LAW COMMISSION OF INDIA

ONE HUNDRED TWENTY – FIRST REPORT

ON

A NEW FORUM FOR JUDICIAL APPOINTMENTS

JULY, 1987

LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAWAN,
NEW DELHI

D. A. DESAI
Chairman

Shri P. Shiv Shanker,
Minister for Law and Justice,
Government of India,
Shastri Bhawan,
NEW DELHI-110 001.

July, 31, 1987

My Dear Shri Shiv Shanker,

This report follows in quick succession the one submitted recently. I am happy to forward One Hundred and Twenty-First Report of the Law Commission of India dealing with the question of power and the area of consultation in the matter of appointments to superior Judiciary. Now that you are aware that the task of comprehensively recommending judicial reforms has been assigned to the present Law Commission, you will find that the reports that are being submitted are interlinked. In this chain the just preceding report drew up a blue print for Manpower Planning in Judiciary.

To recall a few earlier reports so as to help you in assessing the value of the present report, I may point out that the Law Commission has recommended restructuring of village level courts in its first report (114th Report) and the recommended setting up Indian Judicial Service (116th Report) followed by a report on restructuring subordinate judicial service (118th Report). Thereafter the Law Commission diverted its attention and recommended a structure of an Academy for training judicial officers in modern court management, docket management and management of socio-economic justice (117th Report).

These reports assume that special attention will have to be paid to the personal manning the Judiciary. Their selection and appointment must receive high priority. You are aware that in the past there has been delay in filling-in vacancies at all levels. Add to this, the recommendations of the Law Commission to expand judicial service so as to bring it within the easy reach of the down-trodden, the disadvantage and the weaker sections of the society. The additional end in view is to take justice to the door-steps of the people so that the system can be liberated from the clutches of the vested interests and one can obtain justice easily, cheaply and within a reasonable time.

The Law Commission therefore examined the present scheme of recruiting Judges at various levels and thought of devising a body which may expeditiously assist in this none-too-easy task. The present report deals with the question of power and the area of consultation in the matter of appointments to superior judiciary.

Before I conclude, I must refer to a slight improvement in the functioning of the Law Commission brought about by sanctioning a few posts, the incumbents of which have assisted in extensive research on the subject. Practically all aspects have been explored by Mrs. Neeru Chadha, L.L.M., who had been assigned the work of putting together all the materials and a tentative framework, has done a commendable job which I must acknowledge. She willingly participated with the Chairman and the Members in the discussion at the end of which a final shape could be given to the report. I on behalf of the Commission would like to acknowledge the immense help rendered by her.

With regards,

Yours sincerely,
Sd-

(D. A. DESAI)

Encl : *A report*

87-M/B(D)420MofLJ& CA—2

Errata of 121*st* ***Report of Law Commission on A New Forum for Judicial Appointments***

S. No.	Page No.	Para and Line	For	Read
1	(i)	Top	—	DO No. F. 2(6)/85-LC
2	1	1.1, line 10	for	far
3	2	1.5, line 6	Sripadgalvaru	Sripadgalyaru
4	2	1.5, line 18	Sentinl	Sentinel
5	3	Footnote 5	Supra note 8 at 39-42	LCI, *14th Report*, 39-42.
6	3	Footnote 6	Supra note at 46	N.A. Palkhiwala, *A Judiciary mad to Measure*, 46 (1973)
7	5	Footnote 2	LCI.	LCI,
8	5	Footnote 1	Id. at 192	U. Baxi, *The Indian Supreme Court and Politics*, 192 (1980)
9	6	Footnote 2	Supra note 11 at 164 & 165	G. Austin, *The Indian Constitution Cornerstone of a Nation*, 50 (1956)
10	6	Footnote 4		U. Baxi, *The Indian Supreme Court and Politics*, 191 (1980).
11	8	2.1, line 23	Judges	Judges,
12	8	2.1, line 27	the	these
13	8	2.3, line 4	Adviser	Advisor
14	9	2.7, line 7	State	State,
15	9	2.7, line 7	and,	and
16	9	2.7, line 15	concil	Council
17	10	2.8, line 15	Pressure	Pressures
18	10	2.9, line 1	Straightway	Straightaway
19	10	2.10, line 16	ₜhe	the
20	10	2.10, line 16	India[5]	India
21	10	footnote 6	CI.	LCI,
22	10	footnote 6	LCI.	LCI,
23	11	2.12, line 7	languge	Language
24	11	2.12, line 10	Supeior	Superior
25	11	2.12, line 18	read	read,
26	11	2.12, line 20	evidence	evidence,
27	11	2.12, line 30	opinin	opinion
28	11	2.12, line 30	Constitutioan	Constitutional
29	11	2.13, line 2	Supior	Superior
30	11	2.13, line 7	maning	manning
31	12	2.16, line 4	qestion	question
32	12	2.16, line 5	reply	rely
33	12	2.16, line 6	sondness	Soundness
34	12	2.16, line 8	he	the
35	12	2.16, line 9	have	have;
36	12	2.16, line 12	think	think that
37	12	Footnote 1	Supra note 3 at 2177	H.M. Seervai *Constitutional Law of India*, Vol II 2177 (Third Edition 1984)
38	12	Footnote 6	Supra note 4 at 258	*CAD*, Vol VIII, 230, 258
39	13	2.18, line 6	Irrelavant	Irrelevant
40	13	2.18, line 7	tearch	Search
41	14	3.2, line 12	relevent	relevant
42	14	3.2, line 19	aearnest	earnest
43	15	3.3, line 5	sanetioned	sanctioned
44	15	3.3, line 9	apparantly	apparently
45	15	3.3, line 16	vacances	vacancies
46	15	3.5, statement	30.6.87	30.6.86
47	15	Footnote 3	Supra note at 32	LCI, *80th Report* at 32 Recommendations (2) (3) and (4)
48	16	3.5, Statement	recommenoations	recommendations
49	18	3.9, line 2	along	a long

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50	18	3.9, line 3	to date	to-date
51	18	3.11, line 13	recommned	recommend
52	18	footnote 1	States,	States, 7.
53	19	Para 3.11, line 5	Some one	Someone
54	19	3.12, line 8	singal	single
55	19	3.13, line 4	some times	sometimes
56	19	3.13, line 6	inteference,	interference,
57	19	3.14, line 31	tho	the
58	20	line 3	today	today,
59	20	3.15, line 5	things,	things, is
60	20	3.18, line 3	constitution	constitution,
61	20	3.19, line 7	tne	the
62	20	footnote 1	supra, note 9 at 18-19	*31st Report, Estimates Committee* 18.
63	21	3.22, line 6	challlenged	challenged
64	22	line 1	confimed	confirmed
65	23	4.1, line 17	judicairy	judiciary
66	23	4.1 line 18	opnion	opinion
67	23	4.1, line 23	whithout	without
68	23	4.1 line 25	excutive	executive
69	23	4.1 line 38	prejudces	prejudices
70	24	line 18	functinaries	functionaries
71	24	4.3, line 7	intergrity	integrity
72	24	4.4, line 15	hole	whole
73	24	Footnote 2	Supra note 2 at 246-247	*CAD* Vol. VIII, 246-247
74	25	4.6, line 3	numberous	numerous
75	25	4.6, line 7	for a	fora
76	26	Footnote 1	Supra note 4 at 915	*S.P. Gupta* V. *Union of India* (1981) Supp. SCC at 915.
77	26	4.10, line 13	Evervy	Every
78	26	4.10, line 37	desevers	deserves
79	26	4.10, line 43	interset	interest
80	27	4.11, line 2	in asmuch	inasmuch
81	27	Footnote 2	Supra note 4	*S.P. Gupta* V. *Union of India* (1981) Supp. SCC 87.
82	28	5.1, line 11	1 new	anew
83	28	5.4, line 8	judgements	judgments
84	29	5.9, line 2	Court s	Courts
85	29	footnote 1	*Id* at 24—28	H.J. Abraham, *The Judicial Process*, 24—28 (5th ed, 1986)
86	29	footnote 3	Id at 25	*Id*, at 35
87	30	5.11, line 8	judgements	judgments
88	30	5.14, bottom line	executives	executive
89	30	5.15, line 5	in	an
90	30	footnote 1	*Id* at 33	H.J. Abraham, *The Judicial Process*, 33 (5th ed; 1986)
91	31	5.17, line 6	decript	decrript
92	31	5.17, line 8	would be	would-be
93	31	footnote 2	Supra note at 34.	Shimon Shetreet, *Judges on Trial : A study of the Appointment and Accountability of the English Judiciary*, 32(1976).
94	31	Footnote 4	Supra note 10 at 534-535	H.R. Dubey, *The Judicial system : of India and some foreign Countries at* 534-535.
95	32	Footnote 2	Supra note 10 at 512	*Id.* at 512
96	32	footnote 3	Supra note 10 at 548—551	*Id.* at 548—551
97	33	Footnote 1	See...., Supra note 10 at 552—557	H.R. Dubey, *The Judicial system of India and some foreign Countries*, at 522—557.

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98	34	6.1, line 27	If,	If
99	35	6.3, line 24	namey	namely
100	35	6.6, line 6	High Court ;	High Court
101	35	6.6, Line 6	(Chief Justice.)	(Chief Justice)
102	35	footnote 4	Supra note at 19-20	LCI, 80*th Report*, 19-20.
103	36	6.7, line 15	Spacifically	specifically
104	36	foot note 2	Supra note at 18	LCI, 80*th Report*, 18
105	38	foot note 1	See Generally	Quoted in R.K. Hegde, *The Judiciary Today : A Plea for Collegium* 38.
106	39	6.18 bottom	layment	laymen
107	40	para 7.3 line 2	tailure	failure
108	40	para 7.3 line 18	i mport	import
109	41	footnote 4	Supra note 4 at 25	LCI, 116*th Report*, 25
110	43	footnote 1	supra note 5	LCI, 118*th Report*, 13, 40
111	43	footnote 2	supra note 6 at 40	LCI, 117*th Report*
112	44	para 7.13 line 7	according the	according to the
113	45	7.17, line 14	judge ship	judgeship
114	47	line 5	judgement	judgment
115	47	8.5, line 2	judgements	judgment
116	47	8.7, line 19	judge ship	judgeship
117	48	9.1, line 7	to	two
118	51	Annexure II	Vaancies	Vacancies
119	52	Annexure III	Vancancies	Vacancies
120	52	Annexure III	260	26
121	53	Do.	vacanies	vacancies
122	53	Do.	1 year	1½ year
123	54	Do.	infilling	in filling
124	55	Do.	Hon'ile	Hon'ble
125	56	Do.	was	were
126	57	Do.	COUR	COURT
127	57	—(1981)	Parmanents	Permanent
128	57	Do.	29-8-77	29-8-1977
129	57	Do.	29-8-77	29-8-1977
130	57	Do.	December, 198	December 1985
131	58	Do.	Annexure IIII	Annexure III
132	58	Do.	Post a	Post of
133	58	Do.	santion	sanction
134	59	Do.	on 5-1-81	Filled up on 5-1-81
135	59	Do.	on 18-9-81	Filled up on 18-9-81
136	59	Do.	on 18-9-81	Filled up on 18-9-81
137	59	1983	on 1-6-83	Filled up on 1-6-83
138	59	Do.	on 1-6-83	Filled up on 1-6-83
139	59	Do.	on 18-11-83	Filled up on 18-11-83
140	59	1984	on 26-6-84 filled up	Filled up on 26-6-84
141	59	1986	on 21-7-86 filled up	Filled up on 21-7-86
142	60	Annexure III First line	VACANCIE	VACANCIES
143	61	Annexure III	—concld	contd.
144	61	Do.	may	May
145	62	Annexure III	PUNJAB HARYANA	PUNJAB & HARYANA
146	64	Annexure IV top line	ARREARS	ARREARS,
147	64	Annexure IV	dispoasls	disposals
148	64	Do.	1.062	1,062
149	65	Annexure V	ARREARS	ARREARS,
150	65	Do.	480	840
151	65	Do.	Gujrat	Gujarat
152	65	Do.	Himacnal	Himachal

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153	65	Annexure V	Sikkam	Sikkim
154	65	Do.	1,72,205	1,72,20
155	66	Do.	Anchra	Andhra
156	66	Do.	42800	42809
157	66	Do.	Gauhai	Gauhati
158	66	Do.	Gujrat	Gujarat
159	66	Do.	14509	14590
160	66	Do.	Haryrna	Haryana
161	66	Do.	Sikkam	Sikkim
162	67	Do.	Pradese	Pradesh
163	67	Do.	Grissa	Orissa
164	68	Annexure VI	Annexure	Annexure VI
165	68	Top	REPLIES.....	REPLIES RECEIVED FROM VARIOUS HIGH COURTS
166	68	Do.	Mra ks	Marks
167	69	Do.	Yes	—
168	69	Do.	Suiable	Suitable
169	70	Do.	75	75%
170	70	Do.	whethet	whether
171	71	Madhya Pradesh	Missing	2. Small % dissuaded earlier may also accept now
172	72	Annexure VI	betting	getting
173	72	Do.	Relevent	Relevant
174	73	Do.	2 r.——	2.
175	73	Do.	fetween	between
176	74	Annexure VI	whetheravailable	whether available
177	75	Do.	50 quoto	No quota
178	75	Do.	recruit	recruits
179	76	Do.	adeqaate	adequate
180	76	Do.	Sample	ample
181	78	Do. extreme left (top)	Missing of V	V
182	78	Do.	S C	SC
183	78	Do.	Resailiant	Resilient
184	80	Do.	influence	influences
185	80	Do.	resaliant	resilient
186	81	Do.	appointment	appointments
187	81	Do.	crease	increase
188	81	Do.	NO ?	No
189	81	Do.	occurring	occuring
190	81	Do.	If	IN
191	82	Annexure VI	Promptly	Promptly in
192	82	Do.	realiant	resilient
193	82	Do.	defauting	defaulting
194	83	Do. (Sikkim)	(V) CM has made his suggestion	(V) CM has made (vi) his Suggestion (vii) emphasis..... delete (vii) & (viii)
195	84	Do.	filing	filling
196	84	Do.	reraliant	resilient
197	85	Do.	compensing	dampening
198	85	Do.	disrups	disrupts
199	85	Do.	Palikas	palshikas
200	85	Do.	excellance	excellence
201	86	Do.	hometown	home town
202	86	Do.	thier	their
203	86	Do.	presen	present
204	86	Do.	In struction	Instruction
205	86	Do.	resaliant	resilient

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CHAPTER I

INTRODUCTORY

1.1. With a slight variation to suit the context, Julius Stone can be recalled by saying that : "it is not given to any generation of men to complete the task of restructuring legal justice system to make it effective, easily accessible, deprofessionalised and cheap, but no generation is free either to desist from it". Criticism galore, occasionally pungent, is voiced from different platforms and numerous fora against the present day justice system and personnel manning the same. System is variously described as colonial, unsuited to our needs and contrary to our culture, foreign in origin, imposed by the foreign rulers to serve their imperial ends. Personnel manning the system are labelled conservative, elitist, status quoist, precedent oriented, living in ivory towers, for removed from injustice ridden toiling, teeming, poverty ridden masses of republican India. Law Commission has submitted some reports for restructuring the system. Any proposal for reform is incomplete unless it turns its attention on the manpower inputs of the system. That is the *raison d'etre* for this report. No social institution is value free, value neutral. Every system devised to regulate the behaviour of man must aim at bettering the lot of human beings. Every such system with all the technological advances is manned by human beings. Therefore, the quality, capacity, efficiency, integrity, character and value system of human beings, manning the system would manifest its strength, weakness, utility, adaptability and resilience to change. In short, guarantee of its success or failure. Even the most technically sound and effective system may fail for the reason of the manpower inputs. Therefore, the Law commission, while devising way and means to revitalise and rejuvenate the stratified, worn out and wholly irrelevant to the present day situation, justice delivery system, devotes the present report to manpower planning for effectively manning the restructured system.

1.2. A comprehensive programme for judicial reforms necessarily takes within its sweep a critical examination of the system of selecting personnel for manning justice delivery system. Manpower input is vital to the effective functioning of the system. Human resources constitute amongst others a critical element of any organisation. The quality and quantity of human resources significantly influence the level of effectiveness as well as efficiency of an organisation. The criticality of human resources is reflected in the oft-repeated adage that any organisation (its structures and systems included) is only as good as the people who operate it. The nature and degree of knowledge, skills and ethics of the people on the one hand and clarity in the appreciation of and 'commitment' to the objectives on the other, are critical to the internal efficiencies and external effectiveness of organisations.[1]

1.3. The Indian judicial system being pyramidic in character is an integrated one as understood in contradistinction to the American and Australian models. Undoubtedly, while our judicial system is vertically structured with the Supreme Court of India at the apex, the intervening layers consist of subordinate judiciary at the grassroot level, district judge at middle level and High Court at State level. Constitution incorporates separate provisions for manpower planning, selection and induction in the different layers of judicial service. The power to appoint the Chief Justice of India and a Judge of the Supreme Court of India vests in the President of India[2] to be exercised in consultation with such of the Judges of the Suppreme Court and High Courts as the President may deem necessary for the purpose. Similarly, the power to appoint the Chief Justice of a High Court and a Judge of the High Court vests in the President to be exercised in consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court.[3] The power to appoint or promote a person to the post of a district judge vests in the Governor of the State to be exercised in consultation with the High Court exercising juridiction in relation to such State.[4] Similarly, the power to recruit and appoint persons other than district judges to the judicial service of a State vests in the Governor to be exercised in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.[5]

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1. G.S.S. Rao, A Note Submitted to the Law Commission.
2. Article 124, *The Constitution of India.*
3. Id., Article 217.
4. Id., Article 233.
5. Id., Aricle 234.

1.4. Over the last four decades, recruitment to superior judiciary is made according to the procedure prescribed in articles 124 and 217 of the Constitution. A mounting dissatisfaction is voiced with the method and strategy of selection and the selectees to man superior judiciary. This dissatisfaction stems from what is the idolised view of the members of the superior judiciary and what is available. In order to appreciate the fairness and reasonableness of this strident criticism, it is first necessary to determine what is expected of the superior judiciary individually and institutionally.

1.5. Since the supression of the three senior-most Judges of the Supreme Court by elevating the fourth in the line of seniority as Chief Justice of India, in April, 1973, vociferous debate is criss-crossing the country as to who must have the final voice in the matter of selection of members of the superior judiciary as also what should be the criterion and yardstick for selecting such persons. After the decision of the full court in *His Holiness Kesvanand Bharti Sripadgalvaru* vs. *State of Kerala and Others*,[1] popularly known as Fundamental Rights case, on April 24, 1973, the then Chief Justice of India, Shri S.M. Sikri retired on April 25, 1973. Mr. Justice J.M. Shelat was next in the line of succession, followed by Justice K.S. Hegde and Justice A.N. Grover. All the three were passed over and Justice A.N. Ray was appointed as the Chief Justice of India. A countrywide debate started, presumably for the first time, as to what should be the criterion in appointing Chief Justice of India and who should have the last word in the matter. The debate not unnaturally covered wide ground and took within its sweep as to what should be the yardstick and governing considerations for selecting personnel for manning superior judiciary. Those who condemned the supression perceived a massive threat to the independence of judiciary. According to them, in a federal polity with a written Constitution and an ingrained Bill of Rights, judiciary is the sentinel on the *qui vive* and it must be fully insulated against erosion of this independence especially from the executive. In the last analysis, according to them the final guarantee of the citizens' rights is not the Constitution but personality and intellectual integrity of the Supreme Court Judges.[2]

1.6. The supporters of the supersession relied upon the report of the Law Commission in which after noticing the practice till then followed that the senior-most puisne Judge is always promoted as the Chief Justice and such a promotion has become a matter of course, the Commission proceeded to specify what ought to be the qualifications of the person to be appointed as the Chief Justice of India, namely, that 'not only that he should be the Judge having experience but also a competent Administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities and above all, a person of sturdy independence and towering personality who would, on the occasion arising, be a watch-dog of the independence of judiciary'.[3] The Law Commission concluded that 'a convention be established that appointment to the office of the Chief Justice rests on special considerations and does not as a matter of course go to the senior-most puisne Judge'. It further proceeded to recommend that when such a convention is established, 'it would be the duty of those responsible for appointment, to choose a suitable person for that high office, if necessary, from among the persons outside the court'[4].

1.7. It may at once be noticed that the Law Commission did not recommend any change in the power structure for selecting personnel for manning the higher judiciary as it then existed and continues to exist in the Constitution till today.

1.8. One question on which there was unbridgeable difference between the protagonists of supersession and the opponents of the same was whether a Judge should have any 'philosophy' and whether his philosophy is a relevant consideration in determining whether he should be appointed or elevated to the Supreme Court of India. S. Mohankumaramanglam in unmistakeable terms asserted that the

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[1](1973) 4 SCC 225.

[2]N.A Palkhiwala, *A Judiciary Made to Measure*, 55 (1973).

[3]LCI, 14th Report, 39.

[4]Id . a t 40.

power to appoint Judges of the superior court vests in the President who acts on the advice of the Government and the Government is perfectly justified in taking into account the 'philosophy' or the 'outlook on life' or 'the conception of social needs' of the proposed appointee to the court.[1]

1.9. There is a body of opinion that Indian Constitution has a philosophy of its own and incorporates scale of values. "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement".[2] The first Prime Minister of India Pt. Jawaharlal Nehru said :

> "The first task of the Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity."[3]

1.10. In the face of this unquestionable evidence, can there be any one bold enough to assert that "there is no fixed 'philosophy', or no fixed 'values' in our Constitution because that can be achieved in a one-party State which will not tolerate dissent".[4] The question is whether our Constitution is value free, value neutral. Does not the Constitution require the three centres of power: Legislature, Executive and Judiciary, to strive to achieve : abolition of untouchability (article 17), eradication of poverty (article 38), the removal of economic disparity [article 38(2)], destroying the curse of illiteracy and ignorance (article 45), elimination of exploitation of man by man (articles 38 and 39), destroying feudal overlordship (article 31A), commitment to ushering socio-economic justice (articles 41, 42, 43 and 46), radicalising legal system to make it justice-oriented (article 39A) and to set up egalitarian society ? Are these not scales of values ? Can they not be comprehended in the generic expression 'social philosophy' of the Constitution ? In the face of these directives given to the State by the Constitution, can it be said that our Constitution has no fixed philosophy or no fixed values ? However, those who espoused these values were condemned as committed Judges. The adjective 'committed' as a prefix to the term 'judiciary' has raised a bitter controversy. The question is whether there can be a human being who has no philosophy of his own. The status quoist can also claim to have his philosophy, namely, that he would stand-still or as best look to the past and ignore the future or shut his eyes to the change taking place in the society.

1.11. "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos', which, when reasons are nicely balanced, must determine where choice shall fall".[5]

1.12. The controversy fizzled out. The debate did not yield any concrete suggestion which may help in future. The supporters of supersession relied upon the recommendations contained in the report of the Law Commission.[6] The opponents went to the extreme length of saying that the Government's reliance on the report of the Law Commission "amounts to compounding the public wrong with public deception. That report totally destroys the Government's case".[7] It was a bizarre controversy in the sense that nothing of lasting value emerged from it.

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[1] S. Mohan Kumara Managalam, *Judicial Appointments: An Analysis of the Recent Controversy over the Appointment of Chief Justice of India*, 72 (1973)

[2] G. Austin, *The Indian Constitution: Cornerstone of a Nation*, 50 (1966).

[3] *CAD* II, 316.

[4] H.M. Seervai, *Constitutional Law of India*, Vol. II, 2492 (Third Edition, 1984).

[5] Benjamin Cardozo, *The Nature of Judicial Process*, 11, 12.

[6] *Supra* note 8 at 39-40.

[7] *Supra* note 7 at 46.

1.13. A similar situation arose in January'1977. On the retirement of the then Chief Justice, the next in line of succession was passed over. He was not appointed to fill in the office of the Chief Justice of India but the Judge next to him was appointed. Charges, counter-charges, imputations of motives followed revealing the old pattern as in 1973. Threat to independence of judiciary by the executive was the battle cry. Again it died down an ignominious death.

1.14. On the death of the first Chief Justice of India, it was assumed that the next in line of succession would be promoted as the Chief Justice of India. There was no convention at that time. It was in the process of being formed. An impression gained ground that the Government of India was not in favour of him and it was of the opinion that another Judge from the Supreme Court should be promoted as Chief Justice of India. Not merely the superseded Judge but all other Judges then adorning the Bench of the Supreme Court threatened to resign en bloc. The situation was saved when the Judge next to the Chief Justice of India was promoted as the Chief Justice of India.[1] Now at the time of supersession in 1973, only the superseded Judges resigned but other Judges of the Surpreme Court accepted the supersession. Similarly in January 1977, only the superseded Judge resigned. If supersession of the seniormost Justice in the appointment of the Chief Justice of India is violative of judicial independence, the threat to independence emanates from the court itself. The problem of supersession should not be confined to superseded Judges; it has to be, as in the past, a problem of surviving Justices. This having not happened, it was said that there is a threat to independence of judiciary from the Supreme Court.[2]

1.15. In September 1977, two Judges, one from Bombay High Court and one from Gujarat High Court, were elevated to the Supreme Court. The elevation of the latter raised a storm of controversy, the grievance being that 'the Judge elevated from the Gujarat High Court was not the seniormost Judge of the High Court and that senior Justices of High Court should not be passed over when their claims to elevation were at least as strong as the Judge who was elevated'. The Supreme Court Bar Association supported the controversy by adopting a resolution, 29 to 5, disapproving of the elevation of the Judge of the Gujarat High Court to the Supreme Court on the ground that the claims of the seniors were not given due weight. The controversy, as in the past, did not reveal any ideological differences; neither did it yield any worthwhile information nor did it indicate a path following which such a situation could be avoided in future. 'At the end of the day, it was a clumsy controversy; none of the real issues about the appointment of Judges really emerged from the controversy. Most people accepted that the principle of seniority was not always the best principle. There was no real explanation as to why the controversy took its own course'.[3] However, one author is of the view that as no Judges of the Gujarat High Court, including the Chief Justice, made any public protest at the undignified tactics of the Bar and lowering of the public image of the judiciary by the reckless attack on the integrity of one of their own brethren, it is suggestive of factionalism in the High Court as well.[4] This is another source of threat to independence of judiciary. There is no question of seniority and supersession on the elevation of a Judge from High Court to Supreme Court. This is generally accepted though the Gujarat Bar raised an issue to the contrary.

1.16. When the term of the sitting Chief Justice was about to expire in February 1978, a group of Bombay lawyers submitted a memorandum completely taking a somersault on their stand in the earlier controversy. On earlier occasions in April 1973, January 1977 and September 1977, some of these very persons who were signatories to 1978 memorandum vociferously advocated the principle of seniority in making appointment to the office of the Chief Justice or for elevation from the High Court to the Supreme Court of India. Some of these worthies were members of the first Law Commission which recommended against the principle of seniority. In February 1978, they strongly advocated and insisted upon, the supersession

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[1] J. R. Siwach, *Sinking Indian Judicial Pyramid*, 42 (1986).

[2] U. Baxi, *Courage Craft and Contention: The Indian Supreme Court in the Eighties*, 24 (1985).

[3] R. Dhavan, A. Jacob, *Selection and Appointment of Supreme Court Judges: A case Study*, 59 (1978).

[4] U. Baxi, *The Indian Supreme Court and Politics*, 191 (1980).

of the next two judges in the line of succession and insisted upon their supersession. The charges against them was that the next two in line of succession were not upholders of individual's liberties and "that they were 'committed' Justices, a part of a 'hierarchy' so arranged that the senior most sitting Judges would outlive all other sitting Judges of the Supreme Court, many of whom have unexceptionable records".[1] Despite all the sophistry, the demand of the momorandumists amounted to a call for supersession because, according to them, the appointment of any of the two might be considered a national disgrace. In short, as members of the Law Commission, they expressed an opinion against automatic promotion on the basis of seniority only. In a later controversy, supersession itself was perceived by them as a threat to independence of judiciary. At another stage with regard to the same institution, they said that if supersession is not resorted to, the committed Judges would destroy the independence of the judiciary. Can any principle emerge from this jumble of contradictions ? And none emerged, and the situation has become more confounded.

1.17. A successful working of parliamentary democracy under a written Constitution with an entrenched bill of rights presupposes the presence of an independent judiciary. By independent judiciary, it is meant that the judiciary is independent of any external influences emanating from any source, including the political executive. To state that Judges manning the judiciary should be wholly insulated from any extraneous influences, pressures and incursions is to state the obvious. The votaries of judicial independence have gone to the extreme length of asserting that it is the basic postulate of our Constitution and any interpretation of the articles in the fasciculus of articles relating to judiciary must keep it inviolate. There is a sort of passionate attachment to this vague concept of independence of the judiciary. It has raised a pathological paranoia in those outside the realm of political power to apprehend a threat to independence of the judiciary in any and every action of the executive in relation to the judiciary. The founding fathers of our Constitution, in order to insulate the judiciary from any outside influence, have guaranteed tenure (article 124), pay (Second Schedule), pension and conditions of service (by a statute with a guarantee that the same shall not be altered to the disadvantage of a Judge after he has entered the office). As if these provisions are not sufficient to guarantee the independence of the judiciary, it is passionately urged that there are insidious incursions corroding the vitals of the judiciary. One such provision to which reference is repeatedly made is the power vested in the President to appoint Judges of the superior judiciary, i.e., the Judges of the Supreme Court of India (article 124) and Judges of the High Court (article 217) and the transfer of the Judges of the High Court (article 222). As for the subordinate judiciary, numerous decisions of the Supreme Court of India and the High Courts have insulated the subordinate judiciary from any incursion into its portals by the executive. It is not necessary to recapitulate those judgements here. They have been fully discussed in the earlier reports.[2] It is not intended to discuss all sources from where the threat to judiciary emerges. It is generally assumed that the threat emanates from the political executive of the country. Is that the only source ? In a seminar held in Delhi some time back, a legal academe percieved the threat to judiciary from the Bar. There are numerous incidents of strike by members of the bar in various States complaining of appointment or non-appointment of certain persons to the Bench.

1.18. In the course of discussion with various interested groups, it transpired that there is a body of opinion that threat to independence of judiciary arises from the action of some of the Judges themselves. It was pointed out that a Judge resigns to contest Presidency or overnight resigns to become a Member of Parliament next day. It would certainly pose a threat to the non-political nature of judiciary. It was also clearly brought out in the discussion that criticising a colleague on the Bench in a language which lacks decorum, bringing into open the internal feuds amongst Judges, certainly poses a more poignant threat to the independence of the judiciary than any other.[3]

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[1] Id. at 192.

[2] *LCI. 16th Report*, 26-27.

[3] U. Baxi, "Judicial Terrorism : Some Thoughts on Justice Tulzapurkar's Pune Speech", *Mainstream* Jan. 1, 1983, 1.

1.19. Attention was also focussed, in the course of discussion, on a recently revealed tendency to accept briefs while still functioning as Judges. Ignoring individual cases, it was sought to be pointed out that a Judge retires as a High Court Judge and on the very next day, he appears before the Supreme Court. When did he accept the brief ? It was said that if a Judge resigns and next day contests election for a political office, it is considered objectionable, the same would apply *mutatis mutandis* to acceptance of the brief while still a judgeship is subsisting. These are rare cases but, in course of time, if not nipped in bud, the situation might worsen.

1.20. It is beyond question that independence of the judiciary is one of the foremost concerns of our Constitution.[1] If the beacon of the judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence.[2] The unique functions which judiciary performs in the Government make it imperative that the Judges should be given a position quite different from that of the great majority of Government officials.[3] The judicial independence is thus prized as a basic value and so natuarally and inevitably it has come to be regarded and so ingrained in the life and thought of the people that it is now almost taken for granted and it would be regarded as an act of insanity for anyone to think otherwise.

1.21. In 1976, sixteen Judges were transferred from the respective High Courts in which they were functioning to another High Court. For the first time since the Constitution, a Judge of a High Court was transferred from the High Court to which he was appointed to another High Court without his consent. Sankalchand Himatlal Sheth,[4] a Judge of the High Court of Gujarat who was transferred to the Andhra Pradesh High Court, challenged his transfer on diverse grounds, one such being that the non-consensual transfer was outside the purview of article 222 as it would result in erosion of independence of judiciary. The order of transfer was struck down by a full Bench of the Gujarat High Court. Union of India appealed to the Supreme Court. The contention that was put in the forefront in the Supreme Court was that a non-consensual transfer is destructive of the independence of judiciary which is the basic feature of the Constitution and, therefore, the court should read a limitation "without his consent" in article 222(1). Chandrachud, J., observed that the founding fathers of the Constitution envisaged that the judiciary, which ought to act as a bastion of the rights and freedom of the people, must be immune from the influence and interference of the executive. The Constituent Assembly gave to the concept a concrete form by making provisions to secure and safeguard the independence of judiciary. After enumerating those provisions, he concluded that these provisions indisputably are aimed at insulating the High Court judiciary, and even the officers and servants of the court, from the influence of the executive. The concern of the court was not to give such interpretation to article 222 as would in any manner whittle down the independence of judiciary. But even with this concern in the forefront, the majority declined to read the expression "without his consent" in article 222. Undoubtedly, the minority held that non-consensual transfer is outside the purview of article 222. Bhagwati, J., who led on behalf of the minority, observed that independence of judiciary, the fighting faith of our Constitution and fearless justice is a cardinal creed of our founding document; and in order to ensure and guarantee the same, it is inconceivabe that the founding fathers should have left a loophole and conceded power to the executive to inflct injury on a High Court Judge by transferring him without his consent so as to wipe out the effect of other provisions and denude them of meaning and content.

1.22. The very question came to be re-agitated before a larger Bench in *S.P. Gupta* vs. *Union of India*[5]. The view that selective transfer of individual Judge for something improper in his behaviour or conduct would certainly cast a slur or attach a stigma and would leave indelible mark on the character of the Judge, found favour generally. Such a transfer, it was said, was outside the purview of article 222 and power to transfer in this fashion makes Judges vulnerable to pressure or blackmail.

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[1] *Union of India* vs. *S..H. Sheth*, AIR 1977 SC 2398.

[2] *Supra* note 11 at 164-165.

[3] R.M. Dawson, *The Government of Canada*, 433-434 (Second Edition, 1954).

[4] *Supra* note 20.

[5] (1981) Suppl. SCC 87.

1.23. Threat to independence of judiciary was also perceived in a circular letteissued by the then Law Minister and the argument covered much widerground. It was *inter alia,* contended that if primacy is not accorded to the opinion of the Chief Justice of India in the matter of appointment of Judges of High Courts and Supreme Court, the prized independence of the judiciary would become hollow and the executive would be able to impose its own nominees on the judiciary. A comprehensive analysis of the power of appointment of Judges in various democracies was undertaken. It was held by the majority that there is hardly any country in which appointment of Judges is by nomination and not election, where the executive does not enjoy the power of selection and nomination or that the judiciary has a veto in the matter of such appointments. The conclusion, however, was that the vesting of the power of appointment in the executive without a veto of the judiciary is not subversive of the independence of the judiciary[1].

1.24 Past history is usually looked into because it is often said that it sheds light for future path-finder. One additional reasons for looking at the past is the usual human tendency to develop gradualism by providing continuity. Therefore, it is now necessary to look at the historical evolution of the method of appointment of Judges of the superior judiciary in India under the colonial masters and reach the stage where the Constituent Assembly forged the present set of provisions for selecting manpower for judiciary.

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[1]Id. at 593-595.

CHAPTER II

HISTORICAL EVOLUTION OF THE METHOD OF APPOINTMENT OF JUDGES OF THE SUPERIOR JUDICIARY IN INDIA

PART I

2.1. A process of Indianisation of judiciary was in the offing and ground norms were laid for the same in the Government of India Act, 1915-1919. Provisions with regard to Indian High Courts were set out in Part IX of the Act. The power to appoint a Judge of the High Court was conferred on His Majesty (section 101). The power to fix salaries, allowances, furloughs and retiring pensions of a Judge was conferred on the Secretary of State-in-Council. The qualifications for being appointed a Judge of the High Court were set out in sub-section (3) of section 101 which, *inter alia*, provided that he must be : (a) a Barrister of England or Ireland or a Member of the Faculty of Advocates in Scotland of not less than five years' standing, or (b) a Member of the Indian Civil Service of not less than ten years' standing and having for at least three years served as, or exercised the power of, a district judge, or (c) a persons having held judicial office not inferior to that of a subordinate judge, or a judge of a small cause court, for a period of not less than five years, or (d) a persons having been a pleader of a High Court for a period of not less than ten years. The last two qualifying clauses opened up a possibility for Indians being appointed as High Court Judges. There was a concept of a quota reserved for each category set out hereinabove. The quota was that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding Additional Judges, must be such Barristers or advocates as aforesdaid and not less than one-third must be Members of the Indian Civil Service. Section 102 provided that every Judge of a High Court shall hold his office during His Majesty's pleasure. Two ugly features of the colonial approach to appointment of High Court Judges with a tall claim that British Justice is being transplanted to a colonial country, were that the executive branch had a quota in High Court and that the tenure was at His Majesty's pleasure and the salaries and perks were to be determined by the executive. The votaries of independence of judiciary drawing their sustenance from United Kingdom should have examined the provisions before eulogizing British justice.

2.2. Fasciculus of articles in Part IX of the Government of India Act, 1935, provided for setting up of Federal Court and the High Courts. Section 200 provided for establishment of a Federal Court and section 220 for constitution of High Courts. The High Court Judges were to be drawn from four separate and distinct groups, namely (i) barristers of England and Northern Ireland or advocates in Scotland; (ii) Members of the Indian Civil Service; (iii) Holders of judicial office in British India; and (iv) pleaders practising in High Courts. The power to appoint a High Court Judge was vested in His Majesty, as provided in section 220(2). The notable change was that the tenure was changed from His Majesty's pleasure to attaining a certain age, being sixty years then. The power to determine salaries, allowances and such other perks as well as such other rights in respect of leave and pension was conferred upon His Majesty in Council. Similarly, the power to appoint Judges of the Federal Court was vested in His Majesty and he was to hold office till he attained the age of sixty five years. The power to determine salaries, allowances, perks, rights in respect of leave and pension was vested in His Majesty-in-Council. These provisions indisputably show that the power to appoint Judges of the superior judiciary was unreservedly vested in the executive. No one else was even to be consulted. These were the provisions in vogue when the Constituent Assembly was convened and proceeded to determine the shape of superior judiciary as well as the procedure for selecting manpower to man the superior judiciary.

2.3. The Constituent Assembly set up an Experts Committee, consisting of Mr. S. Varadachariar, a former Judge of the Federal Court, Sir Alladi Krishnaswami Ayyar, Mr. B.L. Mitter, Mr. K.M. Munshi and Mr. B.N. Rao the Constitutional Adviser, for drafting provisions relating to judiciary. The Committee submitted its report on May 21, 1945. The approach of the Committee was largely influenced by

the provisions of the Government of India Act, 1935.[1] Long before the advent of independence, a view had gained ground that there must be a Supreme Court at the apex of the judiciary with each State having a High Court of its own. A federal structure with division of powers among the federation and the federating units and a written Constitution with a Bill of Rights, all combined to make a compelling necessity of a body which will have powers to determine whether there is encroachment of power of one by the other. This necessitated conferment of power of judicial review on the Supreme Court. The Supreme Court became the guardian angle of keeping every centre of power created by the Constitution within its prescribed limits. Such a body of necessity must be insulated against executive and political interference.

2.4. The Experts Committee proceeded to give shape to the various provisions under which the Supreme Court of India would be set up as well as the High Court in each State would be set up. The draft Constitution was forwarded to Judges of the Federal Court for their comments. The Chief Justice of the Federal Court convened a conference of the Judges of the Federal Court and the Chief Justices of the High Courts in India. The Conference authorised the Chief Justice of the Federal Court to submit a memorandum expressing its views. Amongst the various views expressed therein the one that must attract attention is that the Chief Justice of the Federal Court and the Chief Justices of High Courts considered paramount the importance of securing the fearless functioning of an independent, incorruptible and efficient judiciary [2].

PART II

Constitutional Provisions Relating to Judiciary

2.5. A brief resume of the constitutional provisions dealing with the question of appointment to superior judiciary would be advantageous.

2.6. Part V of the Constitution deals with the Union judiciary. Article 124 provides for the establishment and constitution of Supreme Court. Clause (2) provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such Judges of the Supreme Court and of the High Court in States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. There is a proviso which makes it obligatory to consult the Chief Justice of India in the matter of appointment of every Judge of the Supreme Court other than the Chief Justice of India. The qualifications for appointment are set out in clause (3). Clause (4) provides for removal of a Judge of the Supreme Court. Thus the power to appoint a Judge of the Supreme Court vests in the President. The President, in exercise of this executive power, will be bound by the advice given by the Council of Ministers as required by article 74.

2.7. Chapter V in Part VI of the Constitution deals with High Courts in the States. Article 214 provides that there shall be a High Court for each State. Every such High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. Article 217 provides that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. The qualifications for being appointed as a High Court Judge are set out in clause (2). Even here, the power to appoint a Judge of the High Court vests in the President who, while exercising the executive power, will be bound by the advice tendered to him under article 74. It is obligatory upon the President before making an appointment to consult the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court to which the selectee is to be appointed. The consultation with the Governor of the State will imply intervention of the State executive represented by the Concil of Ministers as ordained in article 163. It would thus appear that the Chief Justice of the High Court, the Council of Ministers of the State concerned, the Governor of the State and the Chief Justice of India and the Concil of Ministers at the Centre would all be involved in the process of making and finalising the appointment of a High

1. B. Shiva Rao, *The Framing of India's Constitution :A Study*, 483.
2. B. Shiva Rao, *The Framing of India's Constitution :Select Documents*, Vol IV, 194.

Court Judge. However, the scheme of the Constitution in the matter of appointment of a Judge of a High Court or a Judge of the Supreme Court clearly indicates that the power to appoint vests in the President of India who, in view of the decision in *Samsher Singh* vs. *State of Punjab*,[1] would be bound to act according to the advice of the Council of Ministers.

2.8. Article 124(2) of the Constitution and article 217 confer power on the President to appoint a Judge of the Supreme Court and a Judge of the High Court respectively. Article 124(2) and article 217(1) ensure that the Judges of the Supreme Court and the High Court shall hold office during good behaviour and can be removed only for proved misconduct or incapacity by a process analogous to impeachment. This is in sharp contrast with the position prior to 1947, viz., that the Judges hold office during His Majesty's pleasure, even though Constitution does retain the pleasure doctrine. Article 310 provides that except where contrary is provided, all the members of the Defence Service or Civil Service of the Union or the State hold the office during the pleasure of the President or of the Governor of the State, as the case may be. The Judges of the superior judiciary are assured a fixed tenure subject to maintaining good behaviour. The tenure, pay, pension and other conditions of service are guaranteed and cannot be altered to the disadvantage of a Judge during his tenure. More or less the judiciary is insulated against outside pressure, including one from the executive.

2.9. Having said all this, it must straightway be conceded that the power to appoint members of the superior judiciary, including the Chief Justice of India, vests in the President, i.e., the executive. Under the Constitution, position has not undergone a change at all from what it was prior to the advent of the Constitution save giving a specific role to Chief Justice of India and Chief Justice of a High Court. The debates in the Constituent Assembly put in sharp focus whether appointment to superior judiciary except that of the Chief Justice of India should be made not in consultation with the Chief Justice of India but with his concurrence. This specific suggestion of providing for concurrence of the Chief Jutice of India was specifically proposed and rejected[2].

2.10. The present situation is that ordinarily a formal proposal for filling up of a vacancy in the Supreme Court is initiated by the Chief Jutice of India by recommending the name of the person considered suitable by him to the Minister of Law and Justice. If the Minister accepts the recommendation, the proposal is forwarded to the Prime Miniter of India who, if he approves, advises the President to issue a formal warrant of appointment under his own signature. Similarly, in the case of a Judge of the High Court, the formal proposal emanates from the Chief Justice of the High Court and if that is accepted by the Chief Minister of the State, the Governor of the State, the Chief Justice of India and the Minister of Law and Justice, Government of India, the same is processed and submitted to the Prime Minister of India, who, if he approves the recommendation, advises the President to issue a formal warrant of appointment. The intervention of the Prime Minister of India is not merely formal. Cases are not unknown where even if the Minister of Law and Justice in the Government of India has accepted the recommendation, the same was not given effect to on account of the objections from the Prime Minister of India.[3] Thus, the intervention of the Prime Minister of India[5] is real and substantial.

2.11. The power to make appointment to, or to grant promotion to, the post of a district judge is conferred on the Governor of the State to be exercised in consultation with the High Court of the State[4]. Similarly, power of appointment of a person to a post other than district judge in the judicial service of a State vests in the Governor of the State to be exercised in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State[5]. The Law Commission has analysed in details the power conferred by articles 233 and 234 of the Constitution in its two earlier reports[6] and, therefore, it is unnecessary to re-examine the aspect herein.

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1. AIR 1974 SC 2192, 2209.
2. *CAD*, Vol. VIII, 230, 258.
3. H.M. Seervai, *Constitutional Law of India*, Vol. II, 2295 (Third Edition, 1984).
4. Article 233, *The Constitution of India.*
5. *Id.*, article 234.
6. *CI. 116th Report ; LCI 118th Report.*

2.12. The provisions, especially those dealing with recruitment to superior judiciary (articles 124, 217 and 224) came in for a critical appraisal recently before a Bench of seven Judges of the Supereme Court[1]. A clear cleavage of opinion surfaced in the course of arguments. Two irreconcilable positions adopted were : (1) In the matter of appointment of Judges to High Courts and Supreme Court, the last word should be with the Chief Justice. This position, on deeper examination, was found to be unsustainable not only because of the languge in which the provisions are couched but by also inviting an external aid to construction by referring to the relevant debates in the Constituent Assembly which in terms rejected such a proposition; (2) leaving last word with the executive in the matter of appointment to supeior judiciary is likely to permit the executive to pack the Judiciary with its own nominees which would not only destroy the independence of the judiciary but would be subversive of the independence of the judiciary. Shorn of embellishment, the contention was that even though Chief Justice of India is one of the constitutional functionaries who is to be consulted in the matter of appointment, yet, by a process of interpretation with a view to consolidating the independence of judiciary, his view should be accorded primacy. On the other hand, this submission was repelled by asserting that the court cannot, by a process of interpretation, read by implication, into the provisions something which was expressly suggested and rejected. The majority, in the face of unimpeachable evidence rejected the contention that the view of the Chief Justice in the matter of appointment must be accorded primacy. Bhagwati, J., held that the proposal for appointment of a person as a Judge may be initiated by the Central Government or by any of the three constitutional functionaries required to be consulted and from whomsoever the proposal emanates, the other constitutional functionaries are required to be consulted in reagrd to it on the basis of full and identical material.[2] It would be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court or the Supreme Court, so long as the said decision is based on relevant considerations and is not otherwise *mala fide*.[3] He concluded that the opinin of each of the three constitutioan functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India may have primacy over the opinions of the other two constitutional functionaries. If the primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy means that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, and that the Central Government must accept his opinion.[4] It was also indicated that if the Chief Justice of India and the Chief Justice of concerned High Court were unanimous in their opinion in either confirming an additional Judge or renewing his term, the Central Government should ordinarily accept it, otherwise its decision is liable to be attacked and the burden would lie heavily on the Central Government to show that it has cogent reasons to disagree with the Chief Justice of the High Court and the Chief Justice of India.[5] The majority, broadly stated, leaned in favour of this view with some marginal variations.

2.13. There is a body of opinion that the majority decision having undermined the position of Chief Justice of India in the matter of appointment to supeior judiciary, further inroads have been made in the insulated walls of independence of judiciary and, to some extent, there is perceptible erosion of independence of judiciary. It would have been an interesting case study to examine and thread-bare analyse the approach of the Chief Justice of India in the matter of selection of persons for maning the superior judiciary; what was the yardstick employed; what criteria were developed in reference to which the selection was objectively made or whether it was a wholly subjective process. It would have been equally interesting to find out whether the recommendation by the Chief Justice of India was invariably accepted in pre-Gupta period. In fact, spokesman for the Government of India, whenever an occasion arose, emphatically asserted and reiterated that every appointment was made by accepting the recommendation of the Chief Justice of India and no one has been appointed atleast to the Supreme Court of India who has not been recommended by the Chief Justice of India.

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1. *S.P. Gupta* vs. *Union of India*, (1981) Suppl. SCC 87.
2. *Id.* at 256.
3. *Id.* at 228.
4. *Id.* at 229.
5. *Id.* at 245.

2.14. Jurists and commentators on the Constitution of India expressed an opinion that by the majority view, the judiciary has suffered from self-inflicted wounds.[1] An eminent jurist, who showed his disinclination to be identified, stated with a high degree of bitterness that as a matter of official courtesy and formal methodology, Government would be amply justified in asserting that every appointment to the Supreme Court of India has been made on the recommendation of the Chief Justice of India. But how such recommendation is extorted needs indepth examination. He also referred to the post-retirement statement of a former Chief Justice of India which bears out his statement. There is no material available to evaluate the position of the Chief Justice of India prior to the decision in *S. P. Gupta*'s *case* and subsequent thereto. But if in all these situations the appointment has been made on the recommendation of the Chief Justice of India, then it is difficult to appreciate the oft-repeated comment that not according primacy to the opinion of the Chief Justice of India, 'highest diginitary of Indian justice', has totally undermined the independence of the judiciary. To set the records straight, it is necessary to recall the evaluation of the opinion of the Chief Justice in the matter concernig judiciary expressed in the case of *Samsher Singh* vs. *State of Punjab*. [2]. It says :

> "In all conceivable cases, consultation with the highest dignitary of Indian justice will and should be accepted by the Government of India and the court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice, the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order." [3]. However, the same learned Judge, three years after the extracted assertion, observed in this very context in the case of *Union of India* vs. *Sankalchand Himatlal Sheth* [4] as under :

> "It must also be borne in mind that if the Government departs from the opinion of the Chief Justice of India it has to justify its action by giving cogent and convincing reasons for the same and, if challenged, to prove to the satisfaction of the court that a case was made out for not accepting the advice of the Chief Justice of India.... of course, the Chief Justice has no power of veto, as Dr. Ambedkar explained in the Constituent Assembly.". [5]

2.16. A brief reference to the debates in the Constituent Assembly bearing on the topic would shed light on the mental processess of the Founding Fathers. Winding up the debate on the articles concerning judiciary, Dr. Ambedkar observed that :

> "With regard to the qestion of concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to reply implicitly both on the impartiality of the Chief Justice and the sondness 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 he 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 is also a dangerous proposition.". [6]

In the process, the view of Mr. B. Pokhar Saheb, who had given notice of two different amendments Nos. 1818 and 2584 providing for concurrence of the Chief Justice of India in the matter of appointment of a Judge of the Supreme Court of India and a Judge of a High Court, stood rejected. The amendment to draft article 193 was specifically negatived.[7] It would thus appear that giving primacy to the opinion of the Chief Justice of India in the matter of appointment of a Judge of the Supreme Court or

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1. *Supra* note 5 at 2177.
2. *Samsher Singh* vs. *Union of India*, (1974) 2 SCC 831.
3. *Id.* at 882.
4. (1977) 4 SCC 193.
5. *Id.* at 274.
6. *Supra* note 4 at 258.
7. *Id.* at 674.

a Judge of a High Court was specifieally moved and rejected and what is expressly rejeeted cannot be read by implication. This being the constitutional position as emerging from the debates, the primary source of information, the majority leaned in favour of it.

2.17. The situation, therefore, boils down to this that the Constituent Assembly itself rejected the claim for accoiding primacy to the opinion of the Chief Justice in the matter of appointment of a Judge to the Supreme Court oi a High Court ; and yet the debate is going on that if unfettered power is given to the executive to select a person for appointment as a Judge of a High Court or the Supreme Court, it would be subversive of the independence of judiciary.

2.18. Having examined the relevant provisions of the Constitution and its precursors, and having acquainted ourselves with the meaning and effect of those provisions as authoritatively interpreted by the highest court in the country, the stage is now reached when the outcome of the actual and practical working of the provisions may be collected and dispassionately analysed so as to appreciate whether the scheme embodied in these provisions has stood the test of time or has become irrelavant and a tearch for a new model is required to be made. One should caution oneself that a search for a new model should not be readily resorted to if the scheme as in vogue framed by the founding fathers of the Constitution can still be extricated from the dross which has enveloped it or by making peripheral adjustments. Therefore, it is necessary to examine the fall out of the present system.

CHAPTER III

FALL OUT OF THE SYSTEM AND PRESENT POSITION

3.1. The method of appointment to the superior judiciary set out in the just preceding chapter has thus been in vogue for over four decades. Has this system stood the test of time ? Is it functionally sound ? Does it subserve the purpose for which it was devised ? Is it result oriented ? Does it meet with the requirements expected of it in the Constitution itself ? Are any shortcomings visible ? If so whether do they disclose some basic defects in the system or infirmities or shortcomings or any error in the mechanics of working of it ?

3.2. The Law Commission applied its focus on the method of appointment of Judges in the year 1979.[1] In fact, since the supersession controversy in 1973 and the repeat performance in January 1977, the method of appointment to superior judiciary became the subject matter of controversy amongst the Judges and Members of the legal profession and law academics. It attracted the attention of the Government of India. Also The Secretary, Ministry of Law, Justice and Company Affairs addressed a letter dated December 29, 1977, to the Member-Secretary, Law Commission, stating that the Prime Minister directed that the question of the appointment of Judges of the High Courts and the Supreme Court be examined, which led to the reference to the Law Commission so that the 'Commission might study the problem in depth and explore the possibilities of improvement.' Thus, even the Government of India, at relevent time felt that the mechanics for appointment of Judges to the superior judiciary till then in vogue need an indepth study and the direction in which improvement can be made so as to make it functional. This may help in expeditious selection of the right sort of people and also the problem of mounting arrears may be tackled by avoiding any avoidable delay in the matter of making appointment. The Law Commission, after giving the matter its earnest consideration, concluded as under[2] :—

> "After giving the matter our aearnest consideration, we agree with the High Courts and are of the view that the present constitutional scheme which was evolved by the framers of the Constitution after much reflection and after taking into account the various modes of appointment in different countries, *is basically sound. It has worked, on the whole, satisfactorily and does not call for any radical change. There are, however, certain aspects of working of the scheme about which we consider it necessary to make recommendations with a view to bringing about what we believe to be improvement in the working of the scheme.* We shall make our recommendations when dealing with different aspects of the matter." (Emphasis supplied).

Thus, as late as August 1979, the Law Commission, after having held discussions with the various High Courts, was of the firm opinion that the existing system is basically sound and has worked on the whole satisfactorily and does not call for radical change. In this conclusion reached by the Law Commission, it has the support of the broad spectrum of opinion of the High Courts. Minutely going through the report of the Law Commission as also the questionnaire issued by it, it appears that considerable delay in making appointment to the superior judiciary had not become visible or was not so gross as to call for its analysis and the causes for the delay. No statistical information appears to have been compiled to reach the conclusion one way or the other.

3.3. In the Seventy-ninth Report dealing with the delay and arrears in High Courts and other appellate courts, the Law Commission specifically examined the question of delay in filling in vacancies in the High Courts. After collecting the requisite information about the institution and disposal of cases in the High Courts, it concluded that the number of cases disposed of by the High Courts in the country

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[1] *L CI, 80th Report.*

[2] *Id*, at 21.

as a whole was less than the number of cases instituted during the year 1977.[1] In recommending various measures for speedy disposal of cases, *inter alia*, it recommended increase in the Judge strength of the High Courts. As a sub-set, it enquired whether the delay in filling in vacancies in the sanctioned strength of the High Courts contributed to the delay in disposal of cases. It noticed that though the sanctioned strength of the High Courts in the country during the year 1977 was 352, only 287 Judges on an average were in position. Likewise, in the year 1976, even though the sanctioned strength was 361, only 292 Judges were in position. The disparity between the sanctioned strength and the number of Judges in position was apparantly due to the fact that vacancies in the posts were not filled in as soon as they occurred. It concluded that, in its considered opinion, the delay in filling in the vacancies is one of the major contributing factors responsible for the piling accumulation of arrears. In its view, when a vacancy is expected to arise out of the retirement of a Judge, steps for filling in the vacancy should be initiated six months in advance.[2] In the summary of recommendations for improving upon the method of appointment of Judges, it reiterated its earlier view that in case of normal vacances in the High Court, the initiative (for filling up the vacancy) should be taken by the Chief Justice at least six months before the expected date of the vacancy, in order to obviate the possibility of the vavancy remaining unfilled for a long time after the retirement of the previous incumbent. It also recommended that the Chief Justice while making the recommendation should consult his two seniormost colleagues and any recommendation of the Chief Justice which carries the concurrence of his two seniormost colleagues should normally be accepted.[3]

3.4. In the matter of appointment of a Judge to Supreme Court, it was recommended that the Chief Justice of India should consult his three seniormost colleagues and should in the communication incorporating his recommendation, specify the result of such consultation and reproduce the views of each of his colleagues so consulted regarding his recommendation.[4] It appears that between 1977 and 1979, the Chief Justice of India started consulting two of his seniormost colleagues and then expanded his consultation to include four of his seniormost colleagues. Thereafter, the scheme appears to have been put in cold storage. This implies that the recommendation of Law Commission was acted upon in part for a short duration, though there is no evidence to show whether the report was accepted as a whole or in part. It is permissible to infer that the Chief Justice of each High Court also adopted the recommendation. The process for making appointment primarily by initiating the recommendation has to start six months before the date on which the vacancy is likely to occur. Consequently, the vacancy would be filled on the very day on which it occurs and the Judge strength for handling cases would remain unimpaired even for a day.

3.5. If the assumption was that the system is sound and peripheral changes would make it resilient, effective and functional, it is in the fitness of things to find out, what is the present factual situation nearly eight years after the report was submitted. The statement extracted hereunder tells its own tale :—

I. STATEMENT SHOWING THE STRENGTH AND VACANCIES IN VARIOUS HIGH COURTS AS ON 30-6-87

Sl. No.	High Court	Sanctioned strength		Total	Actual strength		Total	Vacancies		Total
		Pmt. Judges	Addl. Judges		Pmt. Judges	Addl. Judges		Pmt. Judges	Addl. Judges	
1	Allahabad . . .	54	6	60	45	—	45	9	6	15
2	Andhra Pradesh . .	24	2	26	18	—	18	6	2	8
3	Bombay . . .	40	3	43	38	1	39	2	2	4
4	Calcutta . . .	41	—	41	38	—	38	3	—	3

[1] *LCI, 79th Report*, 19.

[2] *Id*, at 20.

[3] *Supra* note at 32, Recommendation (2) (3) and (4).

[4] *Id*, at 35, Recommendation (32).

I. STATEMENT SHOWING THE STRENGTH AND VACANCIES IN VARIOUS HIGH COURTS AS ON 30-6-86.—*contd.*

Sl. No.	High Court	Sanctioned strength		Total	Actual strength		Total	Vacancies		Total
		Pmt. Judges	Addl. Judges		Pmt. Judges	Addl. Judges		Pmt. Judges	Addl. Judges	
5	Delhi	25	2	27	22	—	22	3	2	5
6	Gauhati	8	1	9	8	—	8	—	1	1
7	Gujarat	18	3	21	17	—	17	1	3	4
8	Himachal Pradesh	5	1	6	5	1	6	—	—	—
9	Jammu & Kashmir	5	2	7	5	2	7	—	—	—
10	Karnataka	24	—	24	21	—	21	3	—	3
11	Kerala	15	3	18	15	3	18	—	—	—
12	Madhya Pradesh	23	6	29	22	4	26	1	2	3
13	Madras	25	—	25	21	—	21	4	—	4
14	Orissa	11	1	12	9	—	9	2	1	3
15	Patna	35	—	35	29	—	29	6	—	6
16	Punjab & Haryana	23	—	23	16	—	16	7	—	7
17	Rajasthan	21	1	22	19	1	20	2	—	2
18	Sikkim	3	—	3	2	—	2	1	—	1
		400	31	431	350	12	362	50	19	69

Against the sanctioned strength of 431,362 Judges were in position, leaving 69 vacancies unfilled. Similarly, in the Supreme Court of India, on 30th June, 1986, against the sanctioned strength of 25, there were 11 vacancies. The position regarding cases pending in the Supreme Court and the High Courts would be available from the Table hereunder reproduced :—

THE POSITION REGARDING CASES PENDING IN THE SUPREME COURT AND HIGH COURTS AS ON 31-12-1986 AND 31-12-1985 RESPECTIVELY

1. *Supreme Court of India*

   Position as on 31-12-1986 1,52,969

2. *High Courts* . .

   Position as on 31-12-1985 . . . . . 13,77,790[1]

Even though Judges strove hard to keep abreast of the rising tide of inflow of work by almost doubling the output yet the court dockets remained unmanageable as would be evident from the figures herein quoted. The disposal per Judge in 1977 was 742.5 which rose to 1221.1 in 1978 and mildly tapered down to 1130.0 in 1979, yet during these very years, the arrears almost doubled.[2]

The relevant figures for the year 1980 when the recommenoations must have become effective are :—

Supreme Court of India 79,072

High Courts 4,79,686

One can say at a glance that during this peroid, there was a rising crescendo in the backlog of cases, a substantial part of which can be attributed to the delay in filling in vacancies. It has been noticed that on an average, it takes about one to two years in filling the vacancies and in some cases even as long as four years.[3]

[1]Scurce : Report of the Ministry of Law & Justice.

[2]R. Dhavan, *Litigation Explosion in India*, 60, (1986).

[3]*31st Report, Estimates Committee*, 18.

3.6. Even though there was an unexplained failure on the front of filling in vacancies, the Government, realising that the sanctioned strength of the Judges of the Supreme Court and the High Courts is inadequate, raised the sanctioned strength of the Supreme Court of India from 1+17 to 1+25[1] and of the High Courts by sanctioning 81 additional posts raising the permanent strength of Judges as well as sanctioning additional posts. The Table hereunder sets out increase in the strength of permanent and additional Judges by the Government of India with the position as on 20th March, 1987.

DECISIONS TO CREATE POSTS

Position as on 20-3-87

Sl. No.	High Court	Permanent Judges	Additional Judges	Total
1	Allahabad	—	2	2
2	Andhra Pradesh	6	4	10
3	Bombay	2	10	12
4	Calcutta	3	5	8
5	Delhi	—	6	6
6	Gauhati	—	1	1
7	Gujarat	5	4	9
8	Himachal Pradesh	—	1	1
9	Jammu & Kashmir	1	3	4
10	Karnataka	4	2	6
11	Kerala	—	7	7
12	Madhya Pradesh	—	2	2
13	Patna	4	—	4
14	Punjab & Haryana	—	3	3
15	Rajasthan	—	6	6
	Total	25	56	81

3.7. At this stage certain peculiar features of the mechanics employed in filling in vacancies must be unravelled. To start with, in the year 1980, five Judges of the Supreme Court retired in quick succession. The first vacancy in that year occurred on 1-8-1980, that followed by the next one on 12-9-1980, the third on 15-10-1980, the fourth on 15-11-1980 and the fifth soon after on 16-1-1981, None was filled in till January 1981. Similarly, in the year 1985, five vacancies occurred in quick succession. The first occurred on 9th May, 1985, the second on 12th July, 1985, the third on 16th August, 1985, the fourth on 1st October, 1985, and the last on 22nd December 1985. The sanctioned strength of the Judges of the Supreme Court has been raised from 18 to 26 Judges, including the Chief Justice of India, with effect from 9-5-1986.[2] Analysing the position of the vacancies, there were 12 vacancies as on 31-3-1986. It may be stated that two vacancies have been filled in May 1987. However, it may be recalled that two Judges are to retire during vacation in June 1987 and two sitting Judges are busy with a Commission leaving the effective working strength at 12 i.e. half of the sanctioned strength.

3.8. In order to substantiate the inescapable conclusion that there is long unexplained delay in the matter of filling in vacancies in the Supreme Court and High Courts, two separate tables are compiled showing the date on which vacancy occurred and the date on which it is filled-in, covering the period 1981-86 in the Supreme Court and 1980-85 in the High Courts. Tables are set out in Annexures II and III, respectively.

[1]The Supreme Court (Number of Judges) Amendment Act, 1986, came into effect from 9-5-1986.
[2]*Ibid.*

Applying the law of averages, the delay in filling in vacancies in the Supreme Court on an average comes to 3 months approx. as per the information supplied (Annexure II). Similarly, delay in the matter of appointment in various High Courts is tabulated on the information supplied by the High Courts and the average is worked out for each High Court in respect of which the information was made available :—

1. Andhra Pradesh	3 years.
2. Delhi	6 months.
3. Gujarat	Average can't be worked out.
4. Himachal Pradesh	5 years 4 months 11 days.
5. Jammu & Kashmir	2 years.
6. Karnataka	1 year 6 months.
7. Kerala	1 year 3 months.
8. Madhya Pradesh	1 year 6 months.
9. Orissa	9 months.
10. Patna	2 years.
11. Punjab & Haryana	Average can't be worked out.

3.9. One would like to draw attention to a glaring case of utter failure to fill in the vacancy for along time. One post of additional Judge in the Madhya Pradesh High Court is vacant from 10th August, 1977 to date, i.e., for more than nine years. The High Court of Jammu & Kashmir with a total strength of 7 Judges had been working with only 3 Judges in 1980-81 and only 4 Judges in 1983-84. Similarly, a small High Court like the one in Himachal Pradesh at Shimla has a sanctioned strength of five permanent Judges and two additional Judges. Its earliest vacancy unfilled is from September 1983, the second from August 1986 and the third from March 1987.

3.10. Leaving aside any other considerations, there is a minimum requirement of 650 regular cases to be disposed of per Judge per year. It is not necessary to set out how this figure is arrived at save saying a committee of three senior most Chief Justices have compiled the same.[1] Applying the yardstick, apart from any other cause, the failure on the front of filling in vacancies within a reasonable time has affected disposal in the manner set out in the Annexure IV, for the Supreme Court and in Annexure V for the High Courts.

3.11. The Law Commission in order to acquaint itself with the current thinking in the High Courts as also to invite Judges of the High Court to participate in the evolution of the subject of manpower planning of judiciary approached each High Court with a request to state freely and fearlessly the causes for the delay in filling in vacancies and at which point the delay occurs.[2] The commission addressed various queries to the chief justices of each High court bearing, inter alia, on the question whether in the matter of selecting and recommending a mamber of the Bar or a member of the district judiciary any difficulty is experienced in view of the orchestrated cirticism that the power to transfer has been conceded to the executive without the consent of the Judge sought be transferred by the decision in *Union of India* vs. *Sankalchand Himatlal Sheth*[3] and *S.P. Gupta* vs *Union of India*.[4] Chief Justices were requested to shed light on the criteria, yardstick or other relevant considertions which shape the decision to recommned a member of the Bar to be a Judge of the High Court. Amongst others, the query elicited information on : (*i*) income aspect, (*ii*) standing at the Bar; (*iii*) caste; (*iv*) reservation principle and any other considerations which have an impact on the decision to select and recommend a candidate.

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[1]Quoted in *Conference of Chief Justices of High Courts and Chief Ministers and Law Ministers of the States,*

[2]See Annexure I.

[3]AIR 1977 SC 2328.

[4]AIR 1982 SC 149

By and large, the view was unanimous that income of the person under consideration is certainly taken into consideration, qualifying that it is not the only criterion. Standing at the Bar would ordinarily be a relevant consideration and it has been so said save a tiny minority. By and large, the view was that caste is not a relevant consideration except where attempt is made to recruit some one from scheduled castes or scheduled tribes. This will also cover the last query on the subject.

3.12. The one important question imposed was whether a member of the bar to whom a judgeship in the High Court was offered disclosed hesitation and wavered because the executive could transfer him from one High Court to another High Court without his consent as per the decisions of the Supreme Court. Out of 18 High Courts the Chief Justices of three High Courts have expressed their apprehension that a possibility of transfer has swayed the consideration of some members of the Bar about accepting judgeship. Some others are of the view that it has a marginal effect but none has been able to specify a singal specific case where a practising advocate declined to accept judgeship voicing his apprehension that he will not accept the same as he is likely tc be transferred without his consent.

3.13. The query about the delay in making appointments elicited information that the delay was generally either at the State level or at the Central level or occasionally at both the levels, though the Chief Justice of a premier High Court stated that some times delay occurs in finding out a proper person for being recommended. At least one Chief Justice has frankly stated that amongst various causes of delay, one which is disturbing and abominable is political inteference, and one other frankly stated that the vacancy is not filled in because it is treated as part of political patronage, distribution of which takes time. Without analysing all the causes here, the information has been tabulated quastionwise and is annexed to this report at Annexure VI. One Chief Justice pointed out something which is universally known that a very reprehensible tendency has become discernible now in that as soon as the name of a person under consideration is either espoused or published a spate of letters start pouring in, making all sorts of real or imaginary allegations against the recommendee. Inquiring into all the allegations takes time even if they are ultimately proved to be baseless.

3.14. Recalling that mechanism for processing a proposal for appointment of a person as a Judge of a High Court is complex and complicated and involves nearly six constitutional functionaries, the delay is inherent in it. But as far as the appointment to the Supreme Court is concerned, there ought not be any delay because the power of appointment vests in the President who has to act on the advice of the Cabinet and, according to Rules of Business, the Minister of Law and Justice will be in charge of this function. Therefore, only two constitutional functionaries are involved, namely, the Chief Justice of India and the Minister of Law and Justice. Accepting that the normal method is followed, namely, that the Chief Justice of India will initiate the process of recommendation of a person, usually a sitting Judge of the High Court for filling in the vacancy in the Supreme Court, he will forward the same to the Minister of Justice. If any confabulation is necessary, both are in Delhi and reside very near each other. Therefore, the interaction of each can be completed in a short time. If the process starts three months before the occurrence of the vacancy, even with a long drawn out discussion, the process can be over well before the vacancy occurs and the appointment can be made so much in time as not to permit the vacancy remaining unfilled even for a day. The assumption underlying this statement is that the constituency from which selection is made is a limited constituency of High Court Judges who have put in more than five years' service as a Judge of the High Court and about whose credentials no enquiry is required to be made as he is a sitting Judge of the High Court. If there are roughly 450 High Court Judges and the selection is confined to those who qualify and are not about to retire, the selection is to be made from roughly about 150 to 200 Judges. Again, federal principle is generally kept in view which would dictate a choice limited to High Courts which are not represented in the Supreme Court. More often, the question of minority representation is also kept in view. The scope, thus, for selection of talent is so limited that the choice sometimes dictates itself. No time, therefore, would be required to be spent as the choice is not from a wide area or from unlimited number. It is not unkown that since some time a new practice has grown up on that time there is an informal prior disucssion between Chief Justice of India and the Minister of Justice and after a consensus is reached the formal proposal is made. Then the process will be accelerated. And yet the delay in filling in vacancies in the Supreme

Court is enormous and remains wholly unexplained. The time taken in filling in vacancies in the Supreme Court occurring from 1980 onwards have been set out in the Schedule at Annexure II. It would appear at a glance that even as on today. twelve vacancies have remained unfilled for more than a year.

3.15. Failure to fill in the vacancy is failure to perform a constitutional duty. It is the responsibility of the State not only to set up adequate number of courts but to provide manpower for its functioning. It is the duty cast by the Constitution and failure to perform the same can surely be styled as failure to perform the said constitutional duty. Disposal of cases amongst other things, is directly proportionate to the number of the Judges in position. Unfilled vacancies is one of the prime causes for mounting arrears. Schedules at Annexures IV & V would show the delay in filling in vacancies in the Supreme Court and the High Courts and its impact on the disposal of cases and the mounting graph of arrears.

3.16. Before concluding this Chapter, it needs to be pointed out that this failure on the front of making appointments to fill in vacancies within reasonable time has not only attracted the attention of the Judges, jurists and litigating public but also of the Parliament. The Thirty-first Report of the Estimates Committee expressed its regret that despite their detailed recommendation set out in the eightieth Report of the Law Commission of India, the situation has further deteriorated and the time lag in filling in the vacancies in the Sureme Court and the High Courts has enlarged on account of a further delay in attending to this urgent task. The Report noted with regret that the delay in filling in the vacancies by the authorities charged with a duty to undertake this task is primarily responsible for the enormous increase in the arrears. The Committee accordingly suggested that ways and means have to be found out to replace the present procedure for appointment of Judges as the present mechanism is partially responsible for inordinate delay in selection and appointment of Judges. Amongst others, Thirty-First Report of the Estimates Committee also provides an adequate justification for the present report.[1]

3.17. Therefore, the conclusion is inescapable that the mechanics, as devised in the constitutional provisions for making appointment to the superior judiciary, appear to be inadequate and incapable of providing the manpower inputs within a reasonable time. This 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 has on the whole worked satisfactorily and does not call for any radical change. A new approach has become inevitable otherwise the system is likely to be crushed under the weight of its own debris.

3.18. Supersession in the matter of selection of the Chief Justice of India, transfer of Judges, and non-confirmation of additional Judges of the High Courts in exercise of the power conferred by article 222 of the Constitution are some other developments which have given rise to an apprehension that the independence of judiciary, said to be the cardinal feature of the Constitution, is likely to suffer erosion at the hands of the Executive.

3.19. Since the inception of the Constitution. the office of the Chief Justice of India was filled in by promotion of the next man according to seniority. This principle was departed from in April 1973, when the then Chief Justice of India demitted office on reaching the age of superannuation but the Judge next in succession was not promoted tc the office of the Chief Justice of India. He and two others were superseded and the Judge fourth in rank was promoted as the Chief Justice of India. This was seen by the Bar as a threat to the independence of tne judiciary, by some as subversion of the Constitution from within and a manifest attempt to undermine the court's independence. Again, in January 1979, on the retirement of Justice A.N. Ray, the next Judge according to seniority was passed over and the Judge next to him was appointed as Chief Justice of India, the controversy, reenacting the events of 1973, ensued.

3.20. The Government of India, recalling the earlier report of the Law Commission on Judicial Administration. defended its action stating that succession to the office of the Chief Justice of India cannot be regulated by mere seniority, The Commission had recommended that a healthy convention should be set up that appointment to the office of the Chief Justice rests on special consideration and does not as a matter

[1] *Supra*, note 9 at 18-19,

of course go to the seniormost puisne Judge. If such a convention was established, it would be no reflection on the seniormost puisne Judge if he is not appointed to the office of the Chief Justice. The Commission had also recommended that such a convention must alsc be established in the case of appointment of Chief Justice of a High Court. Once such a convention is established, it will be the duty of those responsible for appointment to choose a suitable person for that high office, if necessary, from among persons outside the court.[1]

3.21. It is during this controversy that a reference was made by the then Law Minister and another Minister to the Government of India to the social philosophy of the person to be considered for appointment as the Chief Justice of India being in tune with one of the Government of the day. This statement gave rise to a bitter controversy and it was said that this is the starting point of setting up a committed judiciary.

3.22. Article 222 of the Constitution confers powers on the President to transfer a Judge from one High Court to any other High Court after consultation with the Chief Justice of India. For the first time in the history of India, sixteen Judges from various High Courts were transferred from the High Court in which each was appointed, to other High Courts in the year 1976. Justice S.H. Sheth, a Judge of Gujarat High Court challlenged the constitutionality of the order transferring him from Gujarat High Court to Andhra Pradesh High Court. A full Bench of the Gujarat High Court declared the order consitutionally invalid.[2] The Supreme Court in the appeal by Union of India by a majority more or less upheld the decision of the High Court. What transpired from this exercise was that selective transfer of judges was held to be punitive in character and punitive transfer was held to be outside the purview of article 222. This approach gave rise to a debate whether policy of transfers in exercise of power conferred by article 222 can be sustained. If the policy of transfer is otherwise valid, any transfer in implementation of the policy would be at least not punitive in character. It appears that somewhere in 1982, Government of India took the policy decision to have Chief Justice of each High Court from outside the jurisdiction. Pursuant to this policy decision, numerous transfers were made. There is still a body of opinion that the power to transfer conferred on the executive poses a threat to the independence of the judiciary. This aspect has been discussed in detail in *S. P. Gupta* vs. *Union of India*.[3] At any rate, in pursuance of the policy enunciated, number of Chief Justices were transferred from the High Court of origin to other High Courts. Today we have Chief Justice from outside the jurisdiction in the High Courts of Madras, Kerala, Andhra Pradesh, Karnatka, Madhya Pradesh, Rajasthan, Gujarat, Punjab and Haryana, Uttar Pradesh, Bihar, Orissa and Sikkim. Of course, the policy is being implemented in fits and patches but by and large the policy is being implemented.

3.23. Since the Constitution became operative, the strength of each High Court, subject to review at intervals, consisted of permanent Judges and additional Judges. In fact, the Constitution was being so implemented that as a rule a Judge of a High Court would, in the first instance, be appointed as additional Judge and, in course of time when the vacancy in the permanent strength occurred, he would be confirmed as permanent Judge. Even though this was not in strict compliance with the constitutional mandate, that practice was invariably in vogue all these years.[4] The issue came to the fore when the term of two additional Judges of Delhi High Court expired and was not renewed and they were consequently dropped. One of them challenged the action of the Government of India in the case reported as *S. P. Gupta* vs. *Union fo India*. There was a very interesting and intelligent debate about how in actual practice power conferred by articles 217 and 224 was exercised. This inquiry unravelled the fact that the practice till then followed both by the judiciary and the Government was not strictly in conformity with the constitutional mandate. That apart, there was hardly a case in which additional Judge was not confirmed save and except where he himself disclosed a desire not to be confirmed. It is for

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[1] *LCI, 14th Report* 39-40.

[2] *S.H. Seth*, vs. *Union of India* (1976) 17 GLR 1033.

[3] See generally *S.P. Gupta* vs. *Union of India*, (1981) Supp. SCC 87.

[4] *Ibid.*

the first time that the two additional Judges of Delhi High Court were not confimed and one of them resigned. It was said that non-confirmation of additional Judges would expose such additional Judges to the sweet mercies of the executive and would wholly undermine their independence. There are very interesting observations in the judgment of each Judge composing the bench but it is not necessary to extract the relevant observations here. The consensus was that an additional Judge is not on probation and he has a right to be considered for appointment for a further term on the expiry of his initial term or to be confirmed when a vacancy in the permanent cadre occurs. Even though in the past, the additional Judges were confirmed, power is now claimed by the executive that it may not grant to the additional Judge further extension of the term or confirm an additional Judge. This situation it is said is not conducive to the healthy development of judiciary.

3.24. A threat to judiciary may emanate from a hitherto grey area such as the organised Bar. A new phenomenon of disturbing potentiality has now become evident. The organised Bar in various States has frequently resorted to strike under the pretext of insulting the independence of judiciary. The strike by the Bar of Allahabad High Court against one more bench being set up in Western U.P., the strike by the Bar of Gujarat High Court as well as the bar of the whole of Gujarat against non-appointment of some persons whose names have been recommended for appointment to High Court, the strike against the supersession of three Judges in the Supreme Court of India, the strike by the Bar of Madras High Court questioning the recommendation of a Law Secretary for appointment to the High Court, the strike by the bar of Delhi High Court and a token strike by the Supreme Court bar on the question of appointment of Chief Justice of Delhi High Court and a Judge of the same court, and the strike by the bar of Gujarat High Court about non-confirmation of its acting Chief Justice, would, when properly analysed, show that such frequent resort to strike under the pretext of supporting the independence of the judiciary would, in the long run, make the members of the judiciary so much dependent on the Bar that it would undermine the independence of judiciary.

CHAPTER IV

NEED AND JUSTIFICATION FOR CHANGE

4.1. 'The services rendered by Judges demand the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shillings and pence according to the quantity of work. A form of life and conduct far more severe and restricted than that of ordinary people is required from Judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct.... The Bench must be the dominant attraction to the legal profession yet it rather hangs in the balance now, and heavily will our society pay if it cannot command the finest characters and the best legal brains which we can produce; and heavily will our country pay in an epoch where relative material power had diminished, we do not sustain those institutions for which we are renowned. [1]When the provisions relating to superior judiciary in the draft Constiutution were under discussion, alternative models were suggested for selecting manpower to man the superior judiciary. A number of alternatives were suggested in this behalf drawing sustenance from various models in existence in different parts of the globe. Dr. B.R. Ambedkar, in his summing up, laid bare the object behind the mechanism chosen for selecting members of the superior judicairy. It reads as under :

> "There can be no difference of opnion 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... It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent which we find in the United States, it would be be dangerous to leave the appointments to be made by the President, whithout any kind of reservation or limitation, that is to say, merely on the advice of the excutive of the day. Similarly, it seems to me that to make every appointment which executive wishes to make subject to the concurrence of Legislature is also not a very suitable provision. 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 Legistlature. The provision in the article is that there should be consultation of persons who are *ex hypothesi* well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment."[2]

Rejecting the amendments providing for concurrence of the Chief Justice of India, Dr. Ambedkar said that such a provision seems to rely implicily both on the impartiality of the Chief Justice and the soundness of his judgment. Conceding that the Chief Justice is a very eminent person, he proceeded to state that after all 'the Chief Justice is a man with all the failings, all the sentiments and all the prejudces 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'[3] After referring to the relevant debates in the Constiutent Assembly and keeping in view the language employed in articles 124 and 217 and allied articles in the Constitution, the majority in *Gupta's case*[4] rejected the contention that the opinion of the Chief Justice of India must enjoy primacy in the matter of selection of Judges to man the superior judiciary. Justice Bhagwati in his opinon clearly spelt-out the legal position with reference to the power of appointment of Judges to superior Judiciary as under :

> "It would therefore be open to the Central Government to override the opinion given by the constitutional functionaries required to be consulted and to arrive at its own decision in regard to the appointment of a Judge in the High Court

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[1]Wirston Churchil quoted in *LCI.* 14*th* Report vol. I, 42.

[2]*CAD* vol. VIII, 258

[3]*Ibid.*

[4]*S.P. Gupta* v. *Union of India* (1981) Supp SCC 87.

or the Supreme Court, so long as such decision is based on relevant considerations and is not otherwise mala fide. Even if the opinion given by all the constitutional functionaries consulted by it is identical, the Central Government is not bound to act in accordance with such opinion, though being a unanimous opinion of all the three constitutional functionaries, it would have great weight and if an appointment is made by the Central Government in defiance of such unanimous opinion, it may prima facie be vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. The same position would obtain if an appointment is made by the Central Government contrary to the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India, But we do not think that ordinarily the Central Government would make an appointment of a Judge in a High Court if all the three consitutional functionaries have expressed an opinion against it. We may, however, make it clear that on a proper interpretation of clause (2) of Article 124 and clause (1) of Article 217, it is open to the Central Government to take its own decision in regard to appointment or non-appointment of a Judge in a High Court or the Supreme Court after taking into account and giving due weight to the opinions expressed by the constitutional functinaries required to be consulted under these two Articles and the only ground on which such decision can be assailed is that it is mala fide or based on irrelevant considerations. Where there is a difference of opinion amongst the constitutional functionaries who are consulted, it is for the Central government to decide whose opinion should be accepted and whether appointment should be made or not."[1]

4.2. There was a chorus of protest againt the decision of the majority. After attaching due weight to the views of the critics the incontrovertible fact is that the majority accepted the interpretation which was clearly intended by the founding fathers, which intention could be unravelled by reference to the debates in the Constituent Assembly and especially by analysing not merely what is stated but what was proposed and specifically rejected. This model or mechanism for selection of members of the superior judiciary has been in vogue for the last forty years.

4.3. The twin objects to achieve which the existing model was devised were to attract the best talent enjoying unquestionable integrity and character to enter the judiciary and that the judiciary must both be independent of the executive and must also be competent in itself. Intervening in the debate, Prime Minister Nehru said that "It is important that these Judges (of the superior judiciary) should be not only first rate, but should be acknowledged to be first rate in the country, and of the highest intergrity, if necessary, people who can stand up against the executive Government, and whoever may come in their way...." But the High Court Judges and the Federal Court Judges should be outside political affairs of this type and outside party tactics and all the rest, and if they are fit, they should certainly, I think be allowed to carry on.[2]

4.4. Having these objects in view, the founding fathers devised a mechanism for selecting persons to man superior judiciary and conferred power on the President, the highest executive of the country, to make the appointments. A period of forty years is sufficiently long enough to provide a watershed to assess and evaluate the performance of the model and the functioning of the mechanism. If, on an overall view, it could have been concluded that by and large the mechanism has satisfactrily worked, nothing else would be rquired to be done. If, on the other hand, the situation has so grossly deteriorated that the mechansim has become almost disfunctional, it must be reactivated or an alternative model has to be devised so as to exclude the infirmities in the present model and the new model must effectively perform the task of finding out honest, efficient, independent and capable judges. One cannot ignore the situation by merely expressing one's reverence for a model devised by the founding fathers of the Constitution. They did it with the best of intentions. It may be that the assumptions underlying the functioning of the mechanism may now be found wanting and the hole thing may, therefore, go out of gear.

4.5. Having become aware of what the founding fathers wanted to achieve by devising the present machanism, can it be truthfully said that these objects have been or are being achieved? The matter can be viewed from two independent angles.

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[1] *Id.* at 228.

[2] *Supra note* 2 at 246-247.

Is the mechanism working satisfactorily? Is the power conferred on the President to make appointments being exercised for the purpose for which it was conferred ?

4.6. Any organised society, and more so the developimg society, being governed by a written Constitution incorporating the philosophy of rule of law and an entrenched Bill of Rights, had all the potentialities for generating numberous disputes in the society. The Constitution makers were not oblivious to this distinct possibility. Therefore, provisions were incorporated in the Constitution for setting up a pyramidical integrated court structure from grassroot to the apex court. Court system was devised to provide for a where diputes can be taken for their resolution. Appellate, jurisdiction was devised as a corrective against human failings or errors of judgment. Having structured the court system, the next important step to be taken was to keep constantly under review the manpower position for manning these courts. A court system would be an empty structure unless judges, independent, efficient, competent intelligent and capable of discharging their duties are selected and appointed for manning these courts. To achieve the second object, power was conferred on the highest executive, the President of India, to appoint persons as Judges of the High Courts and of the Supreme Court of India. It is a power coupled with duty. Power to appoint inheres the duty to appoint. If power is conferred on one authority and the authority fails to perform the duty, it would generate a vacuum. According to one view this power of appointment conferred on the President is coupled with a duty, which if the President fails to perform, a writ of mandamus can be issued calling upon him to review the strength and make the appointments.[1] Again, when power is conferred on a constitutional functionary, it has to be exercised for the purpose for which the power is conferred and such power has to be exercised in a reasonable manner, which in turn implies that it must be exercised within a reasonable time. The situation, therefore, is that the President has the power to make appointments; he cannot act on his own; he has to act on the advice given by either the Cabinet or the concerned Minister under the Rules of Business; therefore, it becomes the obligatory duty of the Government to make necessary recommendations after consulting all the constitutional functionaries as provided in the various provisions and the appointment must be made within a reasonable time. The underlying assumption of the model and the mechanism is as analysed herein.

4.7. The questions which must now be faced are : Is the mechanism functioning or has it become disfunctional ? If it has become disfunctional, whether the, failure is of the constitutional functionary on whom power is conferred or search should be made for causes outside the mechanism for its failure ? In other words the questions to be posed are : (1) Is the judicial strength regularly reviewed to keep pace with mounting court dockets ? (2) Are first rate persons of high intellect, unquestioned integrity and character and efficient in discharge of duties being selected by making the mechanism operational ? (3) Are the vacancies filled within reasonable time which is the obligation of the President ? A citizen of this country has a constitutional right to have a forum easily accessible for the resolution of the disputes by efficient Judges and within a reasonable time. Is this object achieved? If the power to appoint inheres duty to appoint and if it can be shown that the appointments are tardy, inordinately delayed, not of the quality expected, then not only failure can be ascribed to the centres of power but also to the mechanism. In that event, a rethinking in this direction is a high priority necessity.

4.8. After working of the mechanism for four decades, the situation on this front is depressing and has reached such a critical stage which provoked a former Chief Justice of India to send a warning that the system of administration of justice is about to collapse.[2]

4.9. It has been succinctly pointed out in the earlier part of this report that there is an inordinate delay in filling in the vacancies. The review of the manpower strength for superior judiciary is not undertaken regularly and at regular intervals. Even when such a review is done, as in the case of Supreme Court of India where the strength has undergone upward revision at the hands of Parliament on four different occasions—1956 (7 to 10), 1960 (10 to 13), 1977 (13 to 17) and 1986 (18 to 25), it more or less remains a paper exercise. While augmenting the strength, the Judges are not put in position by selection and appointment in time. This becomes clear from the statistical chart (See Annexure II). Similarly, in the High Courts

[1] *Supra* note 4 at 915.

[2] *P.N.* Bhagwati, Law Day Speech on 26th November, 1986.

the situation is still worse. The vacancies are not filled in for a long time. When, additional strength is sanctioned, more often couple of years are spent in making the appointments by which time, there being a direct and inseverable relation between the strength of the Judges and the disposal of cases, the arrears have further piled up necessitating a further upward revision of the strength. The whole thing moves in a vicious circle. This position is almost admitted on all hands and it is causing serious dislocation in the functioning of the judiciary. The fact situation, as disclosed in Annexures IV and V showing the linkage between the Judges in position and disposal of cases and deemed disposal of cases if vacancies were filled in time, would unquestionably show that the failure on the front of appointments is largely responsible for total dislocation in the functioning of the superior judiciary. The situation has reached such an impasse that a radical re-thinking in this behalf is inescapable.

4.10. Failure to fill in vacancies gives rise to canards, further widening the credibility gap that has become visible. Whenever a vacancy is not filled in time and as the whole process of selecting personnel is carried on in secrecy, one is at a loss to exactly locate the centre at which the delay occurs. In the matter of appointment to Supreme Court, the two constitutional functionaries involved in the process of selection are the Chief Justice of India and. for all practical purposes, the Minister of Law and Justice, Government of India. Both of them are in Delhi and can easily devise a meeting for discussion, deliberation and conclusion. In such a situation, to resort to unending correspondence is an exercise in futility. Every Chief Justice would be keen to so arrange the affairs of his court as to provide for effective management of dockets. Usually, the historian divides, for the purpose of evaluation, the period in the court by referring to the period for which a given individual has functioned as Chief Justice. Evervy Chief Justice would like that during his regime, the court rose to the occasion, responded to the demands made on it, provided an opportunity for easy accessibility and so managed the dockets as to reduce the arrears and the time spent in disposal of cases. Every such Chief Justice is aware of the day on which the vacancy is to occur save in the rare case of death or resignation. He would ordinarily be expected to initiate the process of appointment by recommending a name or names for filling in vacancies which are likely to occur. The process he would start would be in advance of the occurrence of the vacancy. His constituency is by and large 200 to 250 High Court Judges. He keeps federal principle in view as also partly communal representation. Save this limitation, he has free and unhindered choice. The bio-data of the person concerned is irrelevant because a recommendee has been working as a Judge of the High Court for over five years. The moment he decides to select and recommend the name, he can send it down to the Minister of Law and Justice. The discussion can follow in no time and the appointment can be processed and completed much in advance of the occurrence of the vacancy. Such a thing is not happening is unquestionably established and is an incontrovertible albeit unpalatable truth (see Annexure II). Now, as suggested hereinabove, the Chief Justice would be keen to fill in the vancancy. The inescapable conclusion is that the failure is in the Ministry of Law and Justice. It is established by what the former Chief Justice of India soon after laying down the reins of office frankly confessed :

> "The Government has a great power of filibustering. I will tell you what happens. I say this man must be appointed Chief Justice. The Government has got the power of appointing an acting Chief Justice. The Government says, 'We are not doing anything against you. But you see, he desevers to be appointed. Let us consider it'. Now you see, if that person is kept as acting Chief Justice for say, six months, eight months, one year, two years, acting Chief Justices have been kept in office for three years. Now I find that the administration, the High Court is suffering grievously. Then what do I do ? *I have to give in. I have to give in not because I knuckle under the Government's pressure but in the interset of the institution.* Or else what happens is this : supposing there is no agreement between me and the Governmen on certain appointments to the Supreme Court or to the High Court no appointments are made. As I told, Mrs. Gandhi never overruled me....the Government has got every weapon in its hands. It may not differ with you, but it may not agree with you. So the vacancies are kept unfulfilled".[1]

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[1]Y.V. Chandrachud, quoted in R.K. Hegde, *The Judiciary Today: A Plea for collegium*. 51.

Further, the process of selection is kept a closely guarded secret. One thing must, however, be mentioned that very recently the Minister of Justice stated in the Parliament that the Chief Justice has not made his recommendations till then for filling in not less than twelve vacancies in the Supreme Court.[1]

4.11. Locating with certainty the centre where delay occurs in the matter of appointment to High Court is rather difficult in asmuch as five centres of power are involved in the matter of processing a proposal for such an appointment. Ordinarily save in exceptional cases, the Chief Justice of the concerned High Court initiates a recommendation. It is sent to the Governor of the State. The Chief Minister of the State is involved in the consultation. Thereafter, the recommendation is sent to the Ministry of Law and Justice, Government of India. The Ministry sends it to the Chief Justice of India. And finally, the Ministry draws up the proposal processes it through the Prime Minister and the President makes the appointment. Cases are not unknown where Chief Ministers have killed proposals by not forwarding them to the Ministry of Law and Justice.[2] It is also known that where Chief Justice of the High Court, the Governor and the Chief Minister of the State, and the Chief Justice of India have concurred in one recommendation, the recommendee was not appointed and the reasons for non-appointment were never communicated.[3] The delay may occur, therefore, at any one of those stages but the delay is horrendous, as statistically established in the Tables in Annexure II & III. Therefore, it is permissible inference from these incontrovertible facts that the mechanism has become disfunctional and static resulting in vacancies not being filled in for a very long time causing tremendous dislocation in the functioning of the superior judiciary.

4.12. Having exposed the failure of the present system, one would extend the area of search to find out a new model. Such a search should be unbiased, free from prejudice and wholly uninhibited. The Commission would therefore, look around the world to acquaint itself whether any existing model will deliver the goods or indigenisation of such a model would be helpful or totally devise a new one.

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[1]A.K. Sen, Minister of Law & Justice, intervened in reply to a question in Lok Sabha on 10-3-1987.

[2]*Supra* note 4

[3]See Annexure VI, Q.8, Gujarat High Court.

CHAPTER V

A LOOK AROUND THE WORLD

5.1. A search for a new model must inevitably impel a bird's eye view of the models in vogue in various countries of the world. The mind must be free from bias, prejudice or predilections while looking around for various models. At any rate, no model should be totally ignored. It may be that a particular model may not be suitable for a country like India. Any new model must be such as to be suitable to the needs and demads of consumers of justice of a developing country like India where a sizeable segment of consumers of justice comes from illiterate or semi-literate class of the society. When one is informing one's mind about the available models, there should be no inhibition against any particular model in any part of the country. It must, however, be remembered that every country may have devised its own model either a new or by historical developments to suit its requirements. Therefore, when making the choice, other factors will have to be kept in view, such as, level of development of the society, percentage of literacy in the society, its per capita requirement of institution for dispensing justice, the capacity of the marginal class to spend for the service of rendering justice and other allied factors. This will be the general background within which a search for a model may be made.

5.2. There are two known methods employed the world over in the selection of judges, namely, nomination and election. Some countries have adopted both, such as in U.S.A. both the systems are operating at different levels. In United Kingdom, nomination is the only known method of selecting judges. In U.S.S.R. and some Eastern block countries who have adopted a Soviet model, the elective principle is applied for selection of Judges at all levels as also People's Assessors, who, for all practical purposes, are judges. Where principle of nomination is adopted, power is distributed in different bodies to nominate judges. A collateral question is whether judges should be members of a career service as in France, or chosen from a special group of lawyers as in England, or selected through nomination from the legal profession generally as in United States of America.[1]

PART I

U. S. A.

5.3. Six diverse methods for recruitment of 28,000 Circuit Judges in fifty different States of U.S.A. are in vogue. They are partisan election, non-partisan election, merit selection at one or more levels of the judicial system, gubernatorial appointment, legislative election and selection by sitting judges. All Federal judges are appointed by nomination only.[2]

5.4. All judges of the Federal judiciary in United States are appointed by the President subject to confirmation by simple majority vote of the Senate. The responsibility of the President for selecting and nominating a judge has often been largely delegated to the Attorney General and Deputy Attorney General. Reagan Administration has established a formal committee under the chairmanship of President's Council, including the Attorney General plus seven other high officials of the Department of Justice of the White House. The Committee reviews recommendations for vacancies, submits these to checks by FBI and judgements by American Bar Association and then forwards these recommendations to the President.

5.5. To get through the Senate, the appointee must have the approval of Home State Senator and if he does not, then the Senate defeats the nomination as a matter of fraternal *quid pro quo* courtesy. The American Bar Association has set up a Committee of fourteen members to participate in the process of the selection for Federal judiciary. In course of time, this Committee has become a powerful and respectable vehicle in the vital initial stages of the nominating process and has a powerful voice at least below the Supreme Court level. The Committee does

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[1] H.J. Abraham, *The Judicial Process*, 22. (5th ed., 1986).

[2] *Id* at 23.

not suggest names for nomination to Federal judiciary but its role is confined to evaluating the qualifications of actual and potential nominees. A nominee held to be 'not qualified' by the Committee is generally not approved by the Justice Department.[1]

5.6. The nomination by the President and ratification by the Senate in their combined effect involve political consideration though the President would not attempt to designate members of the judiciary purely on the basis of political considerations. The Committee of the American Bar Association acts as a positive check in this behalf which generally focuses the attention on merit and excellence. Having said all this, it must be conceded that the political pressures must nevertheless be reckoned with and are disregarded only at the appointing authority's peril.[2]

5.7. Election of judges is in vogue and is still widespread in a majority of the States in America. There are two constituencies for the election. They may be elected by the electorate or by the Legislature. They may run on partisan tickets or non-partisan tickets. The term of office for most elected judges is on an average 6 to 10 years, for some it extends to 15 years and for others to life.

5.8. An interesting attempt at a compromise between the elective and appointive method of choosing State judges is present in some of the States. This compromise is designed to minimise political influence and provide a degree of security obtained by retaining the element of popular control.[3]

5.9. What is known as California Plan may be briefly examined.[4] It applies to Judges of the Supreme Court and Court s of Appeal only (Trial Court appointments are at the Governor's discretion). The Governor nominates one person to the Commission on Judicial Appointments, composed of Chief Justice of the State's Supreme Court, the presiding judge of court of appeal of the area concerned and the Attorney General. If the Commission approves, the appointee is deemed to be appointed only until the next general election (but for not less than one year). At the end of that period, the nominee stands for general election for a full twelve years term of office, his or her name being the only one on the non-partisan ballot. There are no limits on the number of terms to which a successful candidate may aspire. If the electorate's response is negative, the Governor will designate a successor in the same manner who will ultimately go before the electorate. The final burden of approval is on the people, who must familiarise themselves with the candidate's record—or at least they ought to do so.

5.10. What is known as Missouri Plan may as well be briefly examined.[5] Plan is mandatory for appointment of a Judge of the Missouri Supreme Court, judges of other appellate courts of the State, the circuit and probate courts in St. Louis and in Jackson county and St. Louis court of corrections. Under this Plan, Missouri Appellate Commission operating on differerent court levels selects three candidates for every vacant judgeship. For the Supreme Court and the appellate court, the Commission consists of the Chief Justice of the State's Supreme Court, the Chairman, three lawyers elected by the State Bar, one from each of the three courts of appeal, and three citizens, who are not members of the Bar, appointed by the Governor, one from each of the three appellate districts. The Commissions for the circuit and other lower court judges comprise the presiding judge of the court of appeals of the district in which the circuit happens to be situated, two members of the Bar elected by its own members residing in the circuit involved, and two similarly resident non-bar citizens appointed by the Governor. The members of these Commissions are designated for staggered six year's term of office with changes taking place in alternate years. The Governor has a four year term and can succeed to the office once only. It is accordingly unlikely that he or she would appoint all the lay members. To ensure an additional degree of impartiality, Commissioners are permitted to hold neither public office nor an official position in a political party. The Governor of Missouri is obliged to choose one of the three individuals selected by the appellate commission and appoint him or her until next general election. After this probationary period, the appointee must be approved by the electorate.

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[1] *Id* at 24—28.
[2] *Id* at 29.
[3] *Id* at 25.
[4] *Id* at 36 38.
[5] *Id* at 38-40.

5.11. The Missouri Plan thus combines the democratic notion of accountability to the electorate with an intelligent method of selecting qualified candidates for judicial office. The necessity of facing the electorate on the record provides a judge with an incentive of judiciousness and the fact that he or she stands on personal record rather than against that of an opponent allied with a specific political party, goes far towards taking the courts out of the more pernicious aspects of politics. On the other hand, the fear that awareness of establishing a good record in the electorate's eyes may lead to timid popular judgements is proved unfounded on the results of the Missouri Plan in action.

UNITED KINGDOM

5.12. Judges are designated by the Crown with little direct surrender to politics. Practically speaking, they are the choices of Lord Chancellor, the senior law member of the Government, who is the Queen's Chief Adviser on the selection. Because the Lord Chancellor is chosen by the Prime Minister, the latter does have an indirect voice in the selection of judges, especially on the middle and higher level. The Prime Minister, in effect, designates the appointees but acts on the advice of the Lord Chancellor. Formally it is the Queen who actually issues the Commission of appointment.

5.13. The Lord Chancellor himself is, however, politically designated head of the judicial hierarchy of the United Kingdom. In addition, he advises on all appointments to judicial office from the rank of justice of peace to the higher offices of the English judiciary. He presides over the House of Lords. He is a member of the Cabinet. He is the head of the judiciary. This is a rare combination. The Lord Chancellor combines in his person the three-fold functions of executive, legislature and judiciary which has been often described as a complete refutation of the principle of separation of powers.[1]

5.14. Lord Chancellor has to make a selection of about 500 full-time judges of England and Wales from a comparatively small and select group. Being a member of the Bar in the past, he may know some of those living elites with their political inclinations but it is said that even when members of the other political hue and colour show promise to be competent judges, he will certainly not hesitate to cross party lines to make appointments. Lack of his personal contact also does not come in his way because he will be able to consult senior judges who must have an uncanny view of the leading members of the bar appearing before them but neither their concurrence nor their prior approval is a *sine qua non.* It is said that any canvassing for office or political pressure on the Lord Chancellor are scouted strongly. After a review of all the appoitments over a period of half a century and more, a conclusion was reached that political considerations have hardly entered the process of judicial selection since 1907.[2] The appointment of Lord Chancellor, Lords of Appeal in Ordinary, Lord Chief Justice, Master of the Rolls, President of the Probate, Divorce and Admirality Division, and Lord Justices of the Court Appeal are made by the Queen on the advice and recommedation of the Prime Minister while those of the Judges of the High Court, county Court Judges, Chairman of the Quarter Sessions, Records of Borough and Metropolitan Stipendiary Magistrates are made on the recommendation of the Lord Chancellor. He also nominates Justices of the Peace. It can be safely concluded here that the power to appoint judges at all levels in England vests entirely in the executives.[3]

5.15. Lord Jowitt, while discussing judicial appointments in United Kingdom observed, "How should I have felt if I made a lot of unworthy apointments, when I noticed the cold looks that I should have received when next I went to lunch at the Inn."[4] Although the Bar and Bench do not share the responsibility of selecting the judges, which lies ultimately with the Lord Chancellor in practice, they play in important role in the process of selection and should also be credited (or held responsible, as the case may be) for the quality of appointments[5] (Professional accountability).

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[1] *Id* at 33.

[2] R. Jackson, *Study on the Machinery of Justice in England.* as quoted in *S.P. Gupta* Vs. *Union of India,* (1981) Suppl. SCC 87 at 593.

[3] H.R. Dubey, *The Judicial System of India and Some Foreign Countries,* 420.

[4] Shimon Shetreet, *Judges on Trial : A study of the Appointment and Accountability of the English Judiciary,* 52 (1976).

[5] *Ibid.*

5.16. However, a fresh thinking is taking place on this time honoured model. In 1972, the Justice Sub. Committee on the judiciary recommended that while retaining the control of Lord Chancellor in the matter of appointments, he should be assisted in his task by a small advisory appointments committee.[1]

FRANCE

5.17. France has an altogether different model for selecting judges. The judicial service is a career service. Right from the inception, one has to make a choice whether he wants to be a judge or a practising advocate. No one is appointed a judge from the cadre of practising advocates. There is a Ministry of Justice forming part of the Government of France. It has really very little authority over judges performing adjudicatory duty. Political patronage plays a non-decript role in the selection of judges. There is a training academy at Bordeaux, *'echole nationale de law magistrature'* where training for a minimum period of 28 months is imparted to the would be judges. One has to clear an examination for entering judicial service.

5.18. Theoratically, the President of the Republic, who is charged by the Constitution to be the "guarantor of the independence of judicial authority", select the judges. He is to be assisted by the high council of the judiciary. In pratice, they are chosen either by the *Counseil Superieur de la Magistrature* (high council of the judiciary) in the case of *Cour d' appel* AND *Cour de Cassation* or by the Minister of Justice who may consult or receive advice from the High Council in case of the lower courts. The High Council consists of the President of the Republic (as President) Minister of Justice (as Vice-President) and nine persons with legal back ground chosen by the President for a once renewable term of four years partly on the recommendation of the *Cour de Cassation and Council d' Etat* as follows : One from the latter, three from the former, three from other courts and two selected for their general legal knowledge and competence. In any event, selecting authorities have little choice, considerably less than in England and invariably less of course, than in the United States.[2] The emerging position is summed up as under :

> "..... members of the Counseil (D'Etat) still lack that status of irremovability which is the treasured privilege of the French judiciary. In practice, however it is unthinkable that a member should be dismissed or otherwise disciplined by reason of political considerations. Indeed, the government of the day had to accept, with such grace as it could muster decisions as troublesome as Trebes (C.E. 4 March, 1949, where the entire career structure of a Ministry was pronounced invalid), Barel (C.E. 28 May 1954, discussed in Chapter 9, post) and Canal (C.E. 19 October, 1962, discussed in Chapter 3, ante). Although this last case did prompt some important reforms in the institution of the *Counseil* d'Etate as a whole, any action against the individual members would, of course, have been quite unthinkable."

5.19. "Promotion depends entirely upon seniority of service, subject to certain limits of age. This principle is regarded by members of the *Counseil (d' Etat)* as the essential guarantee of their independence."[3]

5.20. Justices of peace are appointed by the President on the selection made by the Ministry of Justice from amongst the lawyers of at least two years' standing who qualify at the examination held by the Ministry.

Vertical promotions are governed generally by the rule of seniority.[4]

AUSTRALIA

5.21. The apex court is designated as High Court of Australia and each federating State has its own highest court, designated as Supreme Court of the State. The Constitution confers power to appoint Judges of the federal judiciary on the Governor General-in-Council, which would imply according to the advice of the

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[1] *Id* at 30.

[2] *Supra* note at 34.

[3] Brown and Garner, French Administrative Law, 54-55. (3rd ed., 1983).

[4] *Supra* note 10 at 534-535.

Cabinet. As a matter of form, these appointments are made by the Governor-General or the Governor-in-Council of the States, as the case may be. These appointments are in substance and in reality by the cabinet. Some eligibility qualifications have been prescribed more or less governing the question of standing at the Bar, namely, practice as barrister and/or solicitor within the relevant jurisdictions. Once, these, not very exacting, requirements are met, the appointment is at the discretion of the executive. Unlike the United Kingdom where the power for advising judicial appointments is conferred on one individal, i.e. the Prime Minister in the case of most senior appointments and in the Lord Chancellor in other cases, the contrast lies in the fact that appointments do not form part of the Cabinet discussion. In Australia, the initial nomination would usually be made by the Attorney General but the decision to make the appointment is a collective one and a specific concurrence of the Attorney-General tc it is not required. To contrast it with the system adopted in the United States of America, the nomination for a seat on the Supreme Court of America is made by the President but would require ratification by two-third majority of the Senate which is a facet of public accountability of the incumbent. This ratification is not a mere matter of form but penetrating analysis is made of the views of the proposed nominee on questions of public importance and sometimes scrutiny has led to withdrawal of nominations. This is not available in Australia where the public criticism has usually to wait until after appointment, when it is too late to be effective.[1]

5.22. There is a move to set up a Judicial Apppointment Committee which will be examined at the relevant place.

CANADA

5.23. The appointment to the Supreme Court and Federal Courts of Canada are made by the Governor General-in-Council, in effect by the executive. The provincial courts, though established by the acts of Provincial Legislatures and their constitution, organisation, powers and procedures are determined by the Provincial Legislature, yet the Judges of these courts, i.e., the superior, district and country courts in each Province are appointed by the Governor General. In reality, the appointment is recommended by the Minister of Justice with the consent of the Cabinet and this appointment is made in a formal manner by the Governor General signing the order in Council as a matter of routine. Power to appoint Judges thus undoubtedly vests in the executive.[2]

U.S.S.R.

5.24. Turning now towards the other model, the Supreme Court of U.S.S.R. is the apex court in that country and all other courts throughout the country are subordinate to it. All these courts administer State and Federal law equally. The appointment of Judges is by the elective principle at every level of the judiciary. Each court consists of a trained judge and two lay judges. This rests on the assumption that rendering justice is not the exclusive privilege of technocrats but it is society's obligation to provide machinery for rendering justice which can be discharged by people's participation in the administration of justice. Further assumption is that every citizen of the State must participate in the administration of justice. Every case on criminal or civil side is tried by a collegium consisting of a single trained judge and two people's assessors. The people's assessors, unlike the judges, are not recruited from legally trained practising advocates or law teachers or from those having legal qualification but are drawn from all segments of the society, such as, peasants,labourers, factory and office workers. They enjoy the power of a judge, not the advisory role of an assessor. The status of all the three is equal. In their adjudicatory role, they are wholly independent of any outside interference. Thier independent status is secured by the direct popular election which provides a link in the chain of credibility of the consumers of justice in the administration of justice[3].

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[1]James Crawford, *Australian Court of Law*, 52 (1982).

[2]*Supra* note 10 at 512.

[3]*Supra* note 10 at 548—551.

5.25. To refer to hierarchy of courts, one may first refer to people's courts. These are courts of lowest grade, established in each city and district and the lay judges who are to work in this court are elected from various segments of society other than lawyers. A trained judge is elected from among the lawyers of ten years standing by the citizens of each district on the basis of universal, direct and equal sufferage by secret ballot for a term of five years on the nomination made by unions and cultural organisations. People's assessors are elected by show of hands at the general meetings of industrial, office and professional workers and peasants at the places of work or residence and of serviceman in the military units for a term of two years. The judge is not required to be a professional although he or she usually is and assessors being lay persons have no formal legal or judicial background.

5.26. The Judges of the courts of Territories, Regions, Cities, Autonomous Regions and natural areas are elected by the Soviets of Working People's Deputies of the respective Territories, Regions, Autonomous Regions or areas for a term of five years. The Judges of these courts are professionally trained and politically prominent.

5.27. The Judges of Supreme Court in the Autonomous Republic are elected by the Supreme Soviets of the Autonomous Republics for a term of five years. The Judges of the Supreme Court of Union Republics are also elected by the Supreme Soviet of the respective Union Republic for a term of five years.

5.28. The Judges of the USSR Supreme Court are elected by the Supreme Soviet of USSR for a term of five years. The only criticism of this system heard is that Judges of the USSR Supreme Court are, in reality, chosen by the leaders of the Communist Party and the Court is carefully integrated into the structure of the Central Government.

5.29. The structure of the USSR Supreme Court is worth taking note of. It consists of a Chairman, two vice-Chairmen, nine professional Judges and twenty people's assessors. Chairman of the Supreme Court of each Union Republic is *ex-officio* Member of the Supreme Court of USSR. The Supreme Court of USSR does not enjoy the power of judicial review of executive and legislative action as is understood in our Constitution nor does it possess the authority to interpret laws, especially the Constitution, yet it has an advisory role in relation to the Presidium of the Supreme Soviet of the USSR to whom it may give advice on questions of interpretation of laws and the Constitution.[1]

5.30. The Law Commission, on an earlier occasion,[2] had also examined the method of appointment of Judges adopted by West Germany, Japan and Malvi. There is no notable change in recent years in that method and, therefore, to repeat it would be idle parade of familiar knowledge.

5.31. Knowledge is power. This journey through world models considerably helped the Law Commission in undertaking a search for a new model. Comparable models will be kept in view. To which would be added the experience derived by the working of the scheme for all these years. Goals will be kept in view. All these will combine in conducting the search for a new model.

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[1]See generally, *supra* note 1 at 286—289; *Supra note* 10 at 552—557.

[2]*LCI, 80th Report*, Chapter III.

CHAPTER VI

SEARCH FOR SOLUTION

6.1. A period of four decades clearly provides a watershed for taking stock of the situation and to draw a balance sheet. The scheme for appointment of Judges of the superior judiciary has been in vogue, to be precise, for a period of 37 years. The way in which the model works clearly leaves much to be desired. An effectively functioning model, operational in character, must be able to achieve two things: (1) quick and expeditious filling in of vacancies and putting Judges into position; and (2) Selecting first rate brilliant, efficient, honest and independent Judges. Selecting manpower for manning judiciary is an integral part of the functions assigned to judiciary. When the Government felt a need for setting up a Judicial Reforms Commission for recommending comprehensive judicial reforms, it would take within its sweep not only the restructuring of the judicial system but, as integral thereto and inseparable therefrom, the manpower planning or what can be said to be human input which is the backbone of the system. If the present scheme meets the needs and demands of the society, nothing more is required to be done. But, as pointed out herein earlier, the model is stratified and the scheme has become disfunctional in that both the expectations from it are not at all fullfilled, a new model has to be devised for selection and appointment of Judges and this model in its operational performance, must satisfy the above set out targets. In short, the scheme or model must enable those operating the scheme to fill in vacancies the moment they occur by putting Judges in position on the day on which the vacancy occurs and be able to select Judges—efficient, capable and having a scale of constitutional values. A search for human inputs presages a mechanism for search. If the mechanism is defective or imperfect, search through it would not yield the right sort of persons to man the judiciary. To start with, an analysis may be made why the present scheme has failed to achieve the objects for which it was devised. The next question is whether it is reparable as was attempted by the Law Commission on an earlier occasion.[1] If, the answer is in the negative, the next question is whether a new model should be devised and what ought to be the basic features of such a model.

6.2. The Constituent Assembly had appointed a high powered *ad hoc* Committee consisting of outstanding jurists of the country for recommending the best method of selecting Judges for the Supreme Court. This Committee produced a unanimous report which in terms opined that it would not be expedient to leave the power of appointing Judges of the Supreme Court to the unfettered discretion of the President of the Union. The Committee recommended two alternative methods with a suggestion that either may be adopted. The two alternative models were : (1) The President should in consultation with the Chief Justice of the Supreme Court (so far as the appointment of a puisne Judge is concerned) nominate a person whom he considers fit to be appointed to the Supreme Court and the nomination should be confirmed by a majority of at least seven out of a panel of eleven composed of some of the Chief Justices of the High Courts, some members of both the Houses of Central Legislature and some of the law officers of the Union; or (2) the panel of eleven should recommend three names out of which the President, in consultation with the Chief Justice, may select, a Judge for the appointment. The same procedure should be followed in the appointment of Chief Justice except, of course, that in this case there will be no consultation with the Chief Justice.

The Committee had before it the existing model as set out in the Government of India Act, 1935.[2]

6.3. The Law Commission having reviewed the functioning of this mechanism from 1950 to 1987 concluded :

> "The almost universal chorus of comment is that the selections are unsatisfactory and that they have been induced by executive influence. It has been said that these selections appear to have proceeded on no recognisable principle and

[1] *LCI, 80th Report.*

[2] B. Shiva Rao, *The framing of India's Constitution: Select Documents,* Vol. II, 59.

seem to have been made out of considerations of political expediency or regional or communal sentiments. Some of the members of the Bar appointed to the Bench did not occupy the front rank in the profession, either in the matter of legal equipment or of the volume of their practice at the Bar. A number of more capable and deserving persons appear to have been ignored for reasons that can stem only from political, or communal or similar grounds. Equally forceful or even more unfavourable comments have been made in respect of persons selected from the services. We are convinced that the views expressed to us show a well founded and acute public dissatisfaction at these appointments. The observations made by Chief Justice Kania referred to by us elsewhere that merit alone should be the basis for selection to the High Court judiciary seems to have been completely overlooked[1]"....

"It is widely felt that communal and regional considerations have prevailed in making the selection of the judges. The idea seems to have gained ground that the component States of India should have, as it were, representation on the Court. Though we call ourselves a secular State, ideas of communal representation, which were viciously planted in our body politic by the British, have not entirely lost their influence. What perhaps is still more to be regretted is the general, impression, that now and again executive influence exerted from the highest quarters has been responsible for some appointments to the Bench. It is undoubatedly true, that the best talent among the Judges of the High Courts has not always found its way to the Supreme Court.[2]"

To improve the situation, it recommended an amendment of article 217 incorporating what was rejected by the Constituent Assembly, namey, that every appointment to the High Court shall be made with the concurrence of Chief Justice of India on the recommendation of the Chief Justice of the High Court. This was in terms described as judicial veto over executive power. It also recommended that while it should be open to the State executive to express its own view and forward it to the Centre,the role of the State Executive should be confined to making its remarks about the nominee proposed by the Chief Justice and, if necessary, asking the Chief Justice to make fresh recommendation.[3] Obviously, the recommendation has not been implemented.

6.4. The procedure for appointment of Judges was reviewed by the Study Team on Centre State Relations of the Administrative Reforms Commission. The Team extended its support to the recommendations set out in the earlier paragraph with a view to restricting the role of the executive in the matter of appointment of Judges of the High Court and the Supreme Court. It opined that this approach would strengthen the independence of judiciary. The recommendations of the Study team were considered by the Administrative Reforms Commission. It was, however, of the opinion that no alteration in the existing procedure is desirable[4].

6.5. This very topic again came in for examination by the High Court Arrears Committee. It did not deal with the format of the mechanism for appointment but merely suggested that the exercise for filling in a vacancy must start well in advance so that the selection can be finalised by the time the vacancy occurs. In order to defeat any vacillation on the part of the executive by not processing the proposal, the Committee recommended that if the recommendation made by the Chief Justice is not dealt within one month from the date of its receipt, the Government must be deemed to have accepted the recommendation and the matter may be taken up by the Central Government for expeditious disposal of the same[5].

6.6. During the raging controversy following the 1973 supersession, a Convention of the Bar of the whole country held on August 11 and 12, 1973, unanimously adopted a resolution on the criteria, machinery and procedure for appointment of Chief Justice and Judges. The resolution inter alia recommended that 'the appointment of High Court Judges should be made on the recommendation of a Committee of three seniormost Judges of the High Court; (including the Chief Justice.) and two

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[1] *LCI, 14th Report*, vol.I, 69-70.

[2] *Id* at 34.

[3] *Id* at 75.

[4] *Supra* note at 19-20.

[5] *Report of High Courts Arrears Committee* 1972—80.

senior advocates nominated for the purpose by the Association of the High Court Bar. The initiative in making a recommendation should always be with this Committee and not with any executive authority[1]. For the first time, intervention and association of the Bar of India in the matter of selection of Judges for the superior judiciary was mooted.

6.7. In the year 1977, at the instance of the then Prime Minister of India, the Secretary, Ministry of Law and Justice and Company Affairs requested the Law Commission to examine the question of appointment of Judges of High Court and Supreme Court. Law Commission undertook the task. The Commission observed that :

> "The impression, nevertheless, has prevailed that the appointment of the Judges to the High Court has not been always made on merit and that has affected the image of the High Court. This impression was strengthened by fourteenth Report of the Law Commission. The Commission, while noting that most of the appointments had been made with the concurrence of all concerned, including the Chief Justices of the High Courts and the Chief Justice of India observed that in the prevailing procedure, the Chief Justices of the High Courts gave their concurrence to prevent awkward situations arising from the appointment of persons not recommended by them[2]"

The Commission did not spacifically suggest amendment of article 217, as was done in the earlier report, but recommended that while making a recommendation for appointment of a Judge of a High Court, the Chief Justice should consult his two senior most colleagues and while forwarding the recommendation should incorporate therein the fact of such consultation and indicate the views of the two colleagues. A unanimous recommendation of this body should normally be accepted by the executive. It also recommended that a high level panel consisting of persons known for their integrity, independence and judicial background be set up to ensure dispassionate scrutiny and eliminate extraneous considerations in the matter of appointments to supreme judiciary. The panel was to consist of Chief Justice of India, Minister for Law and Justice and three persons each of whom has been the Chief Justice or a Judge of the Supreme Court. Again, this was a model by which participation of other than those set out in article 217 was envisaged. During1977—79, there was an informal acceptance of a part of this recommendation[3].

6.8. On the eve of retirement of the then Chief Justice of India in February 1978 when the question of the successor was engaging the attention of the Government, a group of people from Bombay, 52 in nubmer, including lawyers, politicians, retired Judges and several others, some of whom had unequivocally supported the principle of seniority in the matter of selection of the Chief Justice of India at the time of 1973 supersession, took a complete somersault and vehemently urged that 'to restore the convention of seniority blindly now would be to perpetuate a hierarchy built on commitment; a hierarchy so arranged that the two seniormost sitting Judges would outlive all other sitting judges of the Supreme Court, many of whom have unexceptional records[4]'. As an alternative, they recommended that: 'a judicial appointments commission should at once be constituted of five or seven persons, say, three former distinguished Judges of the Supreme Court, the President of the Supreme Court Bar Association, a distinguished and eminent member of the Bar (whether actively practising or not) and the President of the Bar Council of India (if elected and not otherwise). This Commission may have the power to co-opt two other members who are not officers of the Government.[5]' The then Government left no one in doubt that the power to appoint Judges cannot be abdicated in favour of anyone and that it is the Government and not lawyers who make judicial appointments.

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[1]R. Dhavan and A. Jacob, *Selection and Appointment of Supreme Court Judges: A Case Study*, 111-112, (1978).

[2]*Supra* note 1 at 18.

[3]*Id* at 34.

[4]Bombay Memorandum, extracted in *Supra* note 8 at 120.

[5]*Id* at 124.

6.9 Responding to the strident criticism made at the Bar in the course of hearing of the case *S.P. Gupta* vs. *Union of India* that the executive interference in the matter of selection and appointment of Judges to the superior judiciary has, apart from eroding the independence of judiciary, given rise to a feeling amongst large segments of the society that membership of the superior judiciary is available as a matter of political largesse, Bhagwati, J., said that :

> 'There must be a collegium to make recommendations to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad-based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and have qualities required for appointment and this last reqirement is absolutely essential— it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of society. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary[1]'.

6.10. Bar Council of India organised a national seminar of lawyers at Ahmedabad to examine in all its ramifications the question of judicial appointments and transfers. The Seminar was of the opinion that the role of executive in appointments, as provided in the Constitution, should be formal and minimal. The initiative in the matter of selection and appointment of Judges of the superior judicary must invariably rest with the Chief Justice of India. It recommended a collegium for appointments to the Supreme Court consisting of : (1) the Chief Justice of India, (2) five senior Judges of the Supreme Court, and (3) two representatives of the Bar representing the Bar Council of India and the Supreme Court Bar Association. It was of the view that the recommendation of the collegium shall be binding on the Government, though it would be open to the Government to ask for reconsideration of specific cases on grounds which *per se* may indicate that the choice requires to be reconsidered. Similarly, for appointment of Judges of the High Court, the Seminar recommended a collegium consisting of : (1) the Chief Justice of the High Court, (2) two seniormost Judges of the High Court, and (3) two leading advocates to be nominated by the Bar Association of the High Court as its representatives.[2]

6.11. A slightly different model is available for examination. The model suggested to set up a superior council of judiciary, consisting of President of the Republic as Chairman, the Minister of Law and Justice as well as Chief Justice of India as Vice-Chairman, two other Judges of the Supreme Court, two Chief Justices of High Courts,four persons to be nominated by the President and four persons to be elected by the Parliament. This council has to be an all-purpose Council to be entrusted with all administrative matters, including selection, appointment, transfer and even disciplinary matters relating to judiciary.[3]

6.12. Shri Y.V. Chandrachud, Chief Justice of India (1978—85), while inaugurating a seminar at Patna on February 26, 1983, under the auspices of Bihar State Bar Council in collaboration with the Bar Council of India Trust on 'The Erosion of Judiciary and Remedial Measures', frankly confessed that the present procedure for selection and appointment of Judges to be superior judiciary is "outmoded" and should be "given a decent burial". In his view, the collegium must comprise of three Judges, two representatives of the Bar, two of the Government and two of the opposition. He was of the opinion that a recommendation by this collegium could be far more credible and acceptable than by a single individual in the narrow confines and secrecy of his chamber.[4]

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[1](1981) Suppl. SCC 87, 233.

[2]"Summary of the proceedings of the National Seminar on Judicial Appointments and Transfers held in Ahmedabad on 17th October, 1981," 8 *JBCI*, 157.

[3]J. Minnatur, "Superior Council of Judiciary", *Mad. L.J.*, 55,60 (1976).

[4]Quoted in R.K. Hegde, *The Judiciary Today : A Plea for Collegium*, 38.

6.13. One' Chief Minister of a State is of the opinion that the constitutional provisions for appointment of High Court Judges embodied in the Constitution have proved to be too frail.....' He strongly advocated setting up of a collegium to make recommendations to the President for making appointment of Judges[1].

6.14. An eminent legal academic, being of the view that the present mechanism has granted a sort of weightage to the executive in the matter of selection of Judges for the superior judiciary, pleads for setting up of a collegium for judicial posts which, according to him, is an investment in democracy.[2] The collegium for the Surpeme Court, according to the author, should consist of the following :

(1) the President of India;

(2) the Speaker of the Lok Sabha;

(3) the Chairman of the Rajya Sabha;

(4) the Leader of the Opposition (if there be one);

(5) the Minister for Law and Justice, Government of India;

(6) the Chief Justice of India;

(7) five senior Judges of the Supreme Court;

(8) the Attorney-General of India.

These are to be the members of the collegium by virtue of their office. The non-official component of the collegium should comprise of members including at least one woman and one person belonging to Scheduled Caste and one to Scheduled Tribe nationally acknowledged for fulfilling the fundamental duties enshrined in article 51A for sustained work towards the promotion and protection of the constitutional and legal rights of the weaker sections of the society referred to in article 46 of the Constitution. The term of each member of the collegium should be of five years.

The collegium, according to him for the High Court Justices should retain the non-official component but its *ex officio* membership may vary to include the Governor, the Chief Minister, five senior Justices of the High Court and Speakers of the Assembly. Necessary amendments to articles 124 and 217 will have to be made but a further provision should be made that, as far as possible, the decisions of the collegia must be unanimous and expeditious and the same must be binding on the Government. One feature of this approach deserves special mention not for what is mentioned but what it significantly omits in that the author is not in favour of giving representation to the organised Bar on the Collegium.

6.15. The Bar Council of India had expressed an opinion in 1979 that of all the segments of the society, the members of the Bar are pre-eminently suited to judge persons who should be appointed as Judges of the High Court and Supreme Court and, therefore, any reform or modification in the model for selection and appointment of Judges of the High Court and the Supreme Court must have adequate representation of the organised bar.[3]

6.16. In U.K. where the power to select and appoint Judges unquestionably vests in the executive and it is commonly believed that the system has worked well, recently opinions were expressed that there must be an advisory body to assist the Lord Chancellor in the matter of selection of personnel for appointment to higher judiciary. In 1972, the Justice Sub-Committee on the Judiciary recommended that while the Lord Chancellor should retain control of the appointment machinery, he should be helped in his task by a small advisory Appointments Committee. The exact composition of the Committee is not set out in the report. On the all important question of composition of the Committee the view was that it should include representatives of the Law Society, the Bar, academic lawyers, the judiciary and perhaps some lay members as, for example, highly trained and experienced personnel officers skilled

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[1] *Id.* See generally.

[2] U. Baxi, "Collegium for Judicial Posts : An investment in Democracy". The Times of India, August 5, 1986.

[3] N.M. Madhava Menon, "Judicial Appointments & Transfers" 8 *JBCI* 137.

in selection procedures[1]. Under the proposed scheme, interested bodies could make recommendations to the Appointments Committee and even persons seeking judicial appointment may submit their names to it. The Lord Chancellor would be free to reject or accept the recommendations of the Committee and even would be free to select anyone whose name is not found in the list recommended by the Committee. But in such a case he would be under an obligation to consider the recommendation of the Committee and to submit his own candidates to the Committee for their comments and would not be able to make appointments without consulting them or applying his mind to the views expressed by them, Even earlier, a committee, styled as the Machinery of Government Committee, in the year 1918 recommended in its report that the Home Office should become a Ministry of Justice and that the Lord Chancellor should be required in recommending persons for judgeship to consult a Committee consisting of the Prime Minister, the Minister of Justice, *ex* Lord Chancellor and the Lord Chief Justice. Therefore, the debate about setting up a committee to assist the Lord Chancellor has been in the offing for more than half a century. It must be confessed that there is also a body of opinion that no change is necessary in the system of appointment to judicial offices as proposed by the Sub-Committee. However, following the introduction of the new scheme by the Courts Act, 1971, those knowledgeable are veering round to the view that the question of reform must be carefully considered and that some improvement in the existing system is necessary. The Committee has examined the question of appointment to superior courts, the circuit benches and even courts below them. Those who advocate the change assert that the present procedure is too much embedded in secrecy and that the acceptance and rejection are unsupported by reasons. They say that the selection procedures should not only be painstaking and fair but seem to be so. There is too much subjectivism in this procedure as the whole thing depends upon the opinion of the Lord Chancellor. With reference to the proposal for a committee, an apprehension was voiced that such a broad based decision making body may encourage lobbying and generate pressure groups. It was also feared that, as the opinion of the Members of the Committee may vary, the horse trading would become inevitable. Some doubt was voiced even with regard to the composition of the Committee.

6.17. President of United States of America has established a circuit judges nominating Commission to recommend names of the best qualified persons for appointment to the United States Court of Appeal. Under the Presidential Order thirteen panels were to be set up. Each panel will have not more than eleven members, including its Chairman and must include members of both sexes, members of minority groups, and approximately equal number of lawyers and non-lawyers. The function of each panel and the standard for selection to be followed have been set out in the order itself. Briefly the standards for selection are that the recommendee must have good standing, must possess and have good reputation for integrity and good character, must be enjoying sound health and must have outstanding legal ability and commitment to equal justice under law[2].

6.18. The Chief Justice of Australia, somewhere in July 1977, advocated that the time is now ripe for a Judicial Appointments Committee to be set up in Australia. This view was conversant in the backdrop of the feeling that the Australian system for selection and appointment of Judges provided an opportunity for political influence. With a view to eliminating the same, the appointment must be made by, or pursuant to, a recommendation from Judicial Appointments Committee to be composed of Judges, Lawyers and some layment[3].

6.19. Similarly, the Royal Commission on Courts, chaired by Justice Beattle, who later on became Governor-General of New Zealand, recommended that a Judicial Commission should consider all judicial appointments, including appointment of High Court Judges[4].

6.20. The conclusion is inescapable that vital changes will have to be made in the existing model. The changes will not be for the sake of changes, but the changes will be introduced with a view to eliminating the infirmities in the scheme and make it functionally operational. New Model will be devised with this end in view.

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[1]Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of English Judiciary*. 393—404 (1976).

[2]H.J. Abraham, *The Judicial Process*, 30 (5th ed., 1986).

[3]Garfield Barwick, "The State of Australian Judicature", 51 *Aus. L.J.* 480.

[4]Harry Gibbs, " The Appointment of Judges". 61 *Aus.L.J.* 7,8.

CHAPTER VII

A NEW MODEL

7.1. Everyone is agreed that the present scheme or model or mechanism for recruitment to superior judiciary has failed to deliver the goods. Even the votaries of the effectiveness of the present model have conceded that 'defects and lacunae have come to surface in the actual working of the scheme and that they were of such character that they can be rectified without throwing overboard the whole scheme. Efforts should, therefore, be made to rectify the defects and plug the loopholes.'[1] Add to that the views already referred to of former Chief Justice, Mr. Y. V. Chandrachud and Mr. P.N. Bhagwati, all of whom were directly involved in the process of selection and appointment of Judges to the superior judiciary, who have bemoaned that the constitutional scheme is cumbersone and operates in such a manner as not to permit the filling in of vacancies within a reasonable time and to attract independent, honest and efficient Judges. Primarily the way in which the scheme operates has an inbuilt potentiality for inordinate delay in making the appointments. It is compounded by various other factors noticed from 1958 till 1985 and the outcome is unedifying.

7.2. Is it possible to re-structure, reform or revitalise the present scheme? Looking to the serious attempts made in the past, one must answer the question with regret in the negative. Nor can one shut his eyes to the everyday deteriorating situation in this behalf. Therefore, a new model has to be devised taking care to see that in its organic structure, it does not suffer from the same infirmities as the present one so as to result in the same type of imbroglio after a few years.

7.3. There is an additional reason why a new model has to be devised. Apart from the utter failure of the present model or scheme which has been in operation for over four decades, there is a vociferous demand for a structural change from all segments of the society, namely, former Chief Justices, both of the Supreme Court and of High Courts, Chief Minister of a premier State, leaders of the organised legal profession, law academics and consumers of justice as well as the society at large. The very fact that in our democracy the Government of the day responding to the public demand asked the Law Commission to give priority to recommending judicial reforms and drew up comprehensive terms of reference, furnishes cogent reasons for an over view of all aspects of justice delivery system, the most important amongst it being manpower inputs of judiciary. The Law Commission has already submitted reports recommending structural changes in the justice delivery system. Each such structural change will have to provide for its manpower. Participatory model of justice in Gram Nayalayas sets out the mode of selection of the Panchayati Raj Judges as well as the mode and method of selection of lay Judges[2]. Numerous disputes arising out of the enforcement of direct and indirect tax laws and the law dealing with export and import have clogged the court dockets and held up tax recovery in huge amounts. With a view to diversify administration of justice and remove the bottlenecks, the Law Commission recommended setting up of Central Tax Court and made detailed recommendations about the manpower planning of such a Court[3]. While recommending setting up of an all-India judicial service to be styled as Indian Judicial Service, it became necessary to recommend setting up of an apex body to be in overall charge of judicial service[4]. As a corollary, it became necessary to comprehensively work out re-structuring of subordinate judiciary which necessitated devising strategies for manpower planning and all ancillary aspects[5]. Keeping in view the modern trend that one must keep abreast with the developments in the society, a detailed training programme for judicial officers at all levels was devised and recommended[6]. The existing institutions dealing with these aspects will not be

[1] H.R. Khanna, quoted in *LCI, 80th Report*, I.

[2] *LCI 114th Report*, 46.

[3] *LCI 115th Report*, 33.

[4] *LCI 116th Report*, 67.

[5] *LCI, 118th Report*, 13,40.

[6] *LCI. 117th Report.*

able to rise to the occasion. All these recommendations presage the setting up of a body for giving concrete shape and form to these recommendations and make them operational. Obviously, this body must ordinarily be composed of experts who have judicial background, judicial training, judicial bearing and judicial decorum.

7.4. It thus appears that if the justice system in this country is pyramidic in structure, a centralised body to deal with it from the lowest to the highest has to be devised and set up. Under the present constitutional position, various power centres deal with judiciary and this sometimes introduces a dichotomy. Numerous judgements have been rendered by the Supreme Court of India demarcating the area of jurisdiction of power centres dealing with judiciary[1]. Conflict amongst power centres dealing with judiciary gave rise to litigation. It would be difficult to say that all the grey areas have by now been covered. It is therefore, an urgent necessity that a body may be devised in which all power relating to affairs of judiciary can be centred. At present, the power is conferred on a single individual. Apart from being dangerous, its exercise has led to various situations which have rendered judiciary more and more ineffective. And, apart from the Chief Justice of India or the Chief Justice of a High Court, the participation of the judiciary in resolving problems relating to judiciary is marginal. A participatory model has a greater chance of acceptability because deliberation among participants to some extent provides a shield against arbitrary action.

7.5. The choice, broadly speaking, is between two models, the existing with its refinements or a new one which is being devised. The present model, which has been extensively discussed in this report, confers overriding powers on the executive in the matter of selection and appointment of Judges and in dealing with the judiciary. The constitutional mandate was to separate executive and judiciary in all its ramifications[2]. The Constitution aims at ensuring independence of judiciary, when translated in action, independence from executive. The power to appoint and the power to transfer Judges of the Superior judiciary vests in the executive and the only limitation on the power is consultation with various functionaries. While consultation can be meaningful and substantial, cases are not unknown where it is said that the duty to consult is fully discharged if the person to be consulted is informed of the problem and his reply is awaited for a reasonable time and then ignored because it is rightly said that consultation is not concurrence. The working of the Constitution has revealed that the Chief Justices have not been able to hold on against the determined executive action and even where the Chief Justice is in a position to assert his point of view, he can be wholly subjective in his approach. All these aspects are not conducive to the healthy growth of the institution of judiciary.

7.6. Therefore, a new model has to be devised. Trends all over the world indicate that even where the power to appoint Judges of the superior judiciary vests in the highest executive, the movement is towards dilution of power by associating more and more people with the decision making process. The Judiciary Sub-Committee in England, Circuit Judges Nominating Commission and a Commission dealing with appointment of Federal Judicial Officers in America, the movement in Australia towards decentralising the power as also the experiment in New Zealand, all indicate that the trend is towards setting up a body in which the judiciary will have a pre-eminent position. Such a model one can think of devising, keeping in view the Indian conditions.

7.7. It is not for a moment suggested that the executive should be excluded from such a body. It must have a voice in its deliberations and decision making process. It is not intended that while dealing with the problems of judiciary, the executive is to be shunned. It must join in the participatory model and make its own contribution, more so because it has extensive resources at its command to investigate and find out all the relevant details concerning any individual or a situation but a time has come where its veto requires to be considerably diluted, if not wholly removed. Such a body can be appropriately styled as National Judicial Service Commission.

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[1] *Supra note* 4 at 25.

[2] Art. 50, *The Constitution of India.*

7.8. The broad based National Judicial Service Commission representing various interests with pre-eminent position in favour of the judiciary is the demand of the time. Composition and functions of such a National Judicial Service Commission will have to be worked out in meticulous details. The Commission must also be of such a nature as to provide an answer to the criticism that the constitutional scheme as interpreted by the courts heavily tilts in favour of the Executive in the matter of recruitment to superior judiciary and the transfer of Judges of the High Courts. All over the English speaking democracies the executive enjoys the power to make appointments to superior judiciary. In all these countries a new trend towards diluting the position of executive in this field is clearly visible. Decentralisation of power by providing a body representing various interested groups is suggested as a substitute. The suggestion is that the power to make appointments must be a shared power i.e., from individual subjective opinion to an opinion of a body arrived at after internal discussion and deliberation by people who are supposed to be in the know of things. Such an approach will marginalise the preponderent role of the executive. The thinking of the Law Commission is considerably influenced by this trend. The present thinking is not a reaction by way of a tilt against the executive. The approach is to devise a body where power is shared so that the objects underlying the conferment of power can be effectively achieved. It cannot be disputed that a deliberated decision amongst knowledgeable persons has a greater chance of acceptability than the decision of an individual unsupported by any tangible reasons arrived at though it may not be the outcome of a prejudicial mind. Viewed from this angle, the composition of a National Judicial Service Commission dictates itself.

7.9. While examining the question of composition of the Commission what is uppermost in the mind of the Law Commission is that its functions are going to be extensive and all pervading. This has to some extent shaped the thinking of the Law Commission about the composition of the Commission. The views expressed in this behalf and referred to earlier have also contributed colour and content to this thinking. Briefly it must be a body of experts drawn from various interest groups in close touch with administration of justice such as Judges, Lawyers, law academics and litigants.

7.10. Unquestionably, the Chief Justice of India must be at the head of this body and must be designated as Chairman. His pre-eminent position should not be diluted at all. Three seniormost Judges of the Supreme Court next in rank to the Chief Justice of India, because of their long judicial experience in close proximity of the Bar, should be members of the Commission. The predecessor in office of the Chairman i.e. the person who has retired as Chief Justice of India to whom the Chairman has succeeded will also be a member. He would be an asset to the Chief Justice of India. Three Chief Justices of the High Courts, according to their seniority as Chief Justices would be members. Minister of Law and Justice, Government of India would by virtue of his office would be a member. He represents at the highest level, in the executive. Attorney-General of India would be a member by virtue of his office. As the leader of the Bar and not owing his position to any questionable electoral process he can adequately represent the interests of the Bar. An outstanding law academic would also be a member of the Commission. Thus the body will consist of eleven persons which cannot be said to be unwieldy looking to the wide ranging functions that it will have to discharge. The composition of the Commission, as recommended herein, gives adequate representation to the Judiciary the Executive the Bar and the Legal Academics, which are the interests vitally affected by the functions of the judiciary. The last unrepresented interest is the consumer of justice– litigants. It would not be advisable in the present state of affairs to provide any representation to it on the Commission.

7.11. As this body would exclusively deal with the question of selection and appointment of Judges of High Courts the question is what role should be assigned to the Chief Justice of the High Court in which the vacancy has occurred and the Chief Minister of the State in which the High Court is situated. Today, as the situation stands, both have a vital say in the matter. Should they be wholly excluded ? That would be rather too radical. The Chief Justice of the High Court, who has also to deal with the administrative side of the High Court, must have some say in the selection of an individual who is to be his colleague. This would foreclose any dispute and ensure harmonious working of the High Court. The next important interest, which at present has a consultative status, is the Governor of the State who acts on the

advice of the Chief Minister. In the effective working of the High Court, the Chief Minister of the State has an interest and it cannot be ignored. And once he is given an opportunity to react to any proposal that is under consideration, one can dispense with the consultation with the Governor. Therefore, to make the new scheme operationally effective, the National Judicial Service Commission while, deliberating over selection and appointment of Judges of the High Court, must co-opt the Chief Justice of the High Court in which the vacancy has occurred and which is under the process of being filled in as well as the Chief Minister of the State in which the High Court is situated. This will accord an opportunity both to the Chief Justice of the State and the executive of the State to express their opinion on the merits or otherwise of the persons under consideration both from the Bar as well as from Indian Judicial Service.

7.12 The Functions of the Commission would cover a large area. Therefore, depending upon the task undertaken, the Commission can co-opt experts from various different segments of the society in order to effectively discharge its functions. The power to appoint the Commission must obviously vest in the President of India.

7.13 The functions or duties or tasks assigned to National Judicial Service Commission must include the following :—

(1) Selecting and recommending persons for being appointed to the superior judiciary, that is, to Supreme Court and High Courts. In accomplishing this task, it can devise criteria and yardstick for selecting persons from amongst numerous available for appointment. Broadly stated, the criteria must include:

(i) deep and abiding faith in constitutional process and constitutional philosophy;

(ii) legal acumen and ability to deal with complex questions of law;

(iii) a man of stature, personality, reputation and unquestioned integrity and good character and sturdy independence;

(iv) scale of values and awareness of the perceived needs of the society

These are illustrative and not exhaustive.

(2) In order to set up Indian Judicial Service, the Commission should be charged with a duty to devise ways and means and to set up machinery for holding examinations for granting promotions and for adjusting persons coming from different sources into the unified service.[1]

(3) The Commission must devise methods for recruitment to the subordinate judiciary specifying the eligibility qualifications, including the age, etc.

(4) There is a move in the direction of tribunalisation of justice, such as Administrative Tribunal and, in the near future, a possibility of setting up of National Labour Commission, Central Educational Tribunal, *et al.* Whenever a tribunal is set up, it shall be the duty of this Commission to provide for manpower planning by selecting qualified personnel to man the same.

(5) It shall be one of the functions of the Commission to select personnel for Central Tax Court.

(6) It shall also be one of the functions of the Commission to set up a Central Academy for imparting training to judicial officers as also Regional Training Centres as recommended by the Law Commission.[2]

(7)) By numerous decisions of the Supreme Court of India, the control over the subordinate judiciary vests in the High Court. As has been oft-repeated the provisions of the Constitution relating to judiciary were devised to insulate judiciary against executive interference. As a sequel, a

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[1] *Supra* note 5.

[2] *Supra* note 6 at 40.

disciplinary proceeding against a member of the subordinate judiciary, though formally held in the name of the Governer, is, substantially and for all practical purposes, held by the High Court or by an officer nominated by the High Court[1]. In the event the individual is found guilty of misconduct, it is the High Court which decides the quantum of punishment and the Governor has to act according the recommendation of the High Court. Now if a member of the subordinate judiciary wants to question the correctness of the decision of the High Court, he has to file a petition on the judicial side of the High Court. A grievance is voiced that when the High Court, as a full court, on its administrative side decides whether the charge is held proved and also determines the quantum of punishment, it becomes embarrassing for the delinquent judicial officer to challenge this finding on the judicial side of the High Court. A feeling is often entertained that this is an appeal from Ceaser to Ceaser's wife. This grievance is not without justification, though no disrespect is meant to any High Court. This grievance can be adequately remedied if the National Judicial Service Commission sets up a small body from amongst members of the judiciary, to be styled as Judicial Disciplinary Committee, before which decisions of the High Court in disciplinary matters on its administrative side can be questioned. The Commission will thus be fulfilling the felt needs of the time. It must, therefore, be one of its functions to set up such a Committee.

National Judicial Service Commission shall have a nucleus of office, a permanent secretariat and requisite staff for discharging its functions adequately and efficiently.

7.14 In a detailed discussion with Chief Justice of a High Court a doubt was raised as to who would initiate the proposal before the Commission for recommendation. He elaborated relying on his own experience, that at present at any rate the Chief Justice initiates the proposal and he is best suited to do so in view of his intimate knowledge both of the practising advocates in the High Courts and the members of the district judiciary. Therefore, according to him, Chief Justice was pre-eminently suited to initiate the proposal, and at any rate, by contrast neither the Chief Minister nor the Governor of the State would have adequate information about the capacity, efficiency and ability of a member of the bar or even of a member of the district judiciary to initiate the proposal. He voiced his apprehension that when a Commission is set up, it is distinctly possible that the members of the Commission may not be aware of the availability of talent from a particular State and, therefore, initiation of proposal for consideration for appointment will create a few problems. Now it is undoubtedly true that the Chief Justice of a High Court has intimate knowledge of the availability of talent from the bar and the district judiciary. And if he acts fairly and without bias, he can certainly be depended upon to initiate a reasonable, fair and generally acceptable proposal for apointment. Experience, however, shows, and it has been noticed way back during the debates in the Constituent Assembly as well that, Chief Justice being a human being suffers limitations to which flesh is heir to. Cases are not unknown where on account of a certain kind of local bias or prejudice or invisible albeit irresistible caste considerations have tugged on and dictated choices excluding a segment on the bar as well also a segment of the district judiciary. To recall what Dr. Ambedkar has said in this context which has been pointed out earlier that though the Chief Justice is a very eminent person yet he is a man with all failings, all the sentiments which common people have and he declined to grant to the Chief Justice practically a veto over appointments. Therefore, it is not possible to retain, as was the view of the Chief Justice that the initiation of the proposal must be within the exclusive domain of the Chief Justice of the High Court in which the vacancy has occurred. This aspect has also been examined in *S.P. Gupta* V. *Union of India* (supra). Leaving that aside, the proposed Commission should not be hamstrung by such medieval ideas as right to initiate proposal. Anyone can write to the Commission proposing the name. The Commission may also call for proposals from the Chief Justice of the High Court. The members of the Commission may have their own expert knowledge of the subject which can be put to use. Therefore, it must be left to the National Judicial Service

[1] *Samsher Singh* v. *Union of India*. (1977) 2 SCC 831.

[2] CAD Vol. VIII, 232.

Commission to devise its own procedure for initiation of proposal for recommending individuals for appointment as Judges of the High Court. The aspect presents no difficulty when it comes to dealing with the Supreme Court because the Chief Justice of India as the Chairman of the Commission would take care of the situation and he is going to be assisted by some of his colleagues.

7.1 5 Only two aspects remain to be dealt with. Undoubtedly, a minor amendment of the Constitution becomes inevitable to give effect to the recommendations herein made. The proposed amendments have been set out in the last Chapter. The new model would retain the present position of President of India as an appointing authority in respect of Judges of the Supreme Court and the High Courts. Instead of the present position the President of India would appoint them on the recommendation of the National Judicial Service Commission. To give effect to this model, it must be made distinctly clear that the recommendation of the Commission would be binding on the President of India. Now it may be that one cannot guard against all possible errors. The President of India in view of the vast resources that he commands, may have extensive machinery for collecting information about any individual. If after the President receives the recommendation and he thinks fit to initiate enquiry and comes across some information which may influence the decision of the Commission, he may refer back the recommendation to the Commission with, the information made available to the President of India.

7.1 6. If after reconsidering the recommendation in the light of the information the Commission thinks fit to reiterate its recomendation, the President shall appoint the person. It is this provision which will make the new model fully operational and effective.

7.1 7. The only aspect that remains to be examined in this connection is the time factor. Today there is inordinate delay in making appointments. Rarely if ever, a High Court or the Supreme Court functions with its full strength and the mandays lost in filling-in the vacancies deny consumers of justice the availability of forum and inevitably piles-up the backlog of cases. Therefore, the National Judicial Service Commission, shall initiate the proposal for filling-in the vacancy occurring on account of retirement six months prior to the occurrence of vacancy and in other cases such as death or resignation, as soon as the vacancy occurs. The object must be to guard against loss of a single man day on this account. When the strength of the court is augmented, the Commission should take immediate steps to recommend person so that the court may work with its full strength. It must be made distinctly clear that if the Commission is of the opinion that there is reluctance on the part of eligible persons belonging to the Bar of a High Court in which vacancy has occurred to accept Judge ship, it would the be open to it to look around the whole country and select persons from any where in the country. This would bring about a healthy change in the outlook of each High Court and would be an answer to parochial, regional or narrow outlook which is becoming discernible in the judiciary recently.

CHAPTER VIII

TECHNOLOGICAL ADVANCES AND ITS USE

8.1. The method for appointment so far followed has brought to surface one feature which has been agitating the minds of the experts and its indepth analysis has not revealed any objective criteria. The votaries of conferring exclusive power on the Chief Justice of a High Court to initiate the proposal for appointment have overlooked the fact that there is a tremendous amount of subjectivism in the proposals. Without meaning any disrespect to the institution of Chief Justice, if proposal after proposal is examined, it would be next to impossible to ascertain with certainty the reasons why one is recommended and some others, equally competent, are excluded. To illustrate this point, one appointment may be examined without reference to names. A judge of a premier High Court was appointed as an Additional Judge on March 19, 1961. Later on, in the same year, another Judge was appointed in the same High Court on October 14, 1961. At the relevant time in 1971-72, the relative position of Judegs in the High Court to which they belonged was that the earlier appointee was at No. 2 and the later appointee was at No. 7. The later appointed Judge standing at S. No. 7 in the *inter se* seniority in the High Court Judges of that High Court was promoted to the Supreme Court on 19th July, 1971, and the one at No. 2 and earlier appointed was promoted to the Supreme Court on August 28, 1972. What rationale one can find in selecting a comparatively junior Judge over the senior Judge who was not only promoted within a year but ultimately became the Chief Justice of India ? The only rationale one can find is the wholly subjected evaluation of the relative merits by the then Chief Justice who considered the later appointee in the High Court with comparatively less experience better suited at the relevant time than the judge with a longer experience and later on, within a short time, brought the senior judge to the Supreme Court. Did the Senior Judge lack experience one year earlier and had to be passed over, and then acquired within a one year such extensive experience as to qualify him for promotion ? The question do not answer to any rational explanation. In another well known incident two Chief Justices had an unbridgeable difference in the evaluation of one Judge for elevation to Supreme Court. This approach also informs the selections in total disregard of standing of selectees in inter High Court and intra High Court seniority. When analysed in depth, the only answer that surfaces is that barring the total subjective satisfaction of the Chief Justice of India, no other rational explanation can be offered for such performances. This situation is equally discernible when a Chief Justice of a High Court selects lawyers from the Bar attached to the High Court. Without in any manner reflecting upon the honesty and integrity of a Chief Justice, one can cite example after example of such a nature. At least in one High Court, reportedly some members of the Bar declined to accept judgeship not because they were not inclined to accept the offer but because the offer came after someone else comparatively junior was offered it earlier. This is true not of one High Court alone but of more than one High Court. Such subjectivism disclosing individual preferences is neither conducive to the healthy development of judicial tradition nor to strengthening the judiciary as an institution.

8.2. The question is whether this aspect can be remedied. In other words, are remedial measures available to deal with this canker of subjective personal preferences ? As stated earlier, deliberations of a body composed of experts may be one such answer. But that body itself may also lack information or material for reaching conclusion *qua* individuals. Can the modern technological advances help in this behalf ?

8.3. As of today, a selectee for appointment is generally recommended in such vague terms as 'a good Judge', 'an efficient Judge with insight into the working of the Constitution'. Occasionally it is stated that he is a men of robust commonsense and sturdy independence and man of unquestionable integrity. If the writer of the opinion is asked how he has arrived at this conclusion, a clear void would be revealed. Occasionally another answer is that someone knowledgeable has so intimated to the Chief Justice. This is an un-scientific approach and suffers from vagueness. The lacuna herein can be filled in.

8.4. It is time that modern technological advances which have grazed past the judiciary as an institution should be taken advantage of. The Ministry of Justice

at the centre and each High Court must have a computer programme. A member of the bar or a member of the district judiciary when within the age-group of 35—40 should be kept under close watch and date collected must be fed into a computer in the High Court as well as a counter-part in the Ministry of Law & Justice. In respect of a member of the district judiciary, every judgement that is delivered and which has been dealt with in appeal by the High Court should be scientifically analysed with regard to his ability speed with which the case is disposed of, intimate knowledge of law, diction, rationality of conclusion and whether it is in tune with the philosophy of Constitution. All this must be continuously fed in the computer.

8.5. While dealing with a member of the bar, every case in which he appears and argues, the nature of his arguments may be collected from the judgements delivered and analysed to the same extent possible and fed in the computer. An additional column may provide for personality, bearing, court behaviour, etc.

8.6. When time comes to fill in vacancies in that High Court, the computer print out both with regard to the member of the judiciary as well as with regard to the member of the bar must be taken out and submitted to National Judicial Service Commission which will have adequate date to come to its own conclusion so as to choose the best available talent. This data will be further supplemented by the expression of opinion of the Chief Justice of the High Court and of the three seniormost Judges of that High Court. The Law Commission is of the view that this approach will totally eliminate subjectivism or individual preferences unsupported by reason and logic and would provide adequate material to affirmatively reach conclusion one way or the other.

8.7. The approach indicated in the paragraph just preceding will provide an effective check against a recent unhealthy development in the field of judicial appointments. While those who have established practice at the Bar with attractive earnings are loathe to accept judgeship, yet there are numerous people keen to become High Court Judges. This apparent contradiction in the matter of appointment has deeper sociological implications which it is not necessary to analyse at this stage. The unquestionable fact is that in a large number of States, numerous lawyers are keen to become High Court Judges; and, depending upon local tradition, in some States even lawyers with attractive practice are willing to become Judges. But as soon as a name becomes current as being under consideration letters—annonymous and pseudonymous—containing filthy and dirty allegations start pouring in to the powers that be. This is not a figment of imagination of the Law Commission but the Law Commission has concrete material in this behalf. The same is not explicitly set out here as it may embarrass some Judges in position. But no one will be able to question this assertion of the Law Commission that as soon as a name is reported as being under consideration, that person becomes a victim of crass vilification. When it comes to a candidate of fair sex, the vilification stigmatises the character and makes life intolerable. In the final analysis, the judge-ship may or may not be awarded but the victimisation on account of the name being under consideration causes untold hardship to some members of the Bar. One cannot easily rule out the possibility of some persons having suffered on this account.

8.8. Now if computerisation programme is undertaken and a watch is being kept over up coming members of the Bar as well as members of the judicial service, then when his name is considered at an appropriate stage, the chances of his vilification would be considerably reduced. This will be an additional advantage over and above getting objective material for scientific assessment of the person concerned.

8.9. Once subjectivism and individual preferences unsupported by objective data are eliminated and instead of an individual, a body deliberates over a proposal and makes recommendation, which recommendation, as stated earlier, would be more or less binding, obviously the credibility gap which has widened today would be narrowed, if not wholly filled in. At any rate, the charge of arbitrariness which can be readily read into individual preferences of a subjective nature could be easily repelled and ruled out when a body with objective data deals with the question of appointment. This new model would, therefore, satisfy what was constitutionally expected, namely, that the superior judiciary would be manned by first rate men, efficient knowledgeable and persons of unquestioned integrity, selected by a body which cannot be accused of arbitrariness. The Law Commission recommends accordingly.

CHAPTER IX

COROLLARY

9.1. If the structure recommended herein is acceptable, it would necessitate amendment to the Constitution. The power to appoint a Judge of the Supreme Court and a Judge of the High Court, which today vests in the President of India, would continue to vest in the President of India. The power has to be exercised under the new dispensation in consultation with the National Judicial Service Commission. To that extent, article 124 and article 217 will have to be amended. Similarly, article 233 and 234 will have two be amended. There are to ways of going at it. One suggestion was that one can provide consultation with this Commission by a necessary amendment in respect of appointments to both the High Courts and the Supreme Court with a convention that the recommendation of this Commission would be binding. No doubt where something which the Commission appears to have overlooked comes to the notice of the President, who would be aided in discharge of this function by the Council of Ministers, the proposal may be referred back to the Commission and the Commission would consider that aspect but if after reconsideration the Commission reiterates its recommendation, there would be no option with the President but to appoint the person. Another suggestion was that consultation can be informal by a convention. That by itself may not be sufficient because the consultation with the local Chief Minister and the Governor will have to be omitted from article 217. Even if such Commission is set up and by convention consultation with it is made mandatory, yet some amendment to article 124 would equally be necessary. In the larger interest of the institution of judiciary, this will be inevitable.

Sd/-

(D. A. DESAI)

Chairman

Sd/-

(S. C. GHOSE)

Member

Sd/-

(V. S. RAMA DEVI)

Member Secretary

New Delhi, dated the 31st July, 1986.

ANNEXURE I

D.O. No. 44(1)/86-LC

Tal. No. 384475

LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAWAN,
NEW DELHI

D. A. DESAI
Chairman

10th December, 1986.

Dear Justice

The Law Commission is at present examining twin problems, viz :—

(*i*) Difficulty in recruitment at all levels in judiciary: and

(*ii*) approach and criteria, apart from the statutory rules governing the same.

To facilitate the empirical research and scientific analysis, I have to request you kindly to send the following information as expeditiously as possible and not later than the end of this month.

I. The recruitment to the lowest cadre of judicial hierarchy is generally done by the Public Service Commission of the State :—

(1) Does it get adequate response by way of applications from the market in relation to the vacancies notified ?

(2) Is it in a position to recruit reasonably good candidates and is the zone of selection sufficiently large to reject the unwanted ?

(3) If the response is not adequate, the causes for the same.

II. In your State, is there is a provision for direct recruitment at the middle level of judiciary say District Judges ? If there is such a provision, kindly give the information about :—

(1) the quota;

(2) the proportion;

(3) the period of recruitment;

(4) adequacy of response; and

(5) fitness of the candidates who are available. If some difficulty is experienced in this behalf, kindly state separately the causes for the same.

III. (1) In the matter of recruitment from the Bar to the High Court, is it your experience that the really able and efficient lawyers, who have established a reasonably good practice are not willing to accept Judgeship in the High Court ?

(2) Whether the recent attempt on revising the emoluments and conditions of service of the High Court Judges would provide sufficient attraction to join judiciary ?

IV. Before recommending candidates for appointment as High Court Judges what relevant considerations have been taken into account such as :—

(*i*) income aspect;

(*ii*) standing at the Bar;

(*iii*) caste;

(*iv*) reservation principle, or any other consideration which has a bearing on the decision to select and recommend a candidate ?

V. More specifically, I would like to know whether the power to transfer as conferred by article 222 of the Constitution and as interpreted by the Supreme Court in the *Union of India* vs. *Sankalchand Sheth*[1], and in *S. P. Gupta* vs. *Union of India*[2], have, to some extent, a dampening effect on the members of the Bar from accepting Judgeship. In other words, have you come across a concrete case where a Member of the Bar was willing to accept Judgeship, but declined to do so on the sole ground that he is liable to be transferred without his consent. If there is no objection, the information may be illustrated with a concrete case. An additional information necessary in this behalf is whether the production of Income-tax Assessment Order is insisted upon.

VI (1) In your opinion, whether the present strength of your High Court is adequate to deal with the inflow of cases and in course of time to reduce the backlog ?

(2) Is the strength fixed in relation to the—

(i) institution of cases; or

(ii) the population basis; or

(iii) the area of the State ?

(3) Is the strength being reviewed and if so, at what interval ?

(4) When was it last reviewed ?

VII. (1) In pursuance of Art. 224, has your High Court ever appointed any additional judges to deal with the increased business of the court or the arrears?

(2) What is the average lapse of time in additional judges getting confirmed? It may be specified if any additional judge of your High Court was not confirmed.

VIII. It is conceded on all hands that there is enormous and inordinate delay in filling in the vacancies in the High Court;

(1) What, according to you, are the causes of delay?

(2) At what end the delay occurs ?

(3) Do you promptly move making recommendations in the face of anticipated vacancies in the course of the next year ?

(4) I would request you kindly to trace the movement of your recommendation after it leaves your office and via Chief Minister/Governor of the State/the Chief Justice of India.

(5) Are any personal discussions arranged between you and the Chief Minister to sort out the differences ?

(6) Are they found to be helpful ?

(7) Do you receive names for appointment from the Chief Minister ?

(8) Have you come across cases where the recommendation made by you was approved by the Chief Minister and the Governor of the State as also cleared by the Chief Justice of India and yet, the Union Government did not appoint him ? I would request you to give specific instances with names.

IX. The delay in filling in the vacancies is likely to reduce the out-turn of cases. Would you kindly give me in a tabulated form the delay in filling in each vacancy commencing from 1.1.1980 till today and its impact on the backlog of the cases and piling up of arrears.

X. After giving the information, as best as you can, I would request you with your mature experience as Judge and Chief Justice of your High Court to suggest solutions so as to make the system more resilient, flexible and result-oriented.

With regards,

Yours sincerely,

(D.A.Desai)

To

Chief Justices of all High Courts.

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[1]AIR 1977 SC 2328.
[2]AIR 1982 SC 149.

ANNEXURE II

STATEMENT SHOWING THE STRENGTH OF THE JUDGES OF THE SUPREME COURT (EXCLUDING THE HON'BLE THE C.J.I.) FROM THE YEAR 1981 TO 1985

Sl. No.	Year	Sanctioned strength of the Judges of the Court	No. of Judges actually elevated to the Bench	PERIOD From	PERIOD To	Vaancies remained unfilled	Period during which vacancies remained unfilled Year	Months	Days
1	2	3	4	5		6	7		
1	1981	17	13	1-1-81	14-1-81	4	0	0	14
		17	12	15-1-81	27-1-81	5	0	0	13
		17	13	28-1-81	29-1-81	4	0	0	2
		17	15	30-1-81	31-12-81	2	0	11	2
2	1982	17	14	1-1-82	6-3-82	3	0	2	6
		17	13	7-3-82	31-12-82	4	0	9	25
3	1983	17	13	1-1-83	12-1-83	4	0	0	12
		17	12	13-1-83	14-3-83	5	0	2	2
		17	16	15-3-83	13-12-83	1	0	9	17
4	1984	17	16	1-1-84	24-6-84	1	0	5	24
		17	17	25-6-84	31-12-84	Nil	0	6	7
5	1985	17	17	1-1-85	8-5-85	Nil	0	4	8
		17	16	9-5-85	11-7-85	1	0	2	3
		17	15	12-7-85	16-8-85	2	0	1	5
		17	14	17-8-85	20-8-85	3	0	0	4
		17	13	21-8-85	30-9-85	4	0	1	10
		17	12	1-10-85	28-10-85	5	0	0	28
		17	14	29-10-85	31-12-85	3	0	2	3
6	1986	17	14	1-1-86	8-3-86	3	0	2	8
		17	13	9-3-86	9-3-86	4	0	0	1
		17	16	10-3-86	6-4-86	1	0	0	28
		17	15	7-4-86	14-6-86	2	0	2	8
		17	14	15-6-86	1-10-86	3	0	3	17

ANNEXURE III

The year-wise information with regard to vacancies of High Court Judges commencing from January, 1980 till today is as follows :—

Number of vancancies as on 1-1-1980: 1+3=4

ANDHRA PRADESH HIGH COURT

Vacancies occurred	Date on which the vacancy filled up
6-1-1980	9-7-1982
1-7-1980	9-7-1982
4-7-1980	9-7-1982
Number of vacancies arose in the year 1981 : 1	
4,12-1981	Nil
Number of vacancies arose in the year 1982 : 2	
19-1-1982	10-12-1982
23-3-1982	10-12-1982
Three vacancies occurred on 20-9-1982 due to increase of the Judges strength from 21 to 24.	
20-9-1982	1-9-1983
20-9-1982	12-11-1983
20-9-1982	—
5-12-1982	—
Number of vacancies arose in the year 1983 : 2	
Two vacancies arose on 26-2-1983 consequent on the increase of Judges Strength from 24 to 260.	
20-2-1983	—
26-2-1983	—
Number of vacancies arose in the year 1984 : 4	
9-4-1984	—
6-7-1984	—
11-7-1984	—
Number of vacancies arose in the year 1985 : 2	
8-4-1985	—
19-8-1985	—
Number of vacancies arose in the year 1986 : —	
	12- 7-1986
	12- 7-1986
	12- 7-1986
	12- 7-1986
	13-10-1986
Number of vacancies as on 1-1-1987 : 3	
Average time taken to fill up the posts : 3 years	

ANNEXURE III—*contd.*

BOMBAY HIGH COURT

STATEMENT SHOWING THE NUMBER OF VACANCIES OF JUDGES AVAILABLE DURING THE CALENDAR YEARS 1981 TO 1985 TOGETHER WITH THE DATES ON WHICH THE SAID VACANCIES AROSE

Year	No. of vacancies available	Dates on which vacan cies arose in High Court
1981	Nil	Nil
1982	1	12-8-82
1983	3	30-4-83 30-9-83 6-10-83
1984	3	21-1-84 9-7-84 4-10-84
1985	4	19-3-85 2-7-85 22-10-85 4-11-85

DELHI HIGH COURT

20-1-1987

STATEMENT SHOWING THE VACANIES OF HON'BLE JUDGES DURING THE YEARS 1981-1985 THE DATE ON WHICH THE VACANCIES WERE FILLED UP AND THE AVERAGE TIME TAKEN TO FILL UP THE VACANCIES

S. No.	No. of vacancies available during the calender years 1981 to 1985, yearwise	The dates on which these vacancies arose	The date on which the vacnacies were filled in	Average time taken in filling up the vacancies	Remarks
1	2	3	4	5	6
	Year 1981				
	Permanent—3	Permanent— 1. 27-6-80 2. 4-9-80 3. 2-10-80	Permanent— 1. 11-9-81 2. 11-9-81	More than one year	
	Additional—6	Additional— 1. 28-5-80 2. 18-7-80 3. 17-7-81 4. 7-7-81 5. 11-9-81 6. 11-9-81	Additional— 1-6-81	7 months	
	Year 1982				
	Permanent—1	Permanent— 21-10-80	Permanent— 7-6-82	more than 1 year	
	Additional—6	Additional— 1. 18-7-80 2. 17-7-81 3. 17-7-81 4. 11-9-81 5. 11-9-81 6. 7-6-82			
	Year 1983				
	Permanent—6	1. 10-5-83 2. 10-5-83 3. 10-5-83 4. 10-5-83 5. 19-11-83 6. 19-11-83	1. 10-5-83 2. 10-5-83 3. 10-5-83 4. 10-5-83 5. 19-11-83 6. 19-11-83		

ANNEXURE III—*contd.*

1	2	3	4	5	6
	Additional—6	1. 10-5-83 2. 10-5-83 3. 10-5-83 4. 10-5-83 5. 19-11-83 6. 19-11-83	1. 12-8-83 (AN) 2. 12-8-83 ,, 3. 12-8-83 ,, 4. 12-8-83 ,,	3 months 2 days	
Year 1984					
	Permanent—5	1. 23-2-84 2. 23-2-84 3. 23-2-84 4. 23-2-84 5. 21-7-84	1. 23-2-84 2. 23-2-84 3. 23-2-84 4. 23-2-84 5. 6-9-84	2 months 5 days	
	Additional—2	1. 19-11-83 2. 19-11-83	1. 1-6-84 2. 1-6-84	6 months 13 days	
Year 1985					
	Permanent—4	1. 9-2-85 2. 6-8-85 3. 16-10-85 4. 22-12-85	1. 12-3-85 2. 29-10-85(AN)	2 months 3 days	
	Additional—2	1. 12-3-85 2. 29-10-85(AN)	1. 4-7-85		

GAUHATI (ASSAM) HIGH COURT

STATEMENT SHOWING INFORMATION REGARDING VACANCIES OF JUDGES ETC. IN THE HIGH COURT OF GAUHATI

Date of Vacancy	Date on which these vacancies were filled	Time taken infilling up these vacancies
5-4-78	20-4-81	3Y 15 D
11-3-79	20-4-81	2Y 1 M 9 D
1-3-80	10-1-84	2 Y 10 M 10 D
1-3-84	21-11-84	8 M 21 D
5-10-84	11-10-85	1 Y 6 D
3-11-86	—	—
20-12-86	—	—

GUJARAT HIGH COURT

STATEMENT SHOWING THE INFORMATION REGARDING VACANCIES ETC. OF JUDGES IN THE HIGH COURT OF GUJARAT, DURING THE YEARS 1981 to 1985

Sanctioned strength	No. of vacancies existed as on 1-1-1981	Number of Vacancies available		Dates on which these vacancies arose	Dates on which these vacancies were filled in	Average time taken in filling up these vacancies
18	3	1981	4	4-1-1981 19-8-1981	29-9-1981	Cannot say for the reasons stated in the letter
18		1982	1	—	26-5-1982 (Three appointments)	
20		1983	1	15-2-1983	28-1-1983 (Two appointments)	
				15-3-1983	21-6-1983	
				22-12-1983	5-9-1983 (Two appointments)	
20		1984	3	14-4-1984 8-11-1984	—	
21		1985	4	1-2-1985 18-12-1985	21-3-1985	

ANNEXURE III—*contd.*

HIMACHAL PRADESH HIGH COURT

Year	Sanctioned strength of permanent Judges	Additional Judges	In Position	Vacancy	Date of Vacancy	Date of filling up the post	Average time taken in filling up the vacancy
1981	3	2	4	1	April 10, 1979		5 years-7 months
1982	3	2	4	1	Do.		17 days.
1983	5	—*	4	1	Do.		
1984	5	—*	4	1	Do.	27-11-1984	
1985	5	1*	6	—			

*In September, 1983, the Government of India had agreed to the creation of two posts of Additional Judges on the condition that the requisite sanction will be issued at the time of making appointment of Additional Judges. Out of these two posts, only one was created and filled in on November 27, 1984. The other post has still not been created and filled in.

**Treating the posts that are agreed to be created as having been duly created, for the first three quarters of 1983, one post remained vacant; for the last quarter of 1983, two posts remained vacant. For almost the whole of the year 1984, three posts remained vacant. In 1985, one post has remained vacant. Besides, one Hon'ble Judge has been partly working as the Commission of Inquiry (Scab Apples) since prior to his appointment as Judge of the High Court and in that capacity has been devoting some time for the Commission work. On the basis of the working norm of disposal of 650 main cases per Judge per year consisting of 210 working days, approximately 3300 main cases more would have been disposed of if the court had functioned with the full strength. In that event no case, civil and criminal, more than three years would have been pending today. Even-one-fourth of three years old cases would have stood disposed of.

JAMMU & KASHMIR HIGH COURT

STATEMENT SHOWING THE SANCTIONED STRENGHT OF JUDGES OF THE HIGH COURT FROM 1980 UP TO DATE AND THE TIME TAKEN FOR FILLING UP THE VACANCIES

Calendar Year	Sanctioned strength	No. of vacancies available in the year under reference i.e. vacancies not filled.	The date on which these vacancies were filled	Average time taken filling up these vacancies
1	2	3	4	5
1980	Seven	Three	—	—
1981	Seven	Three	—	
1982	Seven	Four		
1983	Seven	Four		
1984	Seven	Four	4 (Two on 25-5-1984, and Two on 9-8-1984)	4/3 years.
1985	Seven	One	One on 4-2-1985	One year.
1986	Seven	—	One on 30-5-1986	Two years.

ANNEXURE III—*contd.*

KARNATAKA HIGH COURT

As on 1-1-1981 there were two vacancies. Out of which one vacancy existed since 26-10-1979 and the other vacancy existed from 6-5-1980.

Two vacancies arose in 1981, one on 19-5-1981 due to retirement of a Judge and another on 10-8-1981 due to sanction of one post.

	Y-M-D
(1) One vacancy of 26-10-1979 was filled on 19-6-1981.	
Time taken to fill up the vacancy	1-07-23
(2) The vacancy of 6-5-80 was filled on 11-9-1981	
Time taken to fill up the vacancy.	1-04-5
(3) The vacancy of 19-5-81 was filled on 11-9-81	
Time taken to fill up the vacancy	0-03-22

As on 1-1-1982 there was one vacancy.

On 26-9-1982 one Judge retired and on 10-11-1982 one Judge expired.

No vacancies were filled up in 1982.

As on 1-1-1983 there was 3 vacancies :

(1) The vacancy of 10-8-81 was filled on 10-1-1983.	
Time taken to fill up the vacancies	1-05-0
(2) The vacancy of 26-9-82 was filled on 10-1-1983.	
Time taken to fill up the vacancies	0-03-14

(3) On 11-4-1983 one vacancy arose due to retirement of a Judge

As on 1-1-1984 there were 2 vacancies

(1) The vacancy of 10-11-82 was filled on 25-5-1984.	
Time taken to fill up the vacancies	1-06-15
(2) The vacancy of 11-4-83 was filled on 25-5-84	
Time taken to fill up the vacancies	1-01-14

(3) On 14-11-84 one vacany arose due to death of one Judge.

As on 1-1-1985 there was one vacancy.

(1) On 24-10-85 one vacancy arose due to transfer.

(2) On 18-12- 1985 one vacancy arose due to retirement of a judge.

No appointments were made in 1985.

Thus as on 1-1-1986 there are 3 vacancies of Hon'ble Judges existing in this High Court.

KERALA HIGH COURT

STATEMENT SHOWING THE NUMBER OF VACANCIES OF THE HON'BLE JUDGES OF THE HIGH COURT AVAILABLE AND THE DATES ON WHICH THESE VACANCIES AROSE ETC. DURING THE CALENDAR YEARS 1981 TO 1985

Year	No. of vacancies available during the Calendar year	Dates on which these vacancies arose	Dates on which these vacancies were filled in.
1981	3	19-1-80	28-9-81
		13-3-80	23-12-82
		1-8-80	23-12-82
1982	3	18-1-82	4-8-83
		22-3-82	4-8-83
		11-10-82	11-6-84
1983	2	22-8-83	13-6-84
		20-12-83	13-6-84
1984	2	28-4-84	31-1-85
		28-4-84	31-1-85
1985	1	22-8-85	26-9-85

Average time taken in filling up these vacancies 473 days.

High Court of Kerala, 24-11-86.

Assistant Registrar

ANNEXURE III—*contd.*

MADHYA PRADESH HIGH COUR

NUMBER OF VACANCIES AVAILABLE DURING THE CALENDAR YEARS, 1981 to 1985 IN RESPECT OF HONOURABLE JUDGES OF THE HIGH COURT OF MADHYA PRADESH

Strength of Hon. Judges : { Permanent—20 / Additional— 9

Number of vacancies available during the Calendar Year	Date on which these vacancies arose	Date on which these vacancies were filled in	The average time taken in filling-up these vacancies
1	2	3	4
1981	PERMANENT VACANCIES.		
4—Permanents. 4—Additional — 8 —	1—Post vacant from 21-2-1980	Post filled in on 27-5-82	2 years, 3 months & 6 days.
	1—Post vacant from 21-7-1980	Post filled in on 27-5-82.	1 year, 10 months & 6 days.
	1—Post vacant from 10-1-81	Post filled in on 2-11-82	1 year, 9 months & 21 days.
	1—Post vacant from 2-9-81	Post filled in on 2-11-82	1 year & 2 months.
	ADDITIONAL VACANCIES		
	3—Posts vacant from 29-8-77	Posts filled in on 14-5-84	6 years, 8 Months & 14 days.
	1—Post vacant from 29-8-77	Not filled as yet.	8 years & 4 months upto December, 198
1982	PERMANENT VACANCIES		
4—Permanent. 5—Additional. — 9 —	1—Post vacant from 1-5-82	Post filled in on 2-11-82	6 months & 1 day.
	1—Post vacant from 23-7-82	Post filled in on 3-6-83	8 months & 14 days.
	1—Post vacant from 31-8-82	Post filled in on 7-4-83	7 months & 7 days.
	1— Post vacant from 15-10-82	Post filled in on 20-6-83	8 months & 4 days.
	ADDITIONAL VACANCIES		
	1—Post vacant from 27-5-82	Post filled in on 14-5-84 (Converted into permanent one) w.e.f. 21-2-83	1 Year, 11 months & 16 days.
	1— Post vacant from 27-5-82	Post filled in on 14-5-84	1 Year, 11 months & 16 days.
	1—Post vacant from 2-11-82	Post filled in on 14-5-84	1 Year, 6 months & 11 days.
	1—Post vacant from 2-11-82	Post filled in on 14-5-84	1 Year, 6 months & 11 days
	1—Post vacant from 2-11-82	Post filled in on 14-5-84	1 year, 6 months & 11 days.

ANNEXURE III—*contd.*

Strength of Hon. Judges : { Permanent—21. Additional—8

1	2	3	4
1983			
	PERMANENT VACANCIES		
1— Permanent.			
	1—Post vacant from 5-5-83	Post filled in on 14-5-84	1 year & 9 days.
1984			
1—Permanent	PERMANENT VACANCIES		
	1—Post vacant from 3-1-84	Post filled in on 16-5-85	1 Year, 4 months & 13 days.
1985			
3—Permanent Posts	PERMANENT VACANCIES		
	1—Post vacant from 15-6-85	Post filled in on 14-5-86	11 months
	2—Post vacant from 29-10-85	Post filled in on 14-5-86	6 months & 15 days.
	3—Post vacant from 4-11-85	Posts filled in on 14-5-86	6 months & 10 days.
1986			
2—Permanent.	PERMANENT VACANCIES		
5—Additional.	1—Post vacant from 20-1-86	Post filled in on 14-5-86	3 months & 23 days.
7	1—Post vacant from 28-8-86	Post filled in on 8-1-87	4 months & 10 days.
	ADDITIONAL VACANCIES		
	1—Post of Addl. Judges, out of 2 Posts of Addl. Judges Converted in to permanent Vacancies, w.e.f. 22-5-86.	Post filled in on 10-11-86	5 months & 18 days.
	1—Post of Addl. Judges vacant from 14-5-86	Post filled in on 4-7-86	1 month & 19 days.
	1—Post a Addl. Judges vacant from 14-5-86	Post filled in on 4-7-86	1 month & 19 days.
	1—Post of Addl. Judges vacant from 14-5-86	Post filled in on 22-1-87	8 months & 7 days.
	1—Post of Addl. Judges vacant from 10-11-86.	Post filled in on 22-1-87	2 months & 11 days.
1987			
	One Post of Addl. Judge Vacant from 29-8-77.	Not filled as yet.	
	Two other posts of Additional Judges which have already been approved and for which sanction is to be accorded at the time of appointment are to be filled, thus making the total vacancies to 3.		

ANNEXURE III—*contd.*

ORISSA HIGH COURT

STATEMENT SHOWING DELAY IN FILLING IN EACH VACANCY

(Commencing from 1-1-1980 till to-day)

Year	Sanctioned strength		Actual strength	No. of vacancies	Date of vacancy	Remarks
	Permanent	Addl.				
(1)	(2)		(3)	(4)	(5)	(6)
1980	7	—	4	(1)	One post from 31-7-80 to 31-12-80	—
				(2)	One post from 30-9-80 to 31-12-80	—
				(3)	One post from 4-11-80 to 31-12-80	—
1981	7	—	7	(1)	One post from 1-1-81 to 4-1-81	on 5-1-81 Filled up
				(2)	One post from 1-1-81 to 17-9-81	on 18-9-81 Filled up
				(3)	One post from 1-1-81 to 17-9-81	on 18-9-81 Filled up
1982	7	—	6	(1)	One post from 4-5-82 to 31-12-82	—
1983	9	+ 1	6	(1)	One post from 31-1-83 to 31-5-83	on 1-6-83 Filled up
				(2)	One post from 31-1-83 to 31-5-83	on 1-6-83 Filled up
				(3)	One post from 1-1-83 to 17-11-83	on 18-11-83 Filled up
				(4)	One Addl. Post from 1-1-83 to 31-12-83	—
1984	11	+ 1	9	(1)	One post from 16-7-84 to 31-12-84	—
				(2)	One post from 1-1-84 to 19-6-84	on 20-6-84 Filled up
				(3)	One post from 1-1-84 to 19-6-84	
				(4)	One Addl. post from 1-1-84 to 31-12-84	—
1985	11	+ 1	10	(1)	One post from 1-1-85 to 31-12-85	—
				(2)	One Addl. Post from 1-1-85 to 31-12-85	—
1986	11	+ 1	9	(1)	One post from 20-1-86 to till date.	—
				(2)	One post from 9-7-86 to till date.	—
				(3)	One post from 1-1-86 to 20-6-86	on 21-7-86 Filled up.
				(4)	One Addl. Post from 1-1-86 to 20-3-86 and 21-6-86 to till date.	—

(1) Post of Hon'ble C.J. from 5-11-80 to 15-1-81.
(2) Post of Hon'ble C.J. from 15-3-83 to 10-8-83.
(3) Post of Hon'ble the chief Justice from 14-3-83 to 10-8-83.
(4) Post of Hon'ble the Chief Justice from 1-3-86 to 30-4-86.

ANNEXURE III—*contd.*

CHART SHOWING THE NUMBER OF JUDGE—DAYS LOST ON ACCOUNT OF NON-FILLING OF VACANCIE FROM 1980 TO 31-12-86

Date on which vacancy occurred	Date on which filled up	Time-gap
	During the period covering 16-4-77 to 1-8-79 a total number 5508 Judge-days were lost in this Court on account of delay in the appointment of Judges.	
		Yr. — Mon — Days
1-2-80	18-11-82	2 — 9 — 17
6-5-80	18-11-82	2 — 6 — 12
6-5-80	18-11-82	2 — 6 — 12
6-5-80	18-11-82	2 — 6 — 12
6-5-80	18-11-82	2 — 6 — 12
6-5-80	18-11-82	2 — 6 — 12
1-1-81	18-11-82	1 — 10 — 17
15-6-81	18-11-82	1 — 5 — 3
1-9-81	18-11-82	1 — 2 — 17
2-11-81	18-11-82	1 — 0 — 16
1-1-82	18-11-82	0 — 10 — 17
20-2-82	1-9-83	1 — 6 — 11
13-3-82	29-11-83	1 — 8 — 16
11-7-82	15-2-84	1 — 7 — 4
28-5-83	13-8-84	1 — 2 — 15
9-9-84	17-11-86	2 — 2 — 8
28-11-84	17-11-86	1 — 11 — 19
12-1-85	17-11-86	1 — 10 — 5
May 85	17-11-86	1 — 6 — 0
May 85	17-11-86	1 — 6 — 0
		Total number of Judge—days lost. } 13, 305 days

1-5-86
25-6-86
14-8-86
10-9-86
13-10-86
25-11-86

} Out of these six retirement vacancies, besides three (out of four newly created posts.), totalling nine vacancies, only two Judges have been appointed on 9-3-87. There are yet seven vacancies to be filled up.

ANNEXURE III—*concld.*

PATNA HIGH COURT

Year	No. of vacancies	Date on which vacancy arose	Date on which filled in	Average time taken in filling up vacancies	No. of post remained vacant
1	2	3	4	5	6
1981	15	16-4-77 Two (vacancies) 30-5-78, 3-1-79, 1-8-79, 1-2-80, 6-5-80 (5 vacancies) 1-1-81, 15-6-81, 11-9-81 and 2-11-81	4-12-81 (4 posts)	About 3 Years, 8 months.	11
1982	11+4	1-1-82, 20-2-82, 11-6-82 and 13-3-82	11 judges were appointed on 18-11-82.	About 2 years.	4
1983	4+1	28-5-83	1-9-83 and 29-11-83	About 21 months	3
1984	3+2	9-9-84 and 28-11-84	15-2-84 and 13-8-84	about 17 months	3
1985	3+1+4 posts sanctioned w.e.f. May, 1985	12-1-85	—	—	8

It may be mentioned that 4 posts of judges were sanctioned w.e.f. may, 1985. Thus the total sanctioned strength of Judges of the court at present, is, 39 w.e.f. 1985. In the year 1986 7 vacancies arose due to retirement of six Judges and transfer of one Judge as Chief Justice of Orissa High Court. However, 5 Judges have been appointed on 17-11-86.

ANNEXURE

PUNJAB HARYANA

STATEMENT SHOWING THE NUMBER OF VACANCIES OF

Year	Sanctioned Strength			No. of vacancies available during the year from time to time
	Permanent	Addl.	Total	
1		2		3
1981	17	6	23	4 from 1-1-1981 to 30-8-81 3 from 31-8-81 to 13-12-81 4 from 14-12-81 to 31-12-81
1982 (Six Additional posts of Judges were converted into permanent Judges vide Government of India letter No. 61/1/82-Jus dated 4-11-1982).	17	6	23	4 from 1-1-82 to 17-6-82 3 from 18-6-82 to 31-12-82
1983	23	—	23	3 from 1-1-83 to 2-1-83 2 from 3-1-83 to 1-2-83 1 from 2-2-83 to 8-4-83 2 from 9-4-83 to 28-11-83 3 from 29-11-83 to 31-12-83
1984	23	—	23	3 from 1-1-84 to 15-1-84 4 from 16-1-84 to 13-5-84 5 from 14-5-84 to 1-8-84 6 from 2-8-84 to 31-12-84
1985 The Government of India vide their letter No. 75/11/84-Jus, dated 22-4-85 has agreed to refix the Judges strength of this Court as 23 permanent and 3 Addl. Judges.	23	—	23	6 from 1-1-85 to 21-4-85 9 from 22-4-85 to 23-5-85 10 from 24-5-85 to 29-7-85 9 from 30-7-85 to 31-12-85

III—*concld.*

HIGH COURT

HON'BLE JUDGES LYING VACANT FROM 1ST JANUARY, 1981 TO DECEMBER, 1985

Date on which the vacancies arose	Date on which vacancies were filled in during the year	Average time taken in filling up these vacancies
4	5	6
(i) w.e.f. 19-3-80 on the retirement of Hon'ble Mr. Justice Gurnam Singh.	31-8-81 on the appointment of Hon'ble Mr. Justice B.S. Yadav.	The appointment notification issued by the Govt. of India, Ministry of Law & Justice Department of Justice New Delhi in regard to appointment of Judges does not indicate against which particular vacancy an appointment of Hon'ble Judge has been made and as such in view of these circumstances it is not possible to calculate the average time taken in filling up these vacancies.
(ii) w.e.f. 15-10-80 on the retirement of Hon'ble Mr. Justice Harbans Lal.		
(iii) w.e.f. 25-10-86 on the retirement of Hon'ble Mr. Justice S.S. Sidhu.		
(iv) One vacancy was not filled since its creation from 22-8-1972.		
(v) 14-12-1981 on the death of Hon'ble Mr. Justice B.S. Dhillon.		
	18-6-1982 on the appointment of Hon'ble Mr. Justice S.S. Sodhi	
(i) 9-4-83 on the retirement of Hon'ble Mr. Justice C.S. Tiwana	3-1-1983 on the appointment of Hon'ble Mr. Justice K.P.S. Sandhu.	
(ii) 29-11-83 as a consequence of transfer of Hon'ble Mr. Justice S.S. Sandhawalia, Chief Justice to Patna High Court.	2-2-83 on the appointment of Hon'ble Mr. Justice Pritpal Singh.	
(i) w.e.f. 16-1-84 on the retirement of Hon'ble Mr. Justice S.C. Mittal.		
(ii) w.e.f. 14-5-84 on the retirement of Hon'ble Mr. Justice A.S. Bains.		
(iii) w.e.f. 1-8-84 on the retirement of Hon'ble Mr. Justice M.R. Sharma.		
(i) w.e.f. 24-5-85 on the retirement of Hon'ble Mr. Justice J.M. Tandon.	30-7-85 on the appointment of Hon'ble Mr. Justice D.V. Sehgal.	
(ii) 3 posts of Addl. Judges agreed to be created by the Govt. of India vide letter No. 75/11/84-Jus. dated 22-4-85.		

ANNEXURE IV

STATEMENT SHOWING THE NUMBER OF ARREARS MANDAYS LOST, POSSIBLEDISPOSAL etc. DURING 1962—1986 IN SUPREUM COURT

Year	Pending at the beginning of the year	Institutions during the year	Disposals during the year	Pending at the end of the year	Judge's strength as on 1st Jan of each year	Mandays lost	Possible dispoasls	Decreased in arreats
1960	2,280	3,241	3,202	2,319	10	157	276	2,043
1961	2,319	3,216	3,553	1,977	13	—	—	—
1962	1,977	3,559	3,833	1,703	13	—	—	—
1963	1,703	3,757	3,290	2,170	12	240	360	1,810
1964	2,170	4,064	4,071	2,166	10	472	1,038	1,128
1965	2,166	3,930	3,814	2,282	10	508.5	1,016	1,266
1966	2,282	5,507	3,806	3,983	9	663.5	1,524	2,459
1967	3,983	5,202	4,145	5,039	10	589	1,339	3,700
1968	5,039	6,576	6,228	5,387	10	535	1,828	3,559
1969	5,387	7,524	6,641	6,270	10	421.5	1,537	4,733
1970	6,270	7,106	6,272	7,104	11	368.5	1,154	5,950
1971	7,104	7,979	6,491	8,592	8	685	3,052	5,540
1972	8,592	9,076	6,822	10,846	11	290	988	9,853
1973	10,846	10,174	8,175	12,845	12	231	864	11,981
1974	12,845	8,203	8,261	12,787	12	161	610	12,177
1975	12,787	9,528	8,727	13,588	12	198.5	793	12,795
1976	13,588	8,254	7,734	14,109	12	180.5	639	13,470
1977	14,109	14,501	10,395	18,215	11	221.5	1,150	17,065
1978	18,215	20,840	17,095	21,960	12	654	5,119	16,841
1979	21,960	20,754	15,833	26,883	15	379	2,198	24,685
1980	26,883	26,365	16,953	36,293	14	526	3,497	32,796
1981	36,293	31,040	18,690	48,643	15	396.5	2,714	45,929
1982	48,443	43,510	29,112	63,041	13	689	8,477	54,564
1983	63,041	55,902	45,824	73,206	16	322.5	5,074	68,132
1984	73,206	49,014	35,547	86,733	16	87	1.062	85,671
1985	86,933	51,592	51,078	87,247	16	317	5,560	81,687
1986 30-6-1986	87,247	12,708	19,118	80,837	14	186	2,791	78,046
Total				80,831			54,660	26,177

67% decrease in arrears

ANNEXURE V

STATEMENT SHOWING THE NUMBER OF ARREARS MANDAYS LOST, POSSIBLE DISPOSAL AND POSSIBLE BALANCE OF ARREARS DURING THE YEARS 1981 TO 1985

Sr. No.	Name of the High Court	1981 Arrears	Mandays lost	Possible disposal	Possible balance of arrears
		(1)	(2)	(3)	(4)
1	Allahabad	1,29,301	2,310	7,150	1,22,151
2	Andhra Pradesh	37,565	840	2,600	34,965
3	Bombay	66,906	840	2,600	64,306
4	Calcutta	79,281	1,890	5,950	73,331
5	Delhi	30,987	1,050	3,250	27,737
6	Gauhati	8,385	840	2,600	5,785
7	Gujarat	19,473	630	1,950	17,823
8	Himachal Pradesh	5,995	210	650	5,345
9	Jammu & Kashmir	8,826	630	1,950	6,876
10	Karnataka	66,920	420	1,300	65,620
11	Kerala	30,164	210	650	29,514
12	Madhya Pradesh	25,876	1,260	3,900	21,976
13	Madras	54,127	840	2,600	51,527
14	Orissa	10,877	630	1,950	8,927
15	Patna	37,454	2,100	6,500	30,954
16	Punjab & Haryana	33,915	840	2,600	31,315
17	Rajasthan	22,580	630	1,950	20,580
18	Sikkim	37	—	—	37
	Total	6,68,619	16,170	50,150	6,18,469

ANNEXURE V—*contd.*

Sr. No.	Name of the High Court	1982 Arrears	Mandays lost	Possible disposal	Possible balance of arrears
		(1)	(2)	(3)	(4)
1	Allahabad	1,74,936	2,310	7,150	1,67,786
2	Andhra Pradesh	57,995	480	2,600	55,395
3	Bombay	73,362	1,050	3,250	70,112
4	Calcutta	89,730	1,470	9,550	80,180
5	Delhi	43,103	1,260	3,900	39,203
6	Gauhati	10,569	420	1,300	9,269
7	Gujrat	24,568	840	2,600	21,968
8	Himacnal Pradesh	7,333	210	650	6,683
9	Jammu & Kashmir	12,854	680	1,950	10,904
10	Karnataka	94,593	210	650	93,943
11	Kerala	34,396	420	1,300	33,096
12	Madhya Pradesh	26,196	1,680	5,200	20,996
13	Madras	68,747	1,260	3,900	64,847
14	Orrisa	13,199	210	650	12,549
15	Patna	45,243	2,310	7,150	38,093
16	Punjab & Haryana	33,149	840	2,600	30,549
17	Rajasthan	25,517	1,260	3,900	21,617
18	Sikkam	62	—	—	62
		8,35,552	1,72,205	58,300	7,77,252

ANNEXURE V—*contd.*

Sr. No.	Name of the High Court	1983			
		Arrears	Mandays lost	Possible disposal	Possible balance of arrears
		(1)	(2)	(3)	(4)
1	Allahabad	1,73,536	3,150	9,750	1,63,786
2	Andhra Pradesh	50,901	840	2,600	48,301
3	Bombay	83,331	1,470	4,550	78,781
4	Calcutta	1,01,192	2,520	7,800	93,392
5	Delhi	46,709	1,260	3,900	42,800
6	Gauhati	12,174	210	650	11,524
7	Gujrat	27,755	210	650	27,105
8	Himachal Pradesh	9,041	210	650	8,391
9	Jammu & Kashmir	17,554	630	1,950	15,604
10	Karnataka	1,21,387	210	650	1,20,737
11	Kerala	49,973	840	2,600	47,373
12	Madhya Pradesh	27,402	2,520	7,800	19,602
13	Madras	86,850	1,050	3,250	83,600
14	Orissa	14,509	420	1,300	13,290
15	Patna	49,347	630	1,950	47,397
16	Punjab & Haryrna	34,018	420	1,300	32,718
17	Rajasthan	29,287	1,260	3,900	25,387
18	Sikkam	71	—	—	71
		9,35,118	17,850	55,250	8,79,868

ANNEXURE V—*contd.*

Sr. No.	Name of the High Court	1984			
		Arrears	Mandays lost	Possible disposal	Possible balance of arrears
		(1)	(2)	(3)	(4)
1	Allahabad	1,97,516	3,990	12,350	1,85,166
2	Andhra Pradesh	69,691	630	1,950	67,741
3	Bombay	93,410	630	1,950	91,460
4	Calcutta	1,16,821	2,520	1,800	1,09,021
5	Delhi	57,889	420	1.300	56,589
6	Gauhati	13,403	210	650	12,753
7	Gujarat	32,159	210	650	31,509
8	Himachal Pradesh	9,053	210	650	8,430
9	Jammu & Kashmir	22,290	840	2,600	19,690
10	Karnataka	1,16,564	420	1,300	1,15,264
11	Kerala	72,773	1,050	3,250	69,523
12	Madhya Pradesh	29,054	2,100	6,500	22,554
13	Madras	1,01,066	1,260	3,900	97,166
14	Orissa	17,591	910	650	16,941
15	Patna	54,602	490	1,300	53,302
16	Punjab & Haryana	33,285	680	1,950	31,335
17	Rajasthan	33,469	840	2,600	30,869
18	Sikkim	71	—	—	71
	Total	10,70,707	16,590	51,350	10,19,357

ANNEXURE V– *contd.*

Sr. No.	Name of the High Court	1985				Remarks
		Arrears	Mandays lost	Possible disposal	Possible balance of arrears	
		(1)	(2)	(3)	(4)	
1	Allahabad	2,28,952	1,680	5,200	2,23,752	Mandays lost and possible disposal have been worked out on the basis of the no. of vacancies available on 1st Jan. of each year from 1981 to 1985.
2	Andhra Pradesh	81,256	1,260	3,900	77,356	
3	Bombay	1,02,942	1,260	3,900	99,042	
4	Calcutta	1,36,641	630	1,950	1,34,691	
5	Delhi	68,157	210	0,650	67,507	
6	Gauhati	N.A.	420	1,300	N.A.	
7	Gujarat	36,949	630	1,950	34,999	
8	Himachal Pradesh	9,059	—	—	9,059	
9	Jammu & Kashmir	25,807	420	1,300	24,507	
10	Karnataka	96,764	—	—	96,764	
11	Kerala	1,00,373	840	2,600	97,773	
12	Madhya Pradese	34,210	420	1,300	32,910	
13	Madras	1,23,867	1,050	3,250	1,20,617	
14	Grissa	24,214	210	650	23,564	
15	Patna	57,048	420	1,300	55,748	
16	Punjab & Haryana	33,708	1,260	3,900	29,808	
17	Rajasthan	36,001	630	1,950	34,051	
18	Sikkim	36	—	—	36	
		11,95,984	11,340	35,100	11,62,184	

ANNEXURE

STATEMENT OF REPLIES

S. No.	Questions	ANDHRA PRADESH
I.	Recruitment to lowest cadre of Judiciary by P.S.C.	(i) Yes.
	(i) Does it get adequate response ?	(ii) No. PSC Member unaware of practical aspect of administration of justice Co-opted member of H.C. cannot award mraks. His suggestions may not be agreeable to others. Situation not satisfactory. Is worse in emergency when written examination is dispensed with.
	(ii) Is the Zone large enough to select the good candidates and reject the unwanted?	
	(iii) If the response is not adequate then reasons for the same.	
II	Whether provisions for direct recruitment at the middle level of Judiciary, If yes.:-	Yes.
	(i) Quota.	(i) 1/3 by direct recruitment.
	(ii) Proportion.	(ii) Do.
	(iii) Period of recruitment.	(iii) As & when vacancy arises.
	(iv) Adequacy of response.	(iv) Good except S. T. First S T appointed in 1986.
	(v) Good candidates whether available ? If not—reasons.	(v) Yes.
III.	1. Whether able lawyers with good practice willing to accept judgeship in High Court?	1. Yes, They do accept.
	2. Revised emoluments if sufficient attraction.	2. Marginal impact only. Not adequate to attract really good lawyers.
IV.	Relevant considerations for appointment to High Court.	
	(i) Income.	(i) Yes.
	(ii) Standing at the Bar.	(ii) Yes.
	(iii) Caste.	(iii) No.
	(iv) Reservation principle, if any, or any other consideration.	(iv) No. But Character, integrity, calibre taken into account.

V—*contd.*

DELHI	GAUHATI	GUJARAT
(i) High Court	(1) P.S.C. & High Court 50 : 50	1. Yes.
Yes. In 1984 for 37 vacancies, 1200 applications	(i) Yes.	(i) Yes.
		(ii) PSC is able to select required No. of candidates.
(ii) Yes.	(ii) Candidates selected by PSC & H.C. are good but not of High standard.	
Yes.	Yes.	Yes.
(i) 1/3 by direct recruitment.	(i) 1/3rd by direct recruitment 1/4th in Tripura.	(i) 1/2 by direct recruitment.
(ii) 2/3 by Members of Delhi Judicial Services.	(ii) —	(ii) 50 : 50
(iii) As & When vacancy arises (iv) Good (v) Fitness judged by H.C. No difficulty.	(iii) — (iv) Good. (v) Candidates of High calibre not available Conditions of services & amenities not attractive.	(iii) As & when vacancy arises. (iv) H.C. facing dificulties to pursuade competent and suiable candidates from bar : 50 : 50 ratio not maintained
	1. Not to his knowledge.	1. No. Finding it difficult to pursuade them to accept.
	2. Would provide some attraction.	2. Should prove so.
	(i) Yes.	(i) Yes.
	(ii) Yes.	(ii) Yes.
	(iii) No.	(iii) No.
	(iv) No.	(iv) No.

ANNEXURE

S. No.	Questions	JAMMU AND KASHMIR
I.	Recruitment to lowest cadre of Judiciary by P.S.C.	
	(i) Doest it get adequate response ?	(i) Yes.
	(ii) Is the Zone large enough to select the good candidates and reject the unwanted?	(ii) Yes.
	(iii) If the response is not adequate then reasors for the same.	(iii) —
II.	Whether provision for direct recruitment at the middle level of Judiciary If yes. :—	Yes.
	(i) Quota.	(i) 1/4th by direct recruitment.
	(ii) Proportion.	(ii) 75 by direct promotion.
	(iii) Period of recruitment.	(iii) Good.
	(iv) Adequacy of response.	(iv) Best persons not attracted due to poor emoluments.
	(v) Good candidates whether available ? If not—reasons.	
III.	1. Whether able lawyers with good practice willing to accept judgeship in High Court?	1. No.
	2. Revised emoluments if sufficient attraction.	2. Hope so.
IV.	Relevant considerations for appointment to High Court.	
	(i) Income.	(i) Yes.
	(ii) Standing at the Bar.	(ii) Yes.
	(iii) Caste.	(iii) To some extent.
	(iv) Reservation principle, if any, or any other consideration.	(iv) None.

V—*contd.*

KARNATAKA	KERALA	MADHYA PRADESH
I. By H. C. and not by P.SC. (i) Yes, S. C. & S. T. response not adequate.	1. Yes. But pursuade the State Govt. to entrust the same to the H. C. Govt. has agreed awaiting rules. (i) adequate response.	1. Yes. (i) Yes.
(ii) Yes.	(ii) Yes.	(ii) Yes.
(iii) —	(iii) —	(iii)—
Yes.	Yes	Yes.
(i) 1/3rd by direct recruitment.	(i) 1/3rd by direct recruitment.	(i) 20% direct recruitment
(ii) 2 : 1	(ii) 2/3rd by promotion.	(ii) —
(iii) No prescribed period.	(iii) As and when vacancy arises.	(iii) As and when new posts are created.
(iv) Not adequate response from competent and leading lawyers. Only 5 applicants for 12 posts None of them able to secure out off marks.	(iv) Good. (v) Yes. But of S.C. & S.T. not good response.	(iv) Not very encouraging. (v) —
1. But inordinate delay between recommendation made and actual appointment is main impediment.	1. Yes.	1. Yes.
2. —	2. May induce lawyers having substantial income to accept.	
(i) Yes.	(i) Not very important or decisive.	(i) Yes.
(ii) Yes.	(ii) Yes.	(ii) Yes
(iii) No.	(iii) Some consideration to SC & ST, who are not adequately represented.	(iii) No.
(iv) No. But name of purpose persons belonging to reserved category should be considered sympathetically. Integrity of the persons.	(iv) Competency, integrity Character, alertness of mind.	(iv) No.

ANNEXURE

S. No.	Questions.	ORISSA
I.	Recruitment to lowest cadre of Judiciary by P. S. C.	1. Yes.
	(i) Does it get adequate response ?	(i) Yes.
	(ii) Is the Zone large enough to select the good candidates and reject the unwanted?	(ii) Yes.
	(iii) If the response is not adequate then reasons for the same.	(iii) —
II.	Whether provision for direct recruitment at the middle level of Judiciary? If yes.	Yes.
	(i) Quota.	(i) No quota.
	(ii) Propotion.	(ii) 25% of the permanent cadre usually.
	(iii) Period of recruitment.	(iii) Takes about a year.
	(v) Adequacy of response.	(iv) Good.
	(v) Good candidates whether available ? If not—reasons.	(v) Not betting expected quality of candidates, because gap between emolument and earnings of lawyers has increased.
III.	1. Whether able lawyers with good practice willing to accept judgeship in High Court?	1. Yes.
	2. Revised emoluments if sufficient attraction	2. Yes
IV.	Relevent considerations for appointment to High Court.	
	(i) Income.	(i) Yes.
	(ii) Standing at the Bar.	(ii) Yes.
	(iii) Caste.	(iii) Yes.
	(iv) Reservation principle, if any, or any other consideration.	(iv) No. But in Bihar (When he was CJ) (some backward class candidates with reasonable capacity were picked up.

V—*contd.*

PUNJAB AND HARYANA	RAJASTHAN	SIKKIM
1. Yes.	1. Yes.	1. No. Recruitment made on recommendtions of Selection Committee.
(i) Yes.	(i) Yes.	(i) Not advertised yet.
(ii) Yes.	(ii) Yes.	(ii) Before 1975 during the Chogyal's time lawyers not allowed to practice so enough lawyers who qualify.
(iii) —	(iii) —	
Yes.	Yes.	Yes.
(i) 1/3rd of direct recruitment.	(i) 1/3rd of direct recruitment	(i) 1/3
(ii) 2/32ed promotion from PCS and H.C.S.	(ii) —	(ii) 1 : 3
(iii) —	(iii) As and when vacancies arise.	(iii) No direct recruit yet appointed.
(iv) Not very good.	(iv) Good.	(iv) Not good.
(v) Direct recruits below all promotees officiating against temporary posts. Long time before appointed as DJ also reduces chances of elevation to HC.	(v) Quite suitable candidates available.	
1. Small No. of lawyers with large practice do not accept. But competent lawyers would accept if offer made at proper stage and much time does not elapse fetween initiation and final decision of their case (experience of Allahabad Bar & Bench).	1. Yes.	1. Hardly any efficient lawyer with good practice.
2. Should contribute in pursuasion.	2r —	
(i) Yes, but income alone not a good guide.	(i) —	
(ii) Yes.	(ii) —	
(iii) No.	(iii) —	
(iv) No. only on bonafide overall merit.	(iv) — To ensure that the person is upright, gentleman with strong moral fibre.	

ANNEXURE

S. No.	Questions	CALCUTTA
I.	Recruitment to lowest cadre of Judiciary by P.S.C.	1. Yes, 50% by West Bengal Civil Service (Judicial) and 50% from the bar.
	(i) Does it get adequate response ?	
	(ii) Is the Zone large enough to select the good candidates and reject the unwanted.	
	(iii) If the response is not adequate then reasons for the same.	
II.	Whether provision for direct recruitment at the middle level of Jucidiary? If yes. :—	1. No. All recruitments made from West Bengal Civil Service (Judicial).
	(i) Quota.	
	(ii) Proportion.	
	(iii) Period of recruitment.	
	(iv) Adequacy of response.	
	(v) Good candidates whether available ? If not—reasons.	
III.	1. Whether able lawyers with good practice willing to accept judgeship in High Court?	1. Some not willing to accept.
	2. Revised emoluments if sufficient attraction.	2. Not all provisions relating to revised emoluments in force. Amendment to Part of IInd Sch. of Constitution awaiting ractification of requisite state Assemblies.
IV.	Relevant considerations for appointment to High Court.	
	(i) Income.	(i) Yes, but not decisive.
	(ii) Standing at the Bar.	(ii) Yes
	(iii) Caste	(iii) No.
	(iv) Reservation principle, if any or any other consideration.	(iv) No.

V—*contd.*

ALLAHABAD	HIMACHAL PRADESH	BOMBAY
1. Yes. (i) Yes. (ii) Quality of persons selected not upto the mark. General standard at the Bar, low standard of Legal education also is a contributing factor.	1. Yes. (i) Yes. (ii) Yes. (iii) —	1. Yes. (ii) Most of the candidates not able to come to the minimum expectations. 4 secured marks above 60% and so was the position to select good candidates Some candidates not able to complete probation satisfactorily. (iii) Conditions of service not good. Accommodation main problem. Promotional avenues are less. Income from the Bar is much Higher.
Yes. (i) 15% by direct recruitment. (ii) — (iii) As and when vacancy arises. (iv) Good. (v) No problem.	Yes. (i) 1/3rd by direct recruitment (ii) 2/3rd for promotees. 1/3rd for direct recruit.	Yes. (i) 50 quota. (ii) 50-50 proportion normally maintained. In city Civil Court 2/3rd Bar recruits are taken, Small causes Courts-50% from the Bar. (iii) Nothing fixed normally after two-three years. (iv) Of late, fitness of candidates was not upto the expectations, causes as in one above.
1. Yes. 2. After increase in emoluments there should be no difficulty to attract competent persons.	1. Yes. 2. May improve.	1. No. practice at the Bar has risen sharply while emoluments are static. 2. May pursuade some good lawyers but the gap between earnings of a lawyer and Judges salary is considerable. To some extent compensation by states, pension, etc.
1. Yes. 2. Yes. 3. Not irrelevant considered only to avoid appointments of persons belonging to the same caste. 4. —	1. Yes. 2. Yes. 3. 4. Representation to women, S.C. and ST and BC (If available)—one of the main criteria.	Primary consideration is ability and suitability. (1) Yes, but quantum not a consideration. (2) Yes, if a person with limited standing taken to the bench then it will become difficult to pursuade advocates with higher standing to accept. (3) Not applicable but attempts are made to ensure a good candidate from minority community given preferrence.

ANNEXURE

S. No.	Questions	PATNA
I.	Recruitment to lowest cadere of Judiciary by P.S.C.	Yes.
	(i) Does it get adequate response ?	(i) Yes.
	(ii) Is the Zone large enough to select the good candidates and reject the unwanted.	(ii) deterioration of standard of education so ideal candidates not available. To attract Sound Talent sources at national level have to be tapped and AIIS has to be created. Zone large but quality not available.
	(iii) If the response is not adeqaate then reasons for the same.	
II.	Whether provision for direct recruitment at the middle level of Judiciary? If yes :—	Yes. —
	(i) Quota. (ii) Proportion. (iii) Period of recruitment. (iv) Adequacy of response. (v) Good candidates whether available ? If not—reasons	(i) 1/3rd by direct recruitment but for last 8 years no direct recruit on a dispute with the Govt. over rules. Govt. want a body other than H.C. for appointing Judges contrary to Art. 234. (ii) (iii) As and when vacancies occur. (iv) & (v) In view of (i) cannot answer But understands no quantitative hurdle, quality also sample.
III.	1. Whether able lawvers with good practice willing to accept judgeship in High Court?	1. Yes.
	2. Revised emoluments if sufficient attraction	2. Yes.
IV.	Relevant considerations for appointment to High Court.	(i) Objective indication of the work and status of a lawyer.
	(i) Income. (ii) Standing at the Bar. (iii) Caste. (iv) Reservation principle. if any or any other consideration.	(ii) Long standing at the Bar irrelevant vounger men should be picked up who should have a long and meaningful tenure. (iii) No. (iv) No. Some attempts to bring parity w.r.t. minorities, women and backward classes. No transferred judge would be compensated by Transfer allowance entitling him to visit his home town twice a year by air. Some laywers eager to be employed outside so that later on they can practice in their Home State.

V—*contd.*

MADRAS

1. Yes.

Magestrial Service : New Rules from 1973. After 1973 no selection has been made by P.S.C. The matter is pending in H.C. Judicial Service : From 1975-85 no appointments were made. In 1985. 1400 applicants for 60 posts. In 1986 1500 applicants for 128 posts.

Yes.

(i) 10 posts to be filled by direct recruitment. At present about 388 applicants for 6 vacancies Grade I is filled by promotion from Grade II.

1. No.

2. Not necessarily.

(i) Yes.

(ii) Yes.

(iii) No.

(iv) No. but it is borne in mind that candidates from under privileged section shou'd be given representation on High Courts.

Not so far as this High Court is concerned. Assessment orders of the three preceding years are asked for.

ANNEXURE

Sl. No.	Questions	ANDHRA PRADESH
	1. Whether power to transfer under Art. 222 and as interpreted by S C in Sankal Chand Gupta's case has acted as a dampener ? If yes—Illustrate.	1. No.
	2. Income Tax Assessment Order -If insisted on.	2. Yes.
VI.	1. Whether present strength of Judges adequate to deal with inflow of cases and backlog.	1. Increased from 26 to 36— This is adequate.
	2. Strength fixed a/c to	2.
	(i) Institution of cases	(i) Yes.
	(ii) Population basis.	(ii) —
	(iii) Area of the state.	(iii) —
	3. Is the strength reviewed ? If yes—at what interval ?	3. From time to time.
	4. When, was it last reviewed?	4. 1986.
VII.	1. Under Art. 224, whether additional Judges are appointed?	1. Yes.
	2. Time lapse in confirmation—whether anyone not confirmed.	2. 6 months—No.
VIII.	Enormous delay in filling vacancies :	
	(i) Causes.	(i) Judiciary/Jealousy All allegations against recommended pesons require enquiry. Hence the delay.
	(ii) At what end delay occurs?	(ii) At Govt. level—State or Union.
	(iii) Whether CJ recommends promptly in view of anticipated vacancy.	(iii) Yes.
	(iv) Trace the movement of file containing recommendations.	(iv) N.A.
	(v) Whether personal division/discussion between C J & C M.	(v) No.
	(vi) If helpful	(vi)—
	(vii) Whether CM recommends names.	(vii) No.
	(viii) Illustrate, if recommendation approved by CJ, CM, CH by/but rejected by Union Govt.	(viii) No. Three names yet to be cleared by Govt.
IX.	Delay in filling vacancies from 1980 till date.	See Annexure III
X.	Solutions to make the system more resaliant, flexible and result oriented.	Recently Govt. has fixed one month's time for State Govts to express its views on names sent by C.J. Time limit at each level will reduce the delays.

V—*contd.*

DELHI	GAUHATI	GUJARAT
—	1. No.	1. No.
	2. Income Tax Assessment Order not insisted upon.	2. Yes.
1. No. Steep increase in institution of cases.	1. No, in view of four outlying branches.	1. Strength increased, will be sufficient.
2. (i) Yes. (ii) — (iii) —	2. All factors considered.	2. (i) Yes. (ii) — (iii) —
3. No fixed interval.	3. No. fixed interval.	3. No fixed interval.
4. 1985.	4. 1986. Two new posts of permanent Judges were created.	4. 1985.
1. Yes.	1. Yes.	1. Yes.
2. Earlier 2-3 years but now decreased to 6-9 months.	2. Less than two years—All confirmed.	2. 1-2 years. One Judge superannuated without being confirmed.
Justice O. N. Vohra, *Justice S. N. Kumar.		
	(i) Process of consultation takes time as there are two states.	(i) —
	(ii) At different end.	(ii) at all levels.
—	(iii) Yes.	(iii) Yes.
	(iv) Data not available.	(iv) —
	(v) Nothing on record.	(v) —
	(vi) —	(vi) —
	(vii) Nothing on record.	(vii) No.
	(viii) No.	(viii) By letter dated 12th July, 1985 names of G D. Bhatt, M. B. Patel, N. K. Desai recommended On 19th Dec. '85 name of P.M. Chauhan was recommended. P.M. Chauhan appointed at that instance—later on Patel also appointed.
—	—	—
—	Present system has checks and balances and should work satisfactorily if there is mutual trust and confidence between the functionaries.	—

ANNEXURE

Sl. No.	QUESTION	JAMMU AND KASHMIR
V.	1. Whether power to transfer under Art. 222 and as interpreted by SC in Sankal Chand Gupta s case has acted as a dampener ? If yes—illustrate.	1. No.
	2. Income Tax Assessment Order—If insisted on.	2. No.
VI.	1. Whether present strength of Judges adequate to deal with inflow of cases and backlog.	1. Yes.
	2. Strength fixed a/c to	
	(i) institution of cases. (ii) Population basis. (iii) Area of the state.	(i)) No single factor (ii) } influence this (iii)) decision.
	3. Is the strength reviewed ? If yes—at what interval?	3. Periodical review.
	4. When, was it last reviewed?	4. 1986, Strength raised from 7—11.
VII.	1. Under Art. 224, whether additional Judges are appointed.	1. Yes not more than one year.
	2. Time lapse in confirmation—whether anyone not confirmed.	
VIII.	Enormous delay in filling vacancies :	
	(i) Causes.	(i)) No such experience.
	(ii) At what end delay occurs.	(ii))
	(iii) Whether CJ recommends promptly in view of anticipated vacancy.	(iii) Recommended two persons who were appointed well in time.
	(iv) Trace the movement of file containing recommendations.	(iv)
	(v) Whether personal division /discussion between CJ & CM.	(v) Proposals informally discussed. No. differences.
	(vi) If helfulp.	(vi) Yes so far.
	(vii) Whether CM recommends names?	(vii) No.
	(viii) Illustrate, if recommendation approved by CJ, CM, CJ by/ but rejected by Union Govt.	(viii) No.
IX.	Delay in filling vacancies from 1980 till date.	
X.	Solution to make the system more resaliant, flexible and result oriented.	Recommendations of Chief Justice of State when approved by CJI, should always be accepted.

V—*contd.*

KARNATAKA	KERALA	MADHYA PRADESH
1. No.	1. Yes, would deter good candidates. Impression is that transfers restricted to CJS only. If large scale transfers affected it will become difficult to attract good lawyers.	1. Marginal effect on same.
2. —		
1. Yes if appointment are made in time.	No., Govt. has agreed to increase.	1. Increase necessary.
2.	2.	2.
(i) — (ii) — (iii) —	(i) Yes. (ii) No. (iii) No.	(i) — (ii) — (iii) —
3. —	3. When CJ makes the proposal	3. —
4. 1982.	4. About six months back.	4. 15 Sept. 1984, strength increased from 29 to 30.
—	1. Yes.	1. No. —
	2. 5 months—5 years all confirmed.	2. Depends on occurring of vacancy. If 1962 C.B. Kakre & K. A. Razzaque not confirmed. Razzaque later appointed as permanent judge.
	(i) Delay occurs in the capital only. Cause can be explained by Govt. of India only.	(i) Due to consultation at variuos levels.
—	(ii) Delhi.	(ii)
	(iii) Yes.	(iii) Not yet made any recommendation.
	(iv) With 4-6 weeks of CJ proposal is processed by CM & Governor and forwarded to Govt. of India.	(iv) —
	(v) Yes. Before finalising names.	(v) No. knowledge.
	(vi) Yes.	(vi) —
	(vii) No. (viii) No.	(vii) No names received so far (viii) Does not apply.
—	—	—
Appointments should be made well in time.	Disagreement at any level. CM/Governor. CJ or Centre should be communicated to CJ with reasons so that he can allay the doubts. If recommendation not acceptable then reasons for the same should also be communicated. Will ensure fairness to candidate High Level Committee of PM. Minister of Law and Home should meet and take decisions within a reasonable period.	At every level importance of filling vacancies expeditiously is seriously realised. Emphasis at every level should be on merit alone.

ANNEXURE

S. No.	Questions	ORISSA
V.	1. Whether power to transfer under Art. 222 and as interpreted by SC in Sankal Chand Gupta's case has acted as a dampener ? If yes—illustrate.	1. Yes, Illustrations may be picked up from confidential records of Patna High Court.
	2. Income Tax Assessment Order—If insisted on.	
VI.	1. Whether present strength of Judges adequate to deal with inflow of cases and backlog.	1. No.
	2. Strength fixed a/c to	2.
	(i) institution of cases.	(i) Yes.
	(ii) Population basis.	(ii) No.
	(iii) Area of the state.	(iii) Yes.
	3. Is the strength reviewed ? If yes—at what interval ?	3. Not done since last 4 years. In Patna it was done in quick succession.
	4. When, was it last reviewed ?	4. 1986.
VII.	1. Under Art. 224, whether additional Judges are appointed ?	1. Yes.
	2. Time lapse in confirmation—whether any one not confirmed ?	2. Less than a year.
VIII.	Enormous delay in filling vacancies :	
	(i) Causes.	(i) Political interference. Proper attention not given at all stages.
	(ii) At what end delay occurs ?	(ii) At all stages except CJI mostly occurs at CM's stage.
	(iii) Whether CJ recommends promptly in view of anticipated vacancy.	(iii) No occasion to deal with such situation.
	(iv) Trace the movement of file containing recommendations.	(iv) —
	(v) Whether personal division/discussion between CJ & CM	(v) Yes.
	(vi) If helpful.	(vi) Yes.
	(vii) Whether CM recommends names.	(vii) Yes.
	(viii) Illustrate, if recommendation approved by CJ, CM, CJI by/but rejected by Union Govt.	(viii) No.
IX.	Delay in filling vacancies from 1980 till date.	—
X.	Solutions to make the system more realiant, flexible and result oriented.	Defect not within the system but with human institutions dealing with this matter. If mandatory, time limits are fixed for processing the matter and some sort of accountability is fixed on defauting agency for failure it may improve the position.

V—*contd.*

PUNJAB AND HARYANA	RAJASTHAN	SIKKIM
1. No.	—	Not applicable in this High Court. Acts as a dampener because Govt. abuses their power.
2. Candidates are asked to give returns of last 3-4 years but do not insist.	—	
1. Yes, If vacanies are filled in time.	Yes, if vacancies are filled in time.	Does not arises in this court. Only the Judges including CJ. One post vacant. Only few cases—60 filled per year. No work for more than 60 days.
2. (i) Yes. (ii) — (iii) —		
3. Need basis.		
4. In 1985.		
1. Yes.	1. Yes.	
2. When permanent vacancy occurs.	2. P.D. Gattani, S.N. Beedvania & M.B. Sharma not confirmed. M.B. Sharma after two years directly appointed as permanent Judge.	
(i) —	Recommendations for filling the vacancies are initiated by CJ only.	(v) CM has made his suggestion (vi) emphasis being on appoint- (vii) ment of a local candidate not (viii) withstanding his efficiency and suitability.
(ii) —		
(iii) Yes.		
(iv) —		
(v) Yes.		
(vi) Yes.		
(vii) Yes.		
(viii) —		
—	—	—
—	Expeditious consideration by all Constitutional authorities is largest single factor which can reduce delay.	—

ANNEXURE

S. No.	Question	CALCUTTA
V.	1. Whether power to transfer under Art. 222 and as Interpreted by SC in Sankal Chand Gupta's case has acted as a dampener ? If Yes,—Illustrate.	—
	2. Income Tax Assessment Order—If insisted on.	
VI.	1. Whether present strength of Judges adequate to deal with inflow of cases and backlog.	—
	2. Strength fixed a/c to.	
	(i) institution of cases.	
	(ii) Population basis.	
	(iii) Area of the state.	
	3. Is the strength reviewed. If yes—at what interval ?	
	4. When, was it last reviewed.	
VII.	1. Under Art. 224, whether additional Judges are appointed ?	—
	2. Time lapse in confirmation—whether anyone not confirmed.	
VIII.	Enormous dealy in filing vacancies.	—
	(i) Causes.	
	(ii) At what end delay occurs.	
	(iii) Whether CJ recommends promptly in view of anticipated vacancies.	
	(iv) Trace the movement of file containing recommendations.	
	(v) Whether personal division/discussion between CJ & CM .	
	(vi) If helful.	
	(vii) Whether CM recommends names.	
	(viii) Illustrate, if recommendation approved by CJ, CM, CJI by/but rejected by Union Govt.	
IX.	Delay in filling vacancies from 1980 till date.	—
X	Solution to make the System more reraliant flexible and result oriented.	

V—*contd.*

ALLAHABAD	HIMACHAL PRADESH	BOMBAY
No. campensing effect.	No. Since the policy of having 1/3rd of Judges from outside the States not implemented.	Yes., As transfer disrups family life.
1. No. 2. (i) Yes. (ii) — (iii) — 3. — 4. 1986.	1. Yes. 2. Yes. (ii) — (iii) — 3. — 4. 1982. HC has never functioned with its full strength.	1. Grossly inadequate even increased sanctioned strength of 60 Judges would not be sufficient, would be difficult to give accommodation to 60 Judges. 2. (i) Yes. (ii) Not possible to say. (iii) — (iv) 1986.
	(1) Yes	(1) Yes, Once ad-hoc judges appointed.
—	(2) About one year, all confirmed.	(2) As and when vacancy arises U.R. Lalit and R. S. Padheje not confirmed. Mridul J. not confirmed in his turn and resigned. P. R. Bhatt, Raju Bhonsle, H. N. Mody and P. G. Palikas not confirmed because no permanent vacancies, B. J. Pare not confirmed on his own request.
Causes for delay well known, need not to be stated here.		(i), (ii) and (iii) Not possible to send recommendations on time because vacancy might be unexpected, verify the antecedents, etc. (iv), (v), (vi) Yes. discussions useful (vii). Yes. But no pressure. viii). —
Only increasing the strength of Judges will not solve the problem. Persons who have devotion to duty coupled with commitment to justice and excellance should be appointed.		Present system adequate if convention evolved that Chief Minister accepts the names of Chief Justice and in case of difficulty prompt discussion is held. Misapprehension at both sides clear. At central level also scrutiny of recommendation should be done at single level rather than at different points.

ANNEXURE

S. No.	Question	PATNA
V.	1. Whether power to transfer under Art. 222 and as interpreted by SC in Sankal Chand Gupta's case has acted as a dampener ? If yes—illustrate.	No. Transferred judge would be compensated by Transfer Allowance initiating him to visit his hometown twice a year by air. Some lawyers eager to be appointed outside so that later on they can practice in thier home state.
	2. Income Tax Assessment Order-if insisted on.	
VI.	1. Whether presen strength of Judges adequate to deal with inflow of cases and backlog ?	1. Yes. Recently increased strength adequate to deal with inflow of cases but may not be sufficient to reduce the backlog but disposal rates vary with Judges in the way. Some Judges do not pull their weight to face the problem.
	2. Stregnth fixed a.c to ? (i) In stitution of cases. (ii) Population basis. (iii) Area of the state.	2. Yes.
	3. Is the strength reviewed ? If yes—at what interval ?	3. No fixed interval.
	4. When was it last reviewed ?	4. 1984.
VII.	1. Under Art. 224, whether additional Judges are appointed ?	1. Yes, but since 1982 all additional judges converted into permanent. Disfavours Art 224 after S.P. Gupta and others instances where terms of Additional Judges are sought to be extended for short term favours Ad hoc Judges under Art. 224 A for backlog.
	2. Time lapse in confirmation—whether anyone not confirmed.	2. In Punjab and Haryana. Shib Chandra Prasad not confirmed in 1960. Harbans Singh's period was allowed to lapse but later on he was confirmed.
VIII.	Enormous delay in filling vacancies. (i) Causes. (ii) At what end delay occurs. (iii) Whether CJ recommends promptly in view of anticipated vacancy. (iv) Trace the movement of file containing recommendations. (v) Whether personal division/discussion between CJ & CM. (vi) If helpful. (vii) Whether CM recommends names. (viii) Illustrate, if recommendation approved. by CJ, CM, CJI by/but rejected by Union Govt.	1. Delay in filling vacancies. In 1982—86 14 vacancies in High Court—still 7 vacancies and four new to arise this year. State political processes treat the vacancies as a matter of patronage and attempt to have appointees of their choice which is resisted by Chief Justice and a stalement occurs. 2. At Chief Minister's level. Despite repeated reminders recommendations are allowed to lie even upto two years. The Union Government's directive that recommendation of Chief Justice should be forwarded within a month not observed. 3. Yes. Six months in advance but the promptness loses all meaning if Chief Minister's office does not corroborate. 4. Chief Justice—Chief Minister'-Governor—Law Minister—Chief Justice of India—reprocessed in Law Ministry—P.M.'s Secretariat—President follows the same process to and fro with added objections and queries. 5. Yes. But names should always originate from Chief Justice since he knows the candidates' ability better. 6. Personal discussion is of limited utility. Trend is to bargain over corresponding names which has an insidious effect. Wrong appointments can have deleterious effect on the character and working of the court. 7. Yes. Chief Minister invariably recommends names. 8. Innumerable instances, without relevant papers can't recall names. In Punjab and Haryana High Court. In Patna G.C. Bharukha not appointed for three years and then he withdrew his name.
IX	Delay in filling vacancies from 1980 till date.	
X	Solutions to make the system more resaliant, flexible and result orien'ed	

V—*contd.*

MADRAS

No. so far as this High Court is concerned Assessment orders for the three preceding years are asked for.

1. No.

2. Number of cases Pending and the normal disposal per year per judge.

3. Not at any particular interval.

4. 1986.
1. At the moment all judges are permanent.

2. Generally after two years. All confirmed.

1 & 2 Inordinate delay in filling up the vacancies. Delay at the government level in the State and Centre-High Court completely in dark as to why proposals not processed and the ground on which a particular proposal not acceptable.

3. Sometime proposals made in anticipation of vacancies.

4. —

5. Rarely.

6. Not much.

7. So far one name received from the C. M.

8. This information easily available from the files of Union Government.

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