In the case of appointment of High Court judges, the President had to consult the Chief Justice of India, the Chief Justice of the High Court (except in the case of appointment of Chief Justice of High Court), and the Governor of the State. The President was not bound by the advice of the Board but in that case he had to place a memorandum before Parliament with reasons for not accepting the advice.¹¹¹ As the proposal for the Instrument of Instructions was later dropped, the Drafting Committee did not move the amendment and proceeded with the existing provisions.

In the Assembly basically two issues were raised and discussed on the appointment of judges. Some members proposed that the judges, other than the Chief Justice of India, must be appointed by the President with the concurrence of the Chief Justice of India, while some others proposed approval of Parliament or of its Upper House, the Council of states. Agreeing that the issues were of "greatest importance" and that the Assembly was unanimous that the judiciary must both be "independent of the executive" and "competent in itself," Dr. Ambedkar referred to the practice of appointment of judges in England, where they are appointed by the executive alone, and in

108. *See id.* at 203.

109. *See id.* at 143 (requiring consultation with all judges of the Supreme Court and exclusion of consultation with High Court judges in the appointment of Supreme Court judges); *see id.* at 168 (requiring exclusion of the Governor in the appointment of High Court judges).

110. *See id.* at 144, 166.

111. *See id.* at 491, 499.

the United States, where they are appointed by the executive on the approval of the Senate. Dr. Ambedkar concluded:

It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States [sic], it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature

With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.¹¹²

The proposed amendments on the aforesaid two lines were, therefore, rejected by the Assembly.¹¹³

112. 3 CONSTITUENT ASSEMBLY DEBATES, *supra* note 1, at 258.

113. *See id.* at 260. With respect to the High Courts *see id.* at 674.

B. *The Beginning of the Controversies*

Although no public controversies were raised for quite some time on the appointment of judges to the Supreme Court and the High Courts, dissatisfaction in this regard was expressed from almost the very beginning. Scholars have already noted the dissatisfaction expressed by the judges on the appointment of High Court judges within six months of independence under a procedure which was definitely different from the procedure provided under the constitution.¹¹⁴ But within less than nine years of the commencement of the Indian Constitution greater dissatisfaction was expressed by the Law Commission of India with respect to the appointment of judges both to the Supreme Court as well as to the High Courts.¹¹⁵ In respect of the High Courts, the Commission even recommended an amendment of the constitution exactly along the lines recommended by the judges in the Draft Constitution.¹¹⁶

The controversy seems to have arisen in another form even earlier when after the death of the first Chief Justice of India, the Union executive intended not to appoint the senior most puisne judge as the Chief Justice of India. It is said that the executive had to give up its plan because all the then judges of the Supreme Court threatened to resign en block if the executive did not appoint the senior most puisne judge as Chief Justice of India. The controversy did not become public because the senior most puisne judge was appointed the Chief Justice of India.¹¹⁷ A similar situation arose and averted almost unnoticed in 1971 with respect to the appointment of the Chief Justice of India.¹¹⁸ Earlier, in 1967 a Study Team on Centre-State Relations of the Administrative Reforms Commission reiterated the dissatisfaction expressed by the Law Commission in 1958 with respect to the appointment of the judges, particularly in the High Courts.¹¹⁹

The appointment of judges became a public issue in April 1973 when, in breach of an established convention, instead of appointing the senior most puisne judge of the Supreme Court, its Chief Justice on the retirement of the then Chief Justice, the Union executive appointed the fourth most senior judge as Chief Justice, superseding his three senior colleagues.¹²⁰ The three

114. See also reference to a 1947 letter by the Chief Justice of the Madras High Court in LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, at 18.

115. See LAW COMMISSION OF INDIA, FOURTEENTH REPORT, *supra* note 89, at 33, 69.

116. See *id.* at 106.

117. See LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY-FIRST REPORT, *supra* note 90, at 4. Chief Justice Kania died in November 1951 and the senior most puisne judge was Justice Patanjali Shastri.

118. See M. Hidayatullah, *Unjustified Departure from Settled Convention*, in A JUDICIARY MADE TO MEASURE 10 (N. A. Palkhivala ed., 1973). It concerned the appointment of Justice J. C. Shah on the retirement of Chief Justice Hidayatullah. See *id.*

119. See LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, at 19.

120. The supersession took place on the retirement of Chief Justice S. M. Sikri on April

superseded judges resigned in protest. An intense public debate followed in which critics of executive action saw a clear design of undermining the independence of the judiciary while the supporters of the action defended it broadly on the ground of national need of a committed judiciary.¹²¹ Hardly had the debate subsided when in the appointment of the next Chief Justice again the senior most judge was superseded in favor of the next most senior.¹²² Again, the superseded judge resigned in protest. On both occasions apparently the superseded judges had given judgments inconvenient to the executive while the superseding judges had given judgements palatable to the executive.¹²³ This established a clear nexus between the independence of the judges and their appointment. Before the appointment of the next Chief Justice in 1978, in 1977 the Union Government changed. It referred the matter of appointment of the Chief Justice to the Law Commission of India. The Law Commission recommended that in the matter of appointment of the Chief Justice the convention of appointing the senior most judge should be followed.¹²⁴ Accordingly, the senior most puisne judge was appointed the next Chief Justice. Since then the practice is being followed without exception. The Commission also thoroughly examined the constitutional provisions, procedure, and practice for the appointment of judges in the Supreme Court and the High Courts. While it found the constitutional scheme for the appointment of judges "basically sound," it admitted several flaws in its operation and made several recommendations for ensuring the best and most expeditious appointments with more effective consultative process and elimination of political influence. In short, the Commission recommended a decisive role to the judiciary in the matter of appointments and transfers of judges through a collegial decision making process.

IV. JUDICIAL INTERVENTION

A. *Justice Sheth's Case*

A little after the first supersession under the same government, another threat to the independence of the judiciary was wielded through the mass

26, 1973. The superseded judges were Justices J. M. Shelat, K. S. Hegde, and A. N. Grover. Justice A. N. Ray was appointed Chief Justice.

121. For the contemporary literature on the debate see SEERVAI, *supra* note 6, at 2405 n.57. See also A. R. ANTULAY, *APPOINTMENT OF A CHIEF JUSTICE* (1973).

122. Justice M. H. Beg was appointed, superseding Justice H. R. Khanna.

123. On the first occasion the superseded judges, among other things, had decided that the basic structure of the constitution is unamendable. See *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461. On the second occasion the Court held that suspension of Fundamental Rights during emergencies did not prevent the courts from examining the legality of a detention. See *A.D.M. Jabalpur v. Shivakanta Shukla*, A.I.R. 1976 S.C. 1207 (Khanna, J., dissenting).

124. See *LAW COMMISSION OF INDIA, EIGHTIETH REPORT, supra* note 90, at 3.

transfer of High Court judges, again apparently for the reason that these judges gave judgements inconvenient to the government during the internal emergency of 1975-77. These transfers brought the matter to the courts. One of the judges—Justice S. H. Sheth—who was transferred from the Gujarat High Court to the Andhra Pradesh High Court, challenged, among other things, the constitutionality of his transfer in the Gujarat High Court, on the grounds that it was without his consent and without consultation between the President and the Chief Justice of India.¹²⁵ The petition was allowed on the latter ground. One of the judges also allowed it on the former ground but the majority of two rejected. An appeal in the Supreme Court was disposed of in accordance with an assurance by the Union of India to withdraw the transfer.¹²⁶ However, a majority of three judges in the Supreme Court refused to accept consent of the transferred judge as a condition precedent for transfer and emphasized that transfers must be in the public interest and not as punishment. One judge found that consent was a necessary condition, while the fifth one held that transfer was a new appointment and, therefore, consent was necessary. The important point to be noted is that all the judges, both in the High Court as well as in the Supreme Court, unanimously proceeded on the assumption that the independence of the judiciary is a basic feature of the Indian Constitution and therefore the judiciary must be immune from the influence of the executive.

B. *The Judges Case*

For the second time the matter came before the Supreme Court in *S. P. Gupta v. Union of India*,¹²⁷ known as the *Judges Case*. In that case several writ petitions filed in different High Courts were disposed of by a bench of seven judges of the Supreme Court. Some of these petitions challenged the validity of a circular letter of the Union Law Minister addressed to the Chief Ministers of the States that asked them to obtain advance consent from the proposed appointees to the High Courts for transfer to other High Courts. This was sought “to further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations.”¹²⁸ Some petitions challenged the validity of the practice of appointing additional judges and of not appointing the named additional judges to the permanent positions even though permanent vacancies existed. Other petitions challenged the validity of certain transfers of judges from one High Court to another. The petitions were decided by a divided Court in

125. See *S. H. Sheth v. Union of India*, 1976 17 G.L.R. 1017.

126. See *Union of India v. S. H. Sheth*, A.I.R. 1977 S.C. 2328.

127. *S. P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149.

128. For the text of the letter, see *id.* at 178.

which every judge wrote a separate opinion. These opinions together set the record of being the longest in any single matter decided by the Court in its history. It is not necessary to examine these opinions particularly for the reason that in its material respects the *Judges Case* has been overruled. Mention of its most salient aspects is, however, instructive.¹²⁹

The most relevant aspect of the case was the acknowledgment and reiteration of independence of the judiciary as a basic feature of the Indian Constitution. Otherwise the petitions were dismissed by the majority. The circular letter of the minister was upheld by a majority of four to three, but almost all judges agreed that transfer from one High Court to another could be made only in the public interest and not by way of punishment. Except for Justice Bhagwati, no other judge considered the consent of the concerned judge as a condition precedent for transfer. Appointment of additional judges was generally suspected as having the potential of infraction of judicial independence, but its bona fide application in accordance with the constitutional conditions was appreciated. Normally, an additional judge must be made permanent after the expiration of that judge's term as additional judge if a permanent vacancy existed in the High Court but the judge did not have a right to be so appointed. Similarly, the Court generally agreed that if the amount of work was consistently increasing in the High Courts, the number of permanent posts of the judges must proportionately be increased. Except for one judge, the rest of the Court found itself unable to issue any direction to the executive in this regard. Last, on the question of appointment of the judges, the Court reiterated its *Sankalchand* position that there must be effective consultation between all the constitutional functionaries. But the majority did not agree that the Chief Justice of India had any primacy or veto in this regard. The majority rather gave primacy to the executive so that it could appoint or not appoint any judge to the High Court or to the Supreme Court against the wishes of the Chief Justice of India or any other constitutional functionary. Incidentally, the Court also decided that it could look into the entire record concerning the appointment of judges and the government could not claim any privilege to withhold any of them.

The majority decision in the *Judges Case* was generally found unsatisfactory by the legal fraternity and was criticized in scholarly writings and opinions.¹³⁰ Seminars and conferences were held and academic writings appeared that advocated a change in the situation which gave primacy to the executive in the matter of appointment and transfer of judges. Overwhelmingly, they asked for the creation of a collegial body, with the

129. For a succinct summary of the case, see Jill Cottrell, *The Indian Judges' Transfer Case*, 33 INT'L & COMP. L. Q. 1032 (1984).

130. See, SEERVAI, *supra* note 6, at 2275; Cottrell, *supra* note 129; LAW COMMISSION OF INDIAN ONE HUNDRED TWENTY-FIRST REPORT, *supra* note 90, ¶ 2.13, at 11, ¶ 4.2, at 24; ARUN SHOURIE, MRS. GANDHI'S SECOND REIGN (1983).

predominance of the judiciary, for the appointment and transfer of judges. The Law Commission of India also once again seized the opportunity to examine this issue. Unlike before, this time the Commission came to the conclusion that "experience would make it difficult to continue to subscribe to the view that the present constitutional scheme as to the method of appointment of Judges is basically sound or that it had on the whole worked satisfactorily and does not call for any radical change."¹³¹ Recognizing in the light of global experience and development of law and practice the need of judicial primacy and wider consultation so as to induct the best persons in the judiciary, it recommended the creation of an eleven member National Judicial Service Commission chaired by the Chief Justice of India and a consequential constitutional amendment.¹³²

C. *The Second Judges Case*

The dissatisfaction with the *Judges Case* led to the *Second Judges Case*¹³³ which arose from three petitions under Article 32 that demanded filling existing vacancies in the Supreme Court and various High Courts. In the course of hearing those petitions, a two-judge bench of the Court doubted the correctness of the majority view in the *Judges Case* and directed:

The correctness of the opinion of the majority in S. P. Gupta's case . . . relating to the status and importance of consultation, the primacy of the position of the Chief Justice of India and the view that the fixation of Judge strength is not justiciable should be reconsidered by a larger bench.¹³⁴

In the majority opinion of Justice J. S. Verma (who later became Chief Justice) for a nine-judge bench in the *Second Judges case*, these two issues were reformulated as follows:

(1) Primacy of the opinion of the Chief Justice of India in regard to the appointments of Judges to the Supreme Court and the High Courts, and in regard to the transfers of High

131. LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY-FIRST REPORT, *supra* note 90, ¶ 3.17, at 20.

132. *See id.* at 40.

133. Supreme Court Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268 [hereinafter *Second Judges Case*].

134. Subhash Sharma v. Union of India, A.I.R. 1991 S.C. 631 (quoted in the *Second Judges Case*, A.I.R. 1994 S.C. at 360).

Court Judges/Chief Justices; and
(2) Justiciability of these matters, including the matter of
fixation of the Judges strength in the High Courts.¹³⁵

Out of the five opinions expressed in the *Second Judges Case*, Justice Verma spoke for himself and four of his colleagues with whom two other colleagues concurred in separate opinions. The two minority judges partly dissented and partly concurred with the majority. The bench was, however, unanimous in reiterating the independence of the judiciary as a basic feature of the Indian Constitution essential for upholding the rule of law which was also a basic feature of the constitution.

Briefly, the Court's opinion is dominated by the emphasis on "integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment" in which "all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise" in the matter of appointment of judges to the Supreme Court and the High Courts.¹³⁶ Outlining the operative norms for this purpose, the Court held that the proposal for the appointment of judges to the Supreme Court and the High Courts must be initiated by the Chief Justices of the respective courts. These proposals have to be submitted by the Chief Justice of India to the President. The President must consider these proposals within a set time frame. In case of a difference of opinion between different constitutional functionaries, the opinion of the Chief Justice of India has primacy. In the making of a recommendation, the Chief Justice of India represents the judiciary and does not act as an individual. So the Chief Justice's opinion is the opinion of the judiciary, "symbolised by the view of the Chief Justice of India."¹³⁷ To rule out any arbitrariness on the part of Chief Justice of India and to ensure observance of the rule of law, the opinion of the Chief Justice of India must be formed in the case of appointment to the Supreme Court by "taking into account the views of the two senior most Judges of the Supreme Court."¹³⁸ The Chief Justice "is also expected to ascertain the views of the senior most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise."¹³⁹ In the case of appointment to the High Courts the process of appointment shall be initiated by the Chief Justice of the concerned High

135. *Second Judges Case*, A.I.R. 1994 S.C. at 420. Justice Verma spoke for himself and for Justices Dayal, Ray, Anand, and Bharucha.

136. *Id.* at 442.

137. *Id.*

138. *Id.* at 436.

139. *Id.*

Court who must form his opinion about an appointment “after ascertaining the views of at least two senior most Judges of the High Court.”¹⁴⁰ In the formation of his opinion on the opinion of the Chief Justice of the High Court and of the Governor of the State, “the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court.”¹⁴¹ The Chief Justice of India may also consult one or more senior judges of that High Court. Greatest weight must be given to the opinion of the Chief Justice of the High Court, but the opinions of other constitutional functionaries must also be given due weight.¹⁴² “The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity.”¹⁴³ The seniority of judges in the High Court must be given due consideration in the matter of appointment to the Supreme Court because it is an important factor and it also constitutes a legitimate expectation. No appointment to the Supreme Court or a High Court shall be made except in conformity with the final opinion of the Chief Justice of India made in this manner. An appointment recommended by the Chief Justice of India may not be made if for strong objective reasons disclosed to the Chief Justice of India the person recommended is not suitable for appointment. “However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.”¹⁴⁴

To avoid speculation and uncertainty the Court also suggested a time-bound, expeditious procedure for the appointment of the judges.¹⁴⁵

Regarding the appointment of the Chief Justice of India, by convention the proposal is initiated by the outgoing Chief Justice of India for the appointment of “the senior most Judge of the Supreme Court considered fit to hold the office.”¹⁴⁶ Consultation provided in Article 124(2) is required only “if there be any doubt about the fitness of the senior most Judge to hold the office, which alone may permit and justify a departure from the long standing convention.”¹⁴⁷

140. *Id.* at 437.

141. *Id.* at 436.

142. *See id.* “The initial appointment of a Judge can be made to a High Court other than that for which the proposal was initiated.” *Id.*

143. *Id.* at 437.

144. *Id.* at 442.

145. *See id.* at 439.

146. *Id.* at 442.

147. *Id.* at 439.

Concerning transfers, the Court held that the opinion of the Chief Justice of India not only has primacy, but is determinative.¹⁴⁸ Consent of the concerned judge is not required for the initial or subsequent transfer.¹⁴⁹ In the formation of an opinion on a transfer, the Chief Justice of India is expected to take into account the views of the Chief Justice of the High Court from which the judge is to be transferred, any judge of the Supreme Court whose opinion may be of significance in that case, as well as the views of at least one other Chief Justice of a High Court whose views are considered relevant by the Chief Justice of India. The personal factors relating to the concerned judge—and that judge's response to the proposal—including the judge's preference of places of transfer, should be taken into account by the Chief Justice of India before forming an objective final opinion.¹⁵⁰ Any transfer so made is not to be deemed punitive and is not justiciable except to the extent that it has been made on the recommendation of the Chief Justice of India.¹⁵¹

On the question of fixation of judge strength in the High Courts, the Court held that the Chief Justice of India and the Chief Justice of the concerned High Court must undertake periodic review of such strength in the interest of effective administration of justice and the recommendation of the Chief Justice of India in this regard must be acted upon by the President with "due dispatch."¹⁵² The courts may order the President to act if he fails to do so.¹⁵³

One of the concurring judges made the additional suggestion that as representative of the people, the executive could also suggest names to the Chief Justice of India, although names of all potential appointees must come to the President from the Chief Justice of India.¹⁵⁴ "Though appointment of Judges to the superior judiciary," he added, "should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society."¹⁵⁵ The other concurring judge disagreed with the seniority alone rule in the matter of appointment of the Chief Justice of India and suggested that

148. *See id.* at 442.

149. *See id.*

150. *See id.* at 440

151. *See id.* at 441. The Court said:

Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision making.

Id.

152. *Id.* at 441.

153. *See id.* at 441-42.

154. *See id.* at 356 (Pandian, J., concurring).

155. *Id.*

the Chief Justice of India must be appointed on the basis of merit.¹⁵⁶ One of the minority judges, while agreeing with the primacy of the Chief Justice of India in the matter of appointment of judges to the Supreme Court and the High Courts, disagreed with the subjection of this primacy to the requirement of the Chief Justice acting as a body consisting of the Chief Justice and other judges.¹⁵⁷ Another minority judge agreed with the majority that in the matter of appointment that the views of the Chief Justice of India deserved highest respect but could not be given primacy under the present constitution.¹⁵⁸ On other issues such as transfers¹⁵⁹ and fixing the strength of judges, he agreed with the majority.¹⁶⁰

The *Second Judges Case* was a gain for the judiciary vis-à-vis the executive in the matter of appointment and transfer of judges. However, the case was not universally hailed. H. M. Seervai, the celebrated author of the *Constitutional Law of India*, a staunch supporter of the independence of the judiciary and one of the strongest critics of the *Judges Case* who asked for its immediate overruling and for laying down the law almost exactly on the same lines as laid down in the *Second Judges Case*, has also criticized the *Second Judges Case*¹⁶¹ and called it an amendment and reversal of the constitution.¹⁶² Indications are available that the Union Government has thought more than once of introducing an amendment to the constitution that would either restore the previous position or provide a new mechanism for the appointment of judges.¹⁶³ No concrete step has, however, been taken so far in that direction.

156. See *id.* at 417 (Kuldip Singh, J., concurring).

157. See *id.* at 453-54 (Punchhi, J., dissenting). Judge Punchhi noted:
[T]he role of Chief Justice of India in the matter of appointment of the Judges of the Supreme Court is unique, singular and primal, but participatory vis-à-vis the Executive on a level of togetherness and mutuality, and neither he nor the executive can push through an appointment in derogation of the wishes of the other. S.P. Gupta's case . . . to that extent need be[,] and is hereby explained away[,] restoring the primacy of the Chief Justice.

Id. at 453.

158. See *id.* at 394 (Ahmadi, C.J., dissenting).

159. See *id.* at 395.

160. See *id.*

161. See SEERVAI, *supra* note 6, at 2706. The only important criticism of Seervai of the *Judges Case* that was not upheld in the *Second Judges Case* was his strong plea against transfer without the consent of the transferred judge. See *id.* Otherwise, he has supported the primacy of the opinion of the Chief Justice of India in the matter of appointment of judges, though, of course, he did not speak of a college in this or any other regard. See *id.*

162. See *id.* at 2927; Rao, *supra* note 88, at 837.

163. See Bal Krishna, *Move on Judges' Appointment Sparks Debate*, HINDUSTAN TIMES, Aug. 4, 1997, at 9; P. Patra, *The Case for a Judicial Commission*, HINDUSTAN TIMES, July 27, 1998, at 12; S. Mitra, *Nudge the Judges*, INDIA TODAY, May 4, 1998, at 46.

D. *The Third Judges Case*

At the operational level, it has been noted that the vacancies of the judges remain unfilled as before¹⁶⁴ and the transfers of judges from one High Court to another have not been free from controversy and have even resulted in litigation.¹⁶⁵ However, as between the executive and the judiciary, no controversy became public until towards the end of 1997 when the then Chief Justice of India failed to name his successor on time in terms of the *Second Judges Case*¹⁶⁶ and later in mid-1998, when the executive refused to appoint judges to the Supreme Court and to transfer Chief Justices of High Courts recommended by the Chief Justice of India.¹⁶⁷ While the first controversy was resolved by the Chief Justice of India by delayed nomination of his successor, the second led to an unsavory exchange of notes and letters between the Chief Justice of India and the executive and culminated in litigation.¹⁶⁸ The gravity of the situation led the President to refer to the Supreme Court to give its opinion in the matter known as the *Third Judges Case*.¹⁶⁹

Referring to the decision in the *Second Judges Case* on the question of appointment and transfer of judges and to the doubts that had arisen with respect to its interpretation which required to be resolved in the public interest, the President's reference specified nine questions for the opinion of the Supreme Court.¹⁷⁰ The Court assembled a nine judge bench for deciding the reference. The bench stated that the nine questions referred to it related

164. See M. J. Antony, *The Short-Staffed Judiciary*, BUS. STANDARD, Aug. 12, 1998; TIMES OF INDIA, June 11, July 1, and Sept. 28, 1999.

165. See K. Ashok Reddy v. Government of India, (1994) 2 S.C.C 303. TIMES OF INDIA, Sept. 18 1999.

166. Chief Justice J. S. Verma could not nominate his successor until January 3, 1998 while he himself was retiring on January 18, 1998. According to the *Second Judges Case* the senior-most puisne judge of the Supreme Court has to be appointed Chief Justice of India on the recommendation of the Chief Justice of India if found fit for service. The name of the succeeding Chief Justice must be announced one month before the retirement of the incumbent Chief Justice, and must be sent to the executive at least six weeks before such announcement. Accordingly, Chief Justice Verma should have sent the name of his successor by November 6, 1997. Perhaps he could have done so but for the serious charges made against the senior-most judge—Justice M. M. Punchhi—by a group of senior lawyers which charges Chief Justice Verma had apparently forwarded to the President.

167. Apparently at the beginning of May 1998, Chief Justice M. M. Punchhi recommended three appointments to the Supreme Court and the transfer of four Chief Justices of the High Courts. These appointments and transfers drew criticism both from some of the affected judges and a group of senior lawyers. The critics alleged lack of bona fides and required consultation in the action of the Chief Justice of India. See Mitra, *supra* note 163, at 46.

168. See *id.* At least two writ petitions were filed in the Supreme Court for appropriate directions to the executive to make the appointments. See *id.*

169. In re Presidential Reference, A.I.R. 1999 S.C. 1. See Appendix for Article 143, which authorizes the President to seek the opinion of the Supreme Court.

170. For the text of the reference along with the questions see *id.*

broadly to three aspects, namely, consultation between the Chief Justice of India and his fellow judges in the matter of appointments of Supreme Court and High Court judges and transfer of the latter; judicial review of transfers of judges; and the relevance of seniority in making appointments to the Supreme Court.¹⁷¹

The bench gave a unanimous opinion. It stated that according to the majority in the *Second Judges Case*, the opinion of the Chief Justice of India is to be made according to the norms laid down in that case. "It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon."¹⁷² The Attorney-General drew the Court's attention to the fact that "at the latest selection of Judges appointed to the Supreme Court, the then Chief Justice of India had constituted a panel of himself and five of the then senior most puisne Judges" and submitted that this precedent should be treated as a convention and institutionalized.¹⁷³ The Court noted that "[p]resently, and for a long time now, that collegium consists of the two senior most puisne Judges of the Supreme Court."¹⁷⁴

The Court also distinguished between the body that had to decide and the others who were to be consulted. Regarding the terms of Article 124(2), the Court concluded:

[A]s analysed in the majority judgement in the second Judges case, as also the precedent set by the then Chief Justice of India, as set out earlier, and having regard to the objective aforesaid, we think it desirable that the collegium should consist of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court.¹⁷⁵

It clarified that in case none of the four puisne judges is going to succeed the Chief Justice of India by seniority, the successor Chief Justice of India must also be included in the collegium.¹⁷⁶ Further, the senior most judge in the Supreme Court from a High Court from where an appointment to the Supreme Court has to be made must be consulted, but such a judge cannot be made member of the collegium. If by chance the senior most judge does not know of the merits or demerits of a candidate, the next senior most judge must be

171. See *In re Presidential Reference*, A.I.R. 1999 S.C. at 7.

172. *Id.* at 16.

173. *Id.*

174. *Id.*

175. *Id.*

176. See *id.*

consulted.¹⁷⁷ The opinions of the members of the collegium and of the senior most judge in the Supreme Court from that High Court must be in writing. The opinion of others, particularly of non-judges, whom the Chief Justice of India may decide to consult, may not be in writing, but a written memorandum must be prepared that should be conveyed to the Government of India.¹⁷⁸

The collegium is expected to make its decision by consensus. "Should that not happen, it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India."¹⁷⁹ If the Chief Justice of India favors an appointment but the majority of the collegium opposes it, the appointment must not be made. If an appointment recommended by Chief Justice of India is found unsuitable by the executive and comes for reconsideration to the Chief Justice of India, the Chief Justice of India will consider it in the whole collegium and if some members have retired in the meantime then in the reconstituted collegium. Only if the collegium unanimously reiterates the appointment must the appointment be made.¹⁸⁰ It is imperative that the number of judges of the Supreme Court who consider the reasons for non-appointment be as large as the number that had made the particular recommendation.¹⁸¹ The Chief Justice of India may also ask for the response of the judge recommended by him and opposed by the government on the reasons given by the government. This response must be considered by the entire collegium.¹⁸²

In making appointments from amongst the High Court judges, the Court reaffirmed the seniority principle but clarified that as merit is the predominant consideration in the matter of a candidate's appointment, meritorious persons may be appointed without regard to their seniority.¹⁸³ It is only in support of such candidates that the reasons have to be given and not about the judges who have been superseded.¹⁸⁴

When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example,

177. *See id.* at 17.

178. *See id.*

179. *Id.*

180. *See id.* at 18.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench.¹⁸⁵

The decision-making collegium for appointment of judges to High Courts must consist of the Chief Justice of India and the two senior most judges who would consider the recommendation of the Chief Justice of the High Court and consult any other High Court judges and judges from the Supreme Court who may be conversant with that High Court.¹⁸⁶

Judicial review of appointments or recommended appointments can be sought if any of the conditions of consultation and decision making as stated by the Court or of eligibility were not satisfied.¹⁸⁷

Regarding the transfer of judges, including Chief Justices, from one High Court to another, the Chief Justice of India should consult the Chief Justice of that High Court as well as of the High Court where a judge is to be transferred and also one or more judges of the Supreme Court "who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place."¹⁸⁸ The views of these judges are to be obtained in writing as well as the response of the judge to be transferred should finally be placed before a collegium consisting of the Chief Justice of India and four senior most judges of the Supreme Court.¹⁸⁹ The views of each member of the collegium along with the views placed before the collegium "should be conveyed to the Government of India along with the proposal of transfer."¹⁹⁰ Thus, the conditions for transfer of a judge have been made even more demanding than the conditions for appointment. A transfer is also subject to judicial review on the petition of the transferred judge on the ground of lack of consultation and non-observance of the decision-making process.¹⁹¹

V. THE WORKING OF THE NEW FORMULA

After the above opinion of the Court one would have expected easier application for the process of appointments and transfers. But that did not happen. Following the norms laid down in the opinion four names were

185. *Id.*

186. *See id.* at 19.

187. *See id.*

188. *Id.* at 21.

189. *See id.*

190. *Id.*

191. *See id.* A petition regarding transfer of a High Court Judge has, however, been recently filed in the Rajasthan High Court on grounds of arbitrariness and discrimination. *See* TIMES OF INDIA, *supra* note 164.

recommended to the President of India for appointment in November 1998. While appointing the recommended persons the President made the following observation:

I would like to record my views that while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25 per cent of the population, and women are given due consideration. . . . Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable. Keeping vacancies unfilled is also not desirable given the need for representation of different sections of society and the volume of work the Supreme Court is required to handle.¹⁹²

After the law minister communicated these observations to the Chief Justice of India and the press came to know of them, they received divergent reactions.¹⁹³ The Chief Justice of India asserted "that merit alone has been the criterion for selection of judges and no discrimination has been done while making appointments."¹⁹⁴ He added: "Our Constitution envisages that merit alone is the criterion for all appointments to the Supreme Court and high courts. And we are scrupulously adhering to these provisions. An unfilled vacancy may not cause as much harm as a wrongly filled vacancy."¹⁹⁵

Nobody seemed to have taken serious objection to the President's remarks which were found well within his domain. Some sections of the press gave an impression of a veiled attempt by the President to achieve reservations in favor of the Schedule Castes and Schedule Tribes and for the appointment of specific judges from the Schedule Castes.¹⁹⁶ But such impression has been stoutly refuted.¹⁹⁷ While nobody spoke against merit, almost everyone has supported the consideration of the diversity of the country and the principle of democratic representation of all sections of the society in all its institutions, including the judiciary. "Merit" was explained in that light,¹⁹⁸ and

192. Prabhu Chawla, *Courting Controversy*, INDIA TODAY, Jan. 25, 1999, at 20-22.

193. *See id.*; SUNDAY PIONEER, (New Delhi), Jan. 17, 1999, at 1, 5; HINDUSTAN TIMES, Jan. 24, 1999, at 12; HINDUSTAN TIMES, Jan. 17, 1999, at 1; TIMES OF INDIA, Jan. 23, 1999, at 8; Rajeev Dhavan, *The President and the Judiciary*, HINDU, Jan. 29, 1999, at 10.

194. Chawla, *supra* note 192, at 22.

195. *Id.* at 23.

196. *See id.* at 22.

197. *See supra* note 193.

198. *See, e.g.*, Dhavan, *supra* note 193. "The criterion of 'merit' has never been founded on some skewed concept of knowledge of black letter law. . . . Legal competence is a baseline.

representation of different sections of the society, particularly of the Scheduled Castes, Scheduled Tribes, and women in the judiciary was supported and demanded.¹⁹⁹

A. *Reflective Judiciary*

Apart from these quick responses from the legal fraternity in India, theory and practice of judicial appointments support and justify the President's remarks. The judiciary is one of the three organs of the government. In a democratic government, ideally speaking, the legislative and executive powers are representative of the society.²⁰⁰ Such representation is necessary to justify the government of the people which rules them by their consent. Perhaps at some point in time long ago it could be have been argued that the judiciary does not rule but simply applies the law in a dispute between two private parties. But it is no more in dispute that the judiciary not only makes laws but also participates in policy making, particularly when handling matters concerning the government and its agencies. For the exercise of such

Experience is not just judicial experience but a capacity to understand the 'felt necessities' of all people of this complex nation." *Id.* Elsewhere the President has said:

Written into the concept of merit is the capacity to uphold interests of the disadvantaged. Hence to guarantee merit you need representation from weaker sections and social justice. Otherwise, merit is very elusive. . . . The President is reminding that appointments to the judiciary should take into account the social and plural diversity of the country—it bolsters faith in the judiciary.

R. Ramachandran, *The Conflict that Never Was*, HINDUSTAN TIMES, Jan. 24, 1999.

199. Another prominent lawyer, Venugopal, also supports merit when he says "every democracy, including the [United States], attempts to provide representation to all sections of society, especially the minorities, in the judiciary. 'Any suggestion regarding induction of unrepresented sections of the community, including women or minorities and weaker sections, is consistent with the democratic basis of the Constitution.'" Ramachandran, *supra* note 198. Other examples of minorities given by Judge Sukumaran include the representation of Muslims in Calcutta and Christians in Cochin. *See id.* Similarly, Nariman, admitting that "the President has a point," illustrates: "In the United States there has been a 'Jewish seat' in its Supreme Court, and in Australia there had been for many years a 'seat' in the High Court for a Judge professing the Catholic faith." *Id.* Senior Congress leader V. N. Gadgil, supporting the President's stand, said "[i]t [i]s only proper that fair representation is given to Dalits in the judiciary." *Id.* Also, the Communist Party of India (CPI) has pointed out that "the under representation of Scheduled Castes and Tribes in judiciary was 'very much a matter of concern.'" Supporting the President, Chandrabhan Prasad (Dalit Shiksha Andolan) commented: "At least one Dalit judge could be appointed to give a boost to the rest. It would help as a confidence-building measure." SUNDAY PIONEER, *supra* note 193. The idea seems to have been further appreciated by the lawyers when they felt that "the superior judiciary had little interaction with the people at the grass-roots level, hence judges were ignorant about the peoples' aspirations." TIMES OF INDIA, *supra* note 193. Nariman said that "the process of appointment of judges has to be more broad-based since it was not possible for the Supreme Court judges sitting in the Capital to know what was happening across the country." *Id.*

200. *See* BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997).

powers in a democracy the judiciary must also have similar, if not the same, justification as the other two organs of the government. Therefore, it must also in some way represent the people. Otherwise the laws and the policies laid down by it will have no democratic basis. For that end it is not necessary or even desirable that the judiciary must be elected in the same way as the other two organs of the government. But it must in some way represent or, as Shetreet prefers, reflect the society in which it operates.²⁰¹ To quote Shetreet:

An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. This is based on a doctrinal ground, which has been suggested: the principle of fair reflection. This doctrinal approach may be supported by additional arguments. The judiciary is a branch of the government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection. There are other grounds for ensuring well-balanced composition of the judiciary. First, the need to preserve public confidence in the courts. Secondly, the need to ensure balanced panels in appellate courts, particularly in cases with public or political overtones.²⁰²

Pursuing the same theme at another place Shetreet says:

[J]udges decide cases upon background understanding based on fundamental values of the system. Those understandings are judge made and are based on the interpretation of the judge. If the judiciary is not reflective of society as a whole, the adjudication may be based on background understandings strongly coloured by a narrower set of values.²⁰³

201. Shimon Shetreet, *Judging in Society: The Changing Role of Courts*, in *THE ROLE OF COURTS IN SOCIETY* 467, 479 (Shimon Shetreet ed., 1988) [hereinafter Shetreet, *Judging in Society*]. Shetreet remarked: "I preferred the term 'reflective' to the term 'representative,' since the judges, unlike legislators or elected executives, do not represent. Likewise, the courts should not be numerically representative; 'reflective,' therefore, is a more appropriate term to indicate this idea." *Id.*

202. Shetreet, *Judicial Independence*, *supra* note 10, at 635.

203. Shetreet, *Judging in Society*, *supra* note 201, at 480. Shetreet repeats that "the judiciary must be fairly reflective of the society it judges in terms of ideological inclinations, geographical distribution, cultural traditions and ethnic compositions." *Id.* at 479. For similar views see also, MARTIN L. FRIEDLAND, *A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA* 246 (1995).

Studies on judicial behavior have long established that a judge's background plays an important role in that judge's decision making.²⁰⁴ For the representation of the background, Shetreet is not suggesting a numerical or accurately proportional representation in the judiciary. He is asking only for a fair reflection of the society in it. He finds such reflection necessary for the independence of the judiciary.²⁰⁵ He supports his view with examples of countries which lead in the independence of the judiciary such as United States, Canada, England, Germany, and several other countries practicing it either as a matter of statutory rule or convention.²⁰⁶ Shetreet is not alone in this venture. He has actually summarized the views of many others, including those of some international bodies. Notable among the conclusions of the international bodies are the Singhvi and Montreal declarations on the independence of justice which in identical language state: "The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects."²⁰⁷ "Balancing 'representation' on bases of religion, geography, race, and sex," tells Henry Abraham, "has also played a major role in presidential choice of Supreme Court nominees" in the United States.²⁰⁸

Such practice is not unknown in India. In pre-independent India the Judicial Committee of the Privy Council included as a matter of law judges from India.²⁰⁹ Similarly, in pre-independence India representation was provided to certain communities in certain High Courts in view of the strength of those communities within the territorial limits of those High Courts.²¹⁰ To some extent these considerations have been taken into account since

204. See BENJAMIN N. CORDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1941); HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* (7th ed. 1998); TONY FREYER & TIMOTHY DIXON, *DEMOCRACY AND JUDICIAL INDEPENDENCE* 261, 263 (1995).

205. Shetreet, *Judicial Independence*, *supra* note 10, at 633; see also John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L. J. 701, 710 (1998).

206. See Shetreet, *Judicial Independence*, *supra* note 10, at 633-34.

207. Draft Universal Declaration on the Independence of Justice (Singhvi Declaration) ¶ 11(a), *reprinted in CILJ Bulletin No. 25-26*, at 38, 41 (Apr.-Oct. 1990); the Universal Declaration on the Independence of Justice (Montreal Declaration) ¶ 2.13, *reprinted in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE*, *supra* note 10, at 447, 451.

208. ABRAHAM, *supra* note 204, at 67. The author states that a female, black, Jewish, and Roman Catholic seat, one each, is almost an unwritten rule in the court appointments. See *id.* For a similar demand in England see STEVENS, *THE INDEPENDENCE OF THE JUDICIARY*, *supra* note 7, at 177.

209. See the Judicial Committee Act 1833 providing for two Indian judges as assessors; the Appellate Jurisdiction Act 1908 providing for full members of the Judicial Committee up to two judges from India. For names of some of the Indian native judges who sat on the Judicial Committee of the Privy Council see MAHABIR P. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY*, 394 (3d ed. 1972).

210. See the examples of Calcutta and Cochin High Courts providing for representation to Muslims and Christians, respectively, in HINDUSTAN TIMES, Jan. 24, 1999, at 2.

independence and care is normally taken to give representation to major communities and regions in the Supreme Court. Although sometimes such practice has been criticized because it may come in the way of the ablest among the prospective candidates for judgeship in reaching the bench,²¹¹ nobody seems to have ever alleged that such practice has in any way affected the independence of the judiciary. On the contrary, time and again the need and fact of representation of different regions and minorities in the appointment of judges, particularly in the Supreme Court, has been emphasized.²¹²

Even though a reflective judiciary was not an issue either in the *Second Judges Case* or the *Third Judges Case*, one of the judges in the former case clearly spoke for it while the entire Court acknowledged its relevance in the latter case. Nowhere the Court has spoken against it in either of these two cases, though some of the judges have clearly spoken for it. Thus, in the *Second Judges Case*, Justice Pandian stated:

It is essential and vital for the establishment of real participatory democracy that all sections and classes of people, be they backward classes or scheduled castes or scheduled tribes or minorities or women, should be afforded equal opportunity so that the judicial administration is also participated in by the outstanding and meritorious candidates belonging to all sections of the society and not by any selective or insular group.²¹³

Clarifying that he was not asking for a quota or reservation for anyone, Justice Pandian supported himself with examples of United States and United Kingdom and reiterated: "Though appointment of Judges to superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society."²¹⁴

Therefore, Justice Pandian also held that "the Government which is accountable to the people, should have the right of suggesting candidates to the concerned Chief Justice for consideration but the Government has no right to directly send the proposal for appointments by-passing the Chief Justice

211. See LAW COMMISSION OF INDIA, FOURTEENTH REPORT, *supra* note 89, ¶ 6, at 34, ¶ 52(1), at 55, ¶ 82(8), at 105. See also LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, ¶ 6.9, at 23.

212. See *Third Judges Case*, A.I.R. 1999 S.C. at 18; LAW COMMISSION OF INDIA, EIGHTIETH REPORT, *supra* note 90, ¶ 6.9, at 23, ¶ 7.10, at 30; LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY FIRST REPORT, *supra* note 90, ¶ 3.14, at 19.

213. *Second Judges Case*, A.I.R. 1994 S.C. 268 at 348.

214. *Id.*

concerned.”²¹⁵ None of his colleagues on the bench has disagreed with these remarks. On the contrary, Justice Verma, who wrote the majority opinion, endorsed the opinion of Justice Pandian in these words: “I am grateful for your concurrence on the main points.”²¹⁶

Similarly in the *Third Judges Case*, after noting that merit is the “predominant” consideration in the appointment to the Supreme Court, the Court promulgated the following:

When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, *for example*, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court bench.²¹⁷

It may be noted that representation or fair reflection of the society was not an issue before the Court in these cases. What would have been the reaction of the Court if it had been an issue before it is subject to speculation. But in view of India’s constitutional provisions and practices which unmistakably provide for and observe representation of weaker sections—minorities and women—in legislative and executive bodies and also in the civil services and lower judiciary, it may reasonably be expected that if the issue is addressed to the Court it will support fair reflection of the society in the higher judiciary also.²¹⁸

Returning to the President’s and the Chief Justice’s reactions to it, an impression was tried to be created as if the President were asking for ignoring the merit in favor of representation of certain sections of the society, while the Chief Justice was insisting on merit and ignoring the representation. Perhaps the divide between the views of the two was not as big as was projected. On a close examination one may find no opposition between representation and merit and, therefore, no opposition between the views of the President and the Chief Justice. Merit is not a fixed or set standard.²¹⁹ It may differ for

215. *Id.*

216. *Id.*

217. *Third Judges Case*, A.I.R. 1999 S.C. at 18 (emphasis added).

218. The constitution specifically reserves seats in Parliament and State legislatures for Scheduled Castes and Scheduled Tribes, as well as for Anglo Indians and in the municipalities, and panchayats for women. It makes special provision for women, children, Scheduled Castes, Scheduled Tribes, and other sections of the society. See M. P. Singh, *Affirmative Protection of Minorities in India*, in *THE LIVING LAW OF NATIONS* 301 (Gudmundar Alfredsson & Peter Macalister-Smith eds., 1996).

219. For an insightful discussion on this issue see Christopher McCrudden, *Merit Principles*, 18 *OXFORD J. OF LEGAL STUD.* 543 (1998). The author notes and discusses five

different purposes and occasions. Therefore, merit for a judge in a pluralistic and diverse society cannot be the same as in a monolithic and homogenous society.²²⁰ Even if one accepts, which is not the case, that the Court in the last two *Judges* cases has insisted on merit as the sole consideration for the appointment of judges, it has not defined or explained merit other than indicating certain qualities of a judge.²²¹ But there is no unanimity or finality on these qualities.²²² Even if one agrees on certain minimum qualities which every judge must possess, no objection should be raised to adding more to supplementing them according to the requirements of a society.

Nobody is asking or seems to have ever asked for quotas or reservations in the appointment of judges. Nor should that be demanded. The diversity of the Indian society, however, could not be ignored. How this diversity is to be dealt with is a complex and delicate issue on which opinions may sharply differ. But for the present purpose of achieving, maintaining, and improving the quality of justice administered by the courts and for reposing greater faith of the people in them and thereby ensuring the independence of the judiciary, the principle of reflection of the society should be observed. With the law established by the Court on the appointment of judges, greater justification lies for the observance of this principle. Earlier a representative executive was supposed to have a dominant role in the appointment of the judges while that role has now been taken over by the judges in whose appointments people have no direct or indirect role. A heavy responsibility, therefore, lies upon the judges to demonstrate that even though they are self-appointed, they represent their society and that they are not a closed group of people perpetuating their own rule. They must discharge that responsibility with sagacity and foresight and must encourage and invite suggestions for appointment of judges from

different conceptions of merit. *See id.*

220. Speaking to the students of the Faculty of Law, University of Delhi in the spring of 1997, one of the most prominent former Chief Justices of India, Justice P. N. Bhagwati, narrated how his perception of the Indian Constitution and law took a turn after he visited some of the rural areas in Gujarat after becoming the Chief Justice of that High Court. Similarly, speaking to the same audience at another occasion, one of the most progressive former judges of the Supreme Court, Justice V. R. Krishna Iyer, narrated that when in a petition of a Naga tribal in the Supreme Court, opposite counsel raised the question of merit in the petition. Iyer's response was that the fact that the petitioner is a Naga and has come all the way to approach the Supreme Court for justice is itself a merit in the petition.

221. *See* Second Judges Case, A.I.R. 1994 S.C. 268 at 433. Justice Verma states that "[l]egal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge." *Id.*

222. *See infra* note 223; Singhvi Declaration, *supra* note 207, ¶ 9; Montreal Declaration, *supra* note 207, ¶ 2.11 (stating that candidates for judicial office shall be individuals of integrity and ability, well-trained in the law). In the same vein, see different opinions in the *Judges Case*, *Second Judges Case*, and SEERVAI, *supra* note 6, ¶ 25.394, supplemented *supra* note 161 and accompanying text. *See also* ABRAHAM, *supra* note 204, at 56.

different sources, including the executive, the bar, and the legal luminaries. Now the responsibility primarily lies on the bench to create a judiciary which is not only independent of the executive and the legislature, but which is also competent to perform the unfinished task of social revolution which the Indian Constitution makers had envisaged.²²³

VI. CONCLUSION

From the foregoing account of the constitutional provisions, their history, interpretation, and application, the problems faced and the solutions suggested, several conclusions emerge. First, the constitution makers did not want to leave the appointment of judges exclusively to the executive. Second, doubts were expressed from the very beginning whether the formula adopted in the Indian Constitution would serve the purpose of establishing and maintaining an independent judiciary. Third, doubts were confirmed with respect to the High Courts even before the commencement of the constitution and soon after the commencement of the constitution even with respect to the Supreme Court. Fourth, though the constitution makers intended effective involvement of the judges, particularly of the Chief Justice of India and the Chief Justices of High Courts, they refused to permit the Chief Justice of India to have the last word. Fifth, the constitution makers did not agree to make the appointments subject to the recommendations of any panel or approval of the legislature. Sixth, the constitution makers sincerely believed that the arrangement they had made in the constitution was the most suitable and appropriate for India and hoped that the high constitutional functionaries involved in the process would discharge their constitutional obligation with full responsibility. Seventh, the constitution makers were not completely wrong in their assessment and, subject to occasional aberrations, the system has worked well.

Eighth, the judicial interpretation of giving primacy to the executive has gone against the expectations of the constitution makers and the independence of the judiciary. Ninth, until the *Judges Case*, which gave primacy to the executive, nobody had seriously entertained the idea of a judicial appointments commission or other similar body outside the scheme already laid down in the Indian Constitution. Tenth, the constitution provides for a consultative process among several constitutional functionaries and reasonably expects a consensual decision. Eleventh, practice of consultation by the Chief Justice of India and Chief Justices of the High Courts with their colleagues before making their recommendations was prevalent and

223. On this point see AUSTIN, *supra* note 6, at 164. Even the title of the chapter, "The Judiciary and the Social Revolution," is striking. On the revolutionary role of the judges, see BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

specifically recommended by the Law Commission to be observed as a rule. Finally, no clear consensus on the form and functions of the proposed National Judicial Appointments Commission and consequential amendment of the Indian Constitution was, or is, in sight.

In view of all these considerations, the solution given by the Supreme Court in the *Second Judges Case* as clarified and confirmed in the *Third Judges Case* appears to be the most appropriate and practical. Without offense to any provision of the constitution it affects and advances the intent of the constitution makers of providing an independent judiciary which could not be expressed in any better words. It does not bring back the concurrence of the Chief Justice of India which had been rejected by the constitution makers primarily because the Chief Justice of India, as an individual unaided by anyone, could also err.²²⁴ Even under this solution, in appropriate cases the opinion of the Chief Justice of India may not be given effect. But that will happen only in consultation with the Chief Justice as a collegium, not at will. The error element which was present in the minds of the constitution makers has been resolved by the Court. Nothing is available in the history of the constitutional provisions that the solution to the error element given by the Court was ever suggested by anyone, much less considered by the Assembly or any of its members. What would have been the reaction of the constitution makers had it been suggested to them is speculative. But asking such questions is a legitimate method of determining the intent of lawmakers in deciding the difficult or hard cases.²²⁵ This is much more so in the case of a constitution which has to endure itself indefinitely in changing times and situations. The Court does not bring back any of the alternatives considered and rejected by the Assembly. "In the appointment of Supreme Court and High Court justices," Austin notes, "the Assembly provided that the President should act neither in his discretion nor on the advice of his council of ministers but in consultation with the Chief Justice and other justices."²²⁶ The Court restores that position.

The Court's interpretation is also justified by the purposive interpretation of the Indian Constitution.²²⁷ It is universally accepted that the

224. See *supra* text accompanying note 2 for Dr. Ambedkar's reply in the Assembly. Unlike the President of India who acts on the aid and advice of a Council of Ministers responsible to Parliament, the Chief Justice of India is not required to act on the aid and advice of anyone, and is also not accountable to anyone. For the view that the *Second Judges Case* brings back the "concurrence" of the Chief Justice of India which was rejected by the Assembly, see SEERVAI, *supra* note 6, at 2945, 2951; see also Rao, *supra* note 88.

225. See RONALD DWORKIN, A MATTER OF PRINCIPLE 9 (1986). Dworkin's counterfactual argument for determining the intentions of the law maker is particularly noteworthy. See *id.* at 119.

226. AUSTIN, *supra* note 6, at 129.

227. On the application of purposive interpretation of a constitution, see the decision of the court of Final Appeal of Hong Kong in *Ng Ka-Ling & Others v. Director of Immigration*

constitution does everything possible to ensure the independence of the judiciary. It is also accepted that the independence of the judiciary is a basic feature of the constitution. The independence of the judiciary is sought to be upheld not just for its sake, but for ensuring smooth functioning of the constitution and for the realization of its goal of a free, just, and democratic society. Any interpretation of the Indian Constitution which comes in the way of the independence of the judiciary is, therefore, not consistent with the constitution and is also not justifiable. The interpretation in the *Judges Case* giving primacy to the executive led to the appointment of at least some judges against the opinion of the Chief Justice of India within the short period of less than a decade.²²⁸ This could not have been intended by the constitution makers because it was a clear threat to the independence of the judiciary. If such an interpretation receives widespread criticism and condemnation and the matter is again brought before the Court for reconsideration, the Court is under a duty to rectify the wrong and give an interpretation which is consistent with the purpose of the provision and is also not inconsistent with its language. The Court has done that job remarkably well in the *Second* and *Third Judges Cases*.

The same may be clearly said with respect to the seniority rule in the appointment of the Chief Justice of India. Apparently, in the two instances in which the seniority rule was broken, the superseded judges had given opinions inconvenient to the then executive. The constitution makers could have never intended that the judges must be calculating the pleasure or displeasure their decisions could bring to the executive of the day and that they could become Chief Justice of India any time or out of turn by giving opinions that pleased the executive or could lose that opportunity forever if they gave an opinion that displeased it. Such an interpretation would be an outright reversal of the intended independence of the judiciary. Of course, no judge of the Supreme Court has the claim to become the Chief Justice of India by seniority. But in view of the fact that they have always become Chief Justice by seniority except in two instances where they gave opinions not liked by the appointing authority makes out a justification for the rule of seniority, unless for objective reasons supportive of judicial independence, such as physical or mental disability or charges of corruption, participation in politics, or any other similar reason it may not be followed.

Similarly, with respect to transfers of judges, including Chief Justices, of the High Courts, the Court has evolved a formula which supports the

[1999] 1 H.K.L.R.D. 315 (H.K.). For its application to the Constitution of India see SEERVAI, *supra* note 6, at 186.

228. According to an affidavit given by the Government of India in the *Second Judges Case*, between January 1, 1983 and April 10, 1993, out of 547 appointments to the Supreme Court and High Courts, seven—five in 1983, one in 1985, and one in 1991—were made against the opinion of the Chief Justice of India. The *Judges Case* was decided on December 30, 1981.

judicial independence and is in consonance with the provisions of the constitution. In principle the power to transfer a judge without that judge's consent is not consistent with the independence of the judiciary. But this power is given in the constitution and has been supported from time to time by different bodies, including the Law Commission of India. The way the power was exercised before the emergency of 1975-77 did not expose its potentiality of misuse. But the transfers during the emergency and later, including the ones recommended by the Chief Justice of India in 1998, have clearly exposed its potentiality of harming the independence of the judiciary. Reading the requirement of consent in the relevant provision would have gone against the well-established practice and precedents. At the same time, its potentiality of misuse had to be guarded. The Court has done that job well by making the transfer more cumbersome than a fresh appointment of a High Court judge. It has also indirectly introduced the element of consent by the requirement of asking and considering the views of the judge to be transferred.

Finally, though the solutions provided by the Court to the problems of appointments and transfers may not be ideal, perhaps they could not be improved upon in the circumstances. The constitution makers had expected that all constitutional functionaries will act in public interest in the independence of the judiciary uninfluenced by personal, political, or even ideological considerations that could harm that interest. Therefore, they did not put any additional checks that would have made the decision making process cumbersome or even unworkable. No problem arose so long as the constitutional functionaries acted on expected lines. As soon as those expectations were broken and the instances and possibilities of such breaches increased, the checks became imminent. Such checks could be created either by an amendment of the constitution or by an interpretation which could be justified under the constitution. As there was no clear move for the former,²²⁹

229. Apparently two Bills, one in March 1982, and another in May 1990, were introduced in Parliament to amend Articles 124(2) and 217(1), which provided for the appointment of Supreme Court and High Court judges on the recommendation of a judicial commission. These amendments were not pursued and passed.

there was no guarantee that it would have either succeeded or worked better because the considerations for which similar checks were rejected by the constitution makers apply even today.²³⁰ Moreover, any moves to amend the constitution were almost on the same lines on which the Court has decided.²³¹

Let us, therefore, make the best of the solution found by the Court. Even though the solution is justified in the circumstances, it may not be easy to implement unless all concerned are guided by the considerations expected of them by the constitution makers. Some of the difficulties in its implementation have already been noted, and others may arise in due course. There may be Chief Justices and other judges who may like to impose their will irrespective, or in disregard, of public interest and there may be executive heads and other members who may always find fault with the recommendation of the Chief Justice and other judges. There may also be genuine differences of opinion with respect to the public interest and the understanding of the constitution between the executive and the Chief Justice as, for example, happened between the President and the Chief Justice in respect of appointments and transfers after the *Third Judges Case*.

230. It has been noted *supra* that proposals resembling a judicial appointment commission or approval of the legislature were considered and rejected by the constitution makers because they would make the procedure cumbersome and bring in immature politics. I do not think that those reasons have disappeared or lost their validity. On the contrary, jurists read of more difficulties in the appointment of judges in the United States because of the Senate's confirmation requirement. See NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS*, Preface (1998). Neither has there ever been overwhelming support for the formation of a commission. It may also be noted that some of those like Griffith, who had earlier argued for a commission in England, do not see much reason to insist on it. See J. A. G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 275 (4th ed., 1991) (cited in STEVENS, *THE INDEPENDENCE OF THE JUDICIARY*, *supra* note 7, at 179-80). While Stevens leaves this issue open, in a recent article he hints towards the possibility of "some form of Judicial Appointments Committee." Stevens, *A Loss of Innocence*, *supra* note 5, at 401. Among the supporters of the Commission, see Shetreet, *Judicial Independence*, *supra* note 10, at 652; BARENDT, *supra* note 7, at 134; see also Surya Deva, *Procedure for the Appointment of the Judges of Higher Judiciary: A Theoretical Perspective* 88 (1998) (unpublished LL.M. dissertation, Faculty of Law, University of Delhi, India). Also note the statement of Ram Jethmalani, the Law Minister of India, favoring the establishment of a national judicial commission for appointment, transfer, and posting of judges. Jethmalani also stated that it could be done only by an amendment of the constitution which was not possible at the moment. See *TIMES OF INDIA*, June 11, 1999. The demand for the creation of a National Judicial Commission has also been made in a recently-held conference of lawyers in New Delhi. See *TIMES OF INDIA*, Sept. 23, 1999.

231. The constitution amendment bill introduced in 1982 had provided for a five-member commission consisting of distinguished jurists while the one introduced in 1990 provided for a commission consisting of the judges almost exactly on the lines of the *Second Judges Case*. See *Second Judges Case* A.I.R. 1994 S.C. at 385. The law laid down by the Court also comes close to the practice developed in England after the passage of the Courts Act 1971. See STEVENS, *THE INDEPENDENCE OF THE JUDICIARY*, *supra* note 7, at 181. The idea of the commission as recommended by the Law Commission seems to have been rejected by the Judges' Conference also.

But even if everything moves ideally, it may not be easy to implement the scheme and remove all the ills associated with the appointments and transfers of judges. A big backlog of vacancies is to be filled up. It is an enormous task for the Chief Justice and his collegium to fill these vacancies in accordance with the norms laid down in the two *Judges* cases. The creation of new vacancies is a continuous and unbroken phenomenon for which a continuous and unbroken exercise has to be undertaken, which again is a heavy demand on the time of the judges and other resources of the Court.²³² Let us hope the Chief Justice and his office will be able to cope up with this demand and that this demand will not create any permanent or fixed division among the members of the collegium. Nor shall collegium just follow the dictates of the Chief Justice.

Appointments and transfers of judges are crucial for the independence of the judiciary, but they are not the only issues about it.²³³ There are other equally, if not more, serious issues and obstacles. One of them which has already been noted is the problem of arrears.²³⁴ The *Second Judges Case* takes some care of it in so far as it authorizes the Court to direct the executive to create additional posts of judges if recommended by the Chief Justice of India in view of the increased work load and arrears. But that takes care only of the High Courts. The real and much more grave problem of arrears and delays lies in the lower courts where more than once it has been noted that under-trials have been languishing behind bars for indefinite periods in violation of their fundamental right to life and liberty.²³⁵ The position in non-criminal litigation is even worse. This goes against the rule of law, which is one of the basic features of the Indian Constitution,²³⁶ and shakes the faith of the common people in the effectiveness of the courts as guardians of their rights

232. According to a statement of the Law Minister of India, as many as one vacancy in the Supreme Court and 136 vacancies in the High Courts existed on that date. See *TIMES OF INDIA*, June 11, 1999. The Law Minister also noted that 1000 posts of sessions judges and judicial magistrates were lying vacant in the country. See *id.* A petition for direction to the Central Government to fill these vacancies has also been filed in the Supreme Court. See *TIMES OF INDIA*, Sept. 28, 1999. It is interesting that the Court should issue notices to the Law Minister while the entire initiative for the appointment of judges now rests on the judges:

233. For the importance of appointments and dismissals, see BARENDT, *supra* note 7, at 131.

234. See RAJEEV DHAVAN, *THE SUPREME COURT UNDER STRAIN: THE CHALLENGE OF ARREARS* (1978); M. Shameem, *Expediting Justice*, 29 *CIV. & MIL. L.J.* 278 (1993). According to a petition filed in the Supreme Court for filling the existing vacancies and for creating more courts, 25 million cases, many of them for over 25-years-old, are pending in various courts in the country. See *TIMES OF INDIA*, Sept. 28, 1999.

235. See, e.g., *Hussainara Khatoon (I) to (VI) v. Home Secretary, Bihar*, (1980) 1 *S.C.C.* 81, 91, 93, 98, 108, 115.

236. See DIETER CONRAD, *Die Zukunft des indischen Rechtsstaats*, in *ERSTE HEIDELBERGER SÜDASIENSPRÄCHE*, 54 (D. Rothermund ed., 1990), reprinted in Conrad's collection of writings, *supra* note 75.

and lowers the courts' prestige in their eyes. The judiciary cannot earn or sustain its independence if it loses people's faith in it. Therefore, the problem of delays and arrears at all levels has to be attended on a war footing.²³⁷

The other factor which is eroding the faith of the people in the judiciary and constitutes a grave threat to its independence is the allegation of widespread corruption among the judges at all levels.²³⁸ Independence and corruption in a judge or judiciary are self-contradictory and cannot coexist. If the judiciary has to be made and kept independent, effective measures need to be taken urgently to eradicate and prevent corruption among judges.

Post-retirement attraction of jobs for the judges handed out by the executive is another factor in the independence of the judges. Among other things, the Attorney General for India has recently called for eliminating this practice and has instead suggested raising of the age of retirement of the judges.²³⁹ Similarly, the Chief Justice of India, among other requests, has asked for financial and functional autonomy of the courts for their effective and efficient functioning and for quick delivery of justice.²⁴⁰

A growing unease is also being felt and expressed about the accountability of the judiciary and its extensive and frequent intrusion into the supposedly executive and legislative domains. Although, as has already been noted, accountability of the judiciary and how far it should scrutinize the acts of the legislature and the executive are delicate and controversial issues, the judiciary should not be left totally unchecked.²⁴¹ If the independence of the judiciary is rooted in the separation of powers, which has been resorted to again and again by the judiciary in support of its independence from executive interference, the judiciary must also in turn respect the autonomy of the executive and the legislature. The judiciary should not get attracted or tempted towards correcting every wrong in the society, a role that society has never assigned to the judiciary and does not expect it to perform. At times the judiciary must be getting popular approbation of its intrusions into the domain

237. A petition for direction to the Government of India to increase the ratio of judges from 10.5 per million people to 50 per million is also pending in the Supreme Court. See *TIMES OF INDIA*, Sept. 28, 1999.

238. See SEERVAI, *supra* note 6, at 2927, 2967; N. A. Palkhivala, *Judiciary in Turmoil: Public Confidence Rudely Shaken*, 26 *CIV. & MIL. L.J.* 299 (1990); A. N. Grover, *Fall in Values*, 27 *CIV. & MIL. L.J.* 163 (1991).

239. S. J. Sorabjee, *Judges Should Not Be Given Post-Retirement Assignments*, *HINDUSTAN TIMES*, Feb. 7, 1999, at 6. For other similar views see N. M. Ghatate, *Ensuring Independence of Judges*, 29 *CIV. & MIL. L.J.* 94, 96; PRATAP KUMAR GHOSH, *THE CONSTITUTION OF INDIA: HOW IT HAS BEEN FRAMED* 240 (1966); LAW COMMISSION OF INDIA, *FOURTEENTH REPORT*, *supra* note 89, at 45.

240. *CJI Calls for Financial Autonomy*, *SUNDAY PIONEER*, Jan. 17, 1999, at 5. See also RAJEEV DHAVAN, *JUSTICE ON TRIAL* 82 (1980).

241. On this issue, see generally 61 *LAW & CONTEMP. PROBS.* (1998) (providing extensive treatment on judicial independence and accountability).

of the legislature and the executive, but in the long run it may erode the very basis and justification of its own independence and endanger it.²⁴²

Let us conclude with an optimistic note. The constitution makers of India had a grand vision of a free and just society based on the rule of law. In the realization of that vision they had assigned a prominent role to the judiciary which it had to perform independently and uninfluenced by the other two branches of the government. By and large the expectations of the constitution makers have been respected, if not fulfilled, by all concerned. Among all the troubles and tribulations India has faced since the commencement of the constitution, the judiciary has performed its role fairly well. In its times of trouble with the executive, the judiciary has received the spontaneous and sustained support of a powerful legal community and of the people in general. Therefore, the judiciary has generally been able to maintain its independence and perform its role along the expected lines. I often wonder whether the largest democracy on earth, among all its adversities, has been able to sustain and effectively operate its constitution because of the constitution makers' vision of an independent judiciary and the sustenance of their vision by the people of India. In spite of many failings, it is no mean achievement for the people of India and their institutions that they have been able to sustain a democratic constitution where all others in similar or even more favorable circumstances have either not attempted or failed. The independence of the judiciary appears to be one of the most prominent factors in the occurrence of this phenomenon. Let us therefore, preserve, protect, and promote it.

242. *See id*; see also Shetreet, *Judicial Independence*, *supra* note 10, at 635; Rao, *supra* note 88; STEVENS, *THE INDEPENDENCE OF THE JUDICIARY*, *supra* note 7, at 179. *Cf.* BARENDT, *supra* note 7, at 139.