LAW COMMISSION OF INDIA

ONE HUNDRED SIXTEENTH REPORT

ON

FORMATION OF AN ALL INDIA JUDICIAL SERVICE

NOVEMBER 1986

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ON FORMATION OF AN ALL-INDIA JUDICIAL SERVICE

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Shri Ashok Kumar Sen,
Minister for Law & Justice,
Government of India,
Shastri Bhavan,
NEW DELHI

November 27, 1986.

Dear Minister for Law & Justice,

I have great pleasure in forwarding to you One Hundred Sixteenth Report of the Law Commission on the topic : 'Formation of an All-India Judicial Service' (Item No. 9 of the terms of reference) in the context of studying judicial reforms.

As desired in your letter dated February 17, 1986 by which you conveyed to the Law Commission the decision of the Government to entrust the work of recommending judicial reforms to the present Law Commission to accord top priority to the same, the Law Commission re-scheduled its plan of action. The first report dealt with rural litigation, the second report dealt with re-structuring courts in relation to tax laws. This report deals with formation of an all-India judicial service. Immediately after this report, the Law Commission hopes to forward the report recommending a comprehensive scheme for the training of judicial officers (Item No. 5).

I was given to understand that the Government of India is very keen to usher in basic judicial reforms. The reports already submitted and the one which is in the pipe line would give the Government of India enough material for enacting comprehensive legislation to usher in judicial reforms.

I hope that the report will be expeditiously placed before the Parliament and printed and circulated so that concrete follow-up action can be taken soon.

With regards.

Yours sincerely,
(Sd.) D. A. Desai

Encl: A Report

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CHAPTER 1

INTRODUCTORY

1.1. The Government of India accorded high priority to the introduction of basic reforms in the administration of justice as prevailing in the country. Accordingly, the Law Commission was requested to submit comprehensive proposals on various aspects relevant to judicial reforms. One of the terms of reference in the context of studying judicial reforms assigned to the Law Commission was term No. 9: "Formation of an All-India Judicial Service". The assignment was received by the Law Commission on 17th February, 1986, accompanied by a request to accord top priority to the terms and submit separate recommendations relating to each term of reference as expeditiously as possible. The anxiety for speed is well appreciated. Whenever an inquiry was made about the steps Government proposed to take for introducing comprehensive and basic reforms in the administration of justice, the official spokesman, on behalf of the Government, stated that this work was assigned to the Law Commission and that the Law Commission is dealing with it as a top priority matter. Even apart from this, the present state of justice delivery system which has been examined by the present Law Commission in depth in its One Hundred Fourteenth Report submitted to the Government of India on August 12, 1986, the Law Commission found it imperative to draw up strategies for judicial reforms and to deal with distinct areas requiring elaborate focussed analysis. But all these areas though distinct are also related: when implemented, the cumulative result, it is hoped, would be that the justice delivery system which is moribund may revive, become resilient and access to justice comes within the easy reach of the poorest and the system becomes result-oriented, informal and de-professionalised.

1.2. The Law Commission is convinced that court system, in final analysis, is nothing but a mechanism for resolving disputes arising in a society. Indian social scene presents a grim picture of society ultra rural to most advanced industrialised one. There are intermediate layers. Commonsense dictates that mechanism for solving highly complex disputes would be counter-productive for resolving simple petty disputes arising in rural areas. However, the monolithic British legal system introduced in colonial days operates today without any perceptible change for all layers of society. To illustrate, a dispute in metropolitan area involving complex legal formalities and complicated facts may need a highly developed justice delivery system but the same would be wholly unsuited for speedily solving simple disputes arising in rural areas without waste of time, money and energy. As a first step it collected data to ascertain the nature of disputes in rural, semi-urban, urban and metropolitan areas. According priority to the needs of the rural population for a simple mechanism for resolution of their small and petty disputes, it prepared a working paper for reviving Gram Nyayalaya providing a de-professionalised, less formal forum for resolution of simple disputes arising in rural areas. As that was the first attempt of the present Law Commission to tackle the difficult question, an attempt was made to develop a national debate so that views and comments from all vitally affected interests could be gathered so as to be able to present a comprehensive report meeting all points of view. A number of workshops were held throughout the length and breadth of the country in collaboration with local academics, Bar associations, Universities and Law Colleges. Taking advantage of the opportunity presented by intensive discussions in workshops, the Law Commission also invited a debate on aspects inter-connected with re-

structuring grassroots judiciary. One such aspect was formation of all-India judiciary.

1.3. The control over district courts and courts subordinate thereto has been vested in the High Court of the State. The scope, the content, the ambit and the width of the control have been the subject matter of numerous judicial decisions. The control has become all pervasive. Accordingly, it was felt that the Chief Justice of India and the Judges of the Supreme Court of India, the Chief Justice and Judges of each High Court would be well informed and well equipped to assist the Commission in formulating a scheme for setting up all-India judicial service. To encompass a broad spectrum of considered opinion relevant to the subject, the Commission addressed individual and personal letters to each Chief Justice and each sitting Judge of each High Court functioning in the country. A detailed letter was also addressed to the Chief Justice of India. A copy of the terms of reference in the context of studying judicial reforms was annexed to each such letter. Each Judge was requested to give his detailed comments and suggestions with regard to all or any of the terms of reference but specifically inviting attention to term No. 9 which specifies formation of all-India judicial service. It is heartening to note that even though extremely busy with their day-to-day work, a number of Judges from various High Courts responded to the letter of the Commission. There was elaborate discussion with the Chief Justice of India, some of the Chief Justices of the High Courts and some Judges of the High Courts. It is sad that this compliment cannot be extended to the Judges of the Supreme Court of India.

The Commission had discussions with the officers in the Department of Justice, Ministry of Law and Justice, Government of India. They also submitted the information collected by them in this behalf from State Governments, Union territory Administrations as well as the resolutions of the conferences of the Chief Justices held in the past. The opinion of the Chief Justices of the High Courts were also summarised and submitted to the Commission.

The Commission was also invited to hold a dialogue at the Indian Law Institute where all the members of the Governing Council were present along with select invitees. The discussions provided new ways of exploration of the many dimensions of the problem. The Commission is especially appreciative of the initiative taken in this regard by Dr. Upendra Baxi, Director (Hony.) of Research of the Indian Law Institute.

CHAPTER II

HISTORICAL BACKGROUND

2.1. By and large, 'the Government of India Act, 1935' has been accepted as a model while framing the Constitution for free India. Part IX dealt with the 'Judicature'. Chapter I in Part IX dealt with the Constitution and jurisdiction of the Federal Court and appointment of Judges to the Federal Court. The provisions contained in Chapter II Part IX dealt with the constitution, jurisdiction, functions and duties of the High Courts in British India. Though Part IX dealt with the 'Judicature', services below the High Court did not find any place in that Part. Part X dealt with the services of the Crown in India. Sections 254, 255 and 256 under the sub-title 'special provisions as to Judicial Officers' in Chapter II Part X dealt with subordinate judiciary. Sec. 254 provided for appointment of district judges and it is in *pari materia* with article 233(1). Sec. 254(2) is in *pari materia* with article 233(2) with this difference that for being eligible to be appointed as a district judge from amongst senior and experienced members of the Bar, the

minimum qualifying practice required was five years which has been enhanced to seven years under the Constitution. Sec. 254 (3) is bodily reproduced in article 236(a). Sec. 255 dealt with subordinate civil judiciary and Sec. 256 dealt with subordinate criminal magistracy The framers of the Government of India Act, 1935, showed their disinclination to separate Executive from the Judiciary and the executive stranglehold of criminal Magistracy was effectively maintained by the provisions contained in Sec. 256. The Provincial Services Commission was given a role in the matter of selection of members of subordinate civil judicial service. Entry 2 in List II, Provincial Legislative List, conferred legislative and executive power on the State to prescribe jurisdiction and powers of all courts except the Federal Court. The departure made in the Constitution in this behalf has insulated subordinate judiciary against outside interference. The High Court has been accorded a decisive voice in the matter of appointment to the cadre of district judges directly from the Bar and even in the matter of promotion from the subordinate rank to the cadre of district judge. Even in the matter of recruitment to judicial service of a State below the district judge, the power to select candidates was conferred on the State Public Service Commission as was provided in Sec. 255 of the Government of India Act, 1935. Consultation with the High Court before making appointments was made obligatory. Article 235 made a specific departure in that the control over district court and court subordinate thereto was conferred on the High Court. The control has become all pervasive as will be pointed out hereafter.

2.2. The services known as the Secretary of State's services namely, Indian Civil Service and the Indian Police Service were to lapse on the advent of freedom.[1] The interim Government undertook an exercise to devise alternative models to replace those services. The question whether the judicial service should be organised on an all-India basis or should be left to be organised by each State, was examined in the conference of the Premiers of the Provinces in 1946 chaired by the then Home Minister, late Sardar Vallabhbhai Patel. This conference resolved that subordinate judicial service should be organised by the Governments of Provinces. The conference was of the opinion that there was no necessity for organising subordinate judiciary on all-India level on the model comparable to administrative services which was to be formed on an all-India basis replacing the then existing civil services. Two factors appeared to have a bearing on the decision of the conference. Till the advent of independence, there was a quota for members of Indian Civil Service to be posted as District and Sessions Judges and who in turn got elevated to the High Court. This was a devious device to thwart total separation of Executive from Judiciary. Undoubtedly, when the Secretary of State's Services lapsed and were replaced by I.A.S. and I.P.S. respectively, a policy decision was taken not to post any member of the I.A.S. to man judicial posts, though those who were already fixed in service were not recalled. This was the starting point in independent India of separating Executive from the Judiciary. It may be recalled that during the independence movement, separation of Executive from the Judiciary was the vital plank of nationalist demand which has found its reiteration in article 50 of the Constitution. But apart from all this, probably the model found in the provisions contained in Secs. 254 to 256 relating to subordinate Judiciary with minor variations was found acceptable and hence reproduced in Part VI, Chatper VI, of the Constitution.

2.3. Neither in the Draft Constitution prepared by the Constitution Adviser in 1947 nor in the one prepared by the Drafting Committee in 1948,

1. Sec. 10, The Indian Independence Act, 1947.

there was any specific provision on the subject of subordinate judiciary.[1] This omission was specifically noticed and mentioned by the Conference of the Judges of the Federal Court and the Chief Justices of High Courts held in March 1948. Their Memorandum observed:

> "So long as the subordinate judiciary, including the district judges, have to depend on the provincial executive for their appointment, posting, promotion, and leave, they cannot remain entirely free from the influence of members of the party in power and cannot be expected to act impartially and independently in the discharge of their duties. It is therefore recommended that provision be made placing exclusively in the hands of the High Courts the power of appointment and dismissal, posting, promotion and grant of leave in respect of the entire subordinate judiciary including the district judges."[2]

The Drafting Committee accepted these recommendations. The view expressed was that the two branches of justice, both civil and criminal, be assimilated and be placed equally under the control of the High Court.[2] The matter remained there. The provision regarding the subordinate judiciary came up for discussion nearly nine months later on September 6, 1949. Dr. Ambedkar moved articles 209(a) to 209(f). There was no provision for extending the control of the High Court over criminal Magistracy. Dr. Ambedkar conceded that there is nothing revolutionary in the articles moved by him. Even in the Act of 1935, appointment and control of the civil judiciary was vested in the High Court. The language, as earlier pointed out, of Sec. 254 may indicate that the power of appointment was conferred on the Governor to be used in his individual judgement and before so using the power, the High Court was to be consulted. The word 'control' was not there. After the advent of the Constitution, the word 'control' made all the difference as has been examined in detail a little later. There was hardly any debate worth the name on the relevant provisions.

When article 282, the precursor of article 312, was debated, no attention was focussed on the question of judicial service being organised on an all-India level. The focus of attention was whether the Parliament can legislate for organising any service on all-India basis if, and only if, a resolution with requisite majority is adopted by the Rajya Sabha. Replying to the debate, Dr. Ambedkar pointed out that –

> "Article 282 proceeds by laying down the proposition that the Centre will have the authority to recruit for services which are under the Centre and each State shall be free to make recruitment and lay down conditions of service for persons who are to be under the State service. We have, therefore, by article 282 provided complete jurisdiction. 282C to some extent takes away the autonomy given to the States by article 282, and obviously if this autonomy is subsequently to be invaded, there must be some authority conferred upon the Centre to do so, and the only method of providing authority to the Centre to run into, so to say, article 282 is to secure the consent of two-thirds of the members of the Upper Chamber. The Upper Chamber is the only body mentioned in article 282. Ex-hypothesi the Upper Chamber represents the States and therefore their resolution would be tantamount to an authority given by the States. That is the reason why these words are introduced in article 282C".[3]

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1. B Shiva Rao : *The Framing of India's Constitution, A study*, p. 508.
2. *Ibid.*
3. *The Constituent Assembly Debates*, Vol. IX B, p. 1118.

2.4. Even though our Constitution is quasi-federal in character, duplication of services, one for the States and other for the Union, was clearly rejected. Even in the two premier administrative services, the I.A.S. and the I.P.S., though organised on an all-India level, its members were allocated to the States. There was no allocation of any of its members to the Union. The States would depute from amongst the members allocated to them for rendering service to the Union as per the requirements of the latter. . Ordinarily, a service common to States and Union should be organised on an all-India level. Article 312 was enacted to make an enabling provision conferring power on the Parliament to set up all-India services. Broadly interpreted, if the pre-requisites set out in article 312 are satisfied, Parliament by law could create an all-India service common to the Union and the States. It appears some doubt was felt whether the judicial service can be organised on an all-India level.

2.5. Swaran Singh Committee, 1976, dealt with the qustion of organising judicial service at an all-India level. Without expressing any opinion, it referred the problem of all-India Judicial service to the Government for their consideration and decision after consultation with the State Governments. Commenting on the proposal whether judicial service should be organized on an all-India level, the then Chairman of the Law Commission[1] expressed in his personal opinion an apprehension that no lawyers with sufficient practice would like to face the prospects of transfer by applying for the posts of subordinate judges. It may be said that practising lawyers joining Indian Judicial Service would form a small fragment of it as per the scheme envisaged in this report.

2.6. Cl. 45 of the Constitution (Forty-fourth Amendment) Bill, 1976, dealt with amendment to article 312 by introducing the words 'including an all-India judicial service' after the words 'all-India service' and before the words 'common to the Union and the States.' Explaining the Objects and Reasons for the proposed amendments accompanying the Bill, it was said:

> "This clause seeks to amend article 312 of the Constitution relating to all-India Service to provide for the creation of an all-India judicial Service by a Parliamentary law. Such service shall not include any post inferior to that of a district judge."

It is rather difficult to make out any compelling necessity for the amendment. In fact, even without the amendment if the resolution was adopted by the Rajya Sabha with requisite majority, Parliament could have enacted a legislation for setting-up an all-India judicial service. That apart, it may as well be pointed out that no worthwhile debate appears to have taken place relevant to clause 45. The Constitution Amendment cannot be undertaken as a futile exercise. It is, therefore, legitimate to assume that what was considered unnecessary in 1946 after a lapse of three decades became a compelling necessity. And it does not require long argument or detailed analysis to reach the conclusion that a service organisation an all-India level attracting talent from the whole country would provide more competent service than the service organised at a State level.

2.7. As the service upto and inclusive of the level of district judge remained a State subject, every State enacted its own laws for recruitment to the service, conditions of service of the members thereof and allied subjects. These laws vary from State to State. In a separate report which is being submitted a short time later, a detailed examination has been undertaken to point out the inadequacy of the laws dealing with the State Judicial Service and as a consequence the present distressing situation.

1. Shri P.B. Gajendragadkar, Chairman, Law Commission, submitted his comments in his individual capacity.

2.8. The All India Services Act, 1951, was enacted to regulate the recruitment and the conditions of service of persons appointed to the all-India services common to the Union and the States. At the commencement of the Act, there were already two services common to the Union and the States, namely, the Indian Administrative Service and the Indian Police Service. Section 2A was incorporated in the Act by the All India Services (Amendment) Act, 1962, with effect from 6th September, 1963. Since then a number of all-India services have been set up, such as (1) the Indian Service of Engineers (Irrigation, Power, Buildings and Roads); (2) the Indian Forest Service; (3) the Indian Medical and Health Service; (4) the Indian Revenue Service; (5) the Indian Audit and Accounts Service, etc. Formation of an all-India judicial service was equally within the contemplation of those charged with the duty to set up services common to Union and the States. However, till 1976 the earlier view that the judicial posts up to the level of a district judge should be dealt with by the State and the High Court in the respective States remained firmly implanted.

2.9. Article 312 of the Constitution of India provides for creation of one or more all-India services. It was amended by the Constitution (Forty-second Amendment) Act, 1976, to include an all-India judicial service. For convenience of reference, it may be extracted here:

> **312. All-India services.**—(1) Notwithstanding anything in Chapter VI of Part VI or Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services (including an all-India judicial service) common to the Union and the States, and subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.
>
> (2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.
>
> (3) The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.
>
> (4) The law providing for the creation of the all-India judicial service aforesaid may contain such provisions for the amendment of Chapter VI of Part VI as may be necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368."

Article 312 even in its unamended form would have enabled the Union Government to set up an all-India judicial service provided a resolution with the requisite majority to that effect was adopted by Rajya Sabha and pursuant to the same a legislation was enacted for that purpose. The amendment merely made explicit what was implicit in the unamended article. Having regard to the provisions contained in Chapter VI, Part VI, of the Constitution (articles 233 to 237), it was provided in article 312(4) that consequential changes or amendments in any of the aforementioned articles because of the enactment of a legislation setting up an all-India judicial service would not be deemed to be an amendment of the Constitution for the purposes of article 368. Article 312(3) restricts the power of the Parliament, while enacting a law for setting up of an all-India judicial service, not to include any post in it inferior to that of a district judge as defined in article 236. Consequently, even if an all-India

judicial service is to be set up, it cannot include any post inferior to that of a district judge as defined in article 236. Such a service, when set up, would be common to the Union and the States including the Union territories, and would regulate the recruitment and conditions of service of persons appointed thereto. If, therefore, Rajya Sabha adopts a resolution with requisite majority, it would enable the Parliament to enact a legislation for creation of an all-India judicial service common to the Union and the States. To that extent, the power vested, under entry 65 of the State List read with articles 233 and 234, in the State Government would be effectively curtailed. If the requisite pre-conditions prescribed in article 312 are satisfactorily carried out, there is no constitutional impediment to the formation and creation of an all-India judicial service which can be appropriately described as Indian Judicial Service.

CHAPTER III

ATTEMPTS TO CREATE ALL-INDIA JUDICIAL SERVICE AND VIEWS THEREON

3.1. The first Law Commission specifically charged with a duty to recommend judicial reforms favoured the creation of an all-India judicial service. Law Commission recommended that in the interest of efficiency of the subordinate judiciary, it is necessary that an all-India service called the Indian Judicial Service should be established.[1] This recommendation of the Law Commission was considered in the Law Minister' Conference held in 1960. There has always been a vociferous support and fierce opposition to the concept of an all-India Judicial service from the States and the High Courts. The proposal was then considered not practical and the recommendation was shelved. On the other hand, the periodical conferences of the Chief Justices of various High Courts convened by the Chief Justice of India in 1961, 1963 and 1965 favoured the acceptance of the recommendation and implementation thereof. In the last mentioned conference, a firm suggestion was made to the Government to take early steps to set up Indian Judicial Service. Again, the views of the State Governments after consultation with the respective High Courts were solicited. Seven States (Bihar, Haryana, Kerala, Orissa, Punjab, Rajasthan and Tamil Nadu) lent support to the proposal while 10 States, namely, Andhra Pradesh, Assam, Gujarat, Jammu & Kashmir, Himachal Pradesh, Maharashtra, Mysore, Nagaland, West Bengal and Uttar Pradesh disapproved the proposal. Later on, three States, Kerala, Punjab and Tamil Nadu which had lent support to the proposal withdrew their support. Probably, this concerted opposition by more than half the number of States forming the Indian Union had a dampening effect on the decision of the Government of India to set up such a service. However, the concept of such a service remained hibernating at regular intervals. In August, 1969, the then Chief Justice of India was requested by the Government of India to offer his views on the proposal for setting up such a service. He reiterated his view that the proposal was not feasible in the prevalent circumstances. As the situation in the State judicial services further deteriorated, both as to the availability of personnel and manner of recruitment as also efficiency, resulting in clogging of cases, the Chief Justice of India in March 1972 wrote to the Prime Minister suggesting some improvements in conditions of service of State judiciary. Demarcating the areas where improvement was called for, he pointed out specifically that simultaneously it may be useful to examine the question of having an all-India judicial service. He

1. Law Commission of India, *Fourteenth Report*, Vol. I, Chapter 9, Para 59, p. 184.

pointed out that even though it was not considered feasible in 1969, the question may again be examined. Nothing concrete appears to have emerged from this correspondence

3.2. The Eighth Law Commission, while examining the problem of 'Delay and arrears', in trial courts recommended formation of an all-India judicial service[1]. It was of the opinion that the suggestion to have an all-India judicial service of the same rank and same pay scales as the Indian Administrative Service should receive serious consideration. After taking note of the current school of thought and the fact that many States were strongly opposed to the creation of an all-India judicial service, it reiterated the recommendation of the first Law Commission that such a service would be able to attract talented young persons to man it. The recommendation lent support to the protagonists who favoured setting up of such a service. The Government of India stated in Parliament that the States would be consulted in this behalf again as early as possible. The issue figured in the Consultative Committee meeting of the Ministry of Law, Justice and Company Affairs held on 17th August, 1978. The Minister stated that the question of constituting an all-India judicial service may be considered at a suitable time. The issue again figured in the meeting dated 4th July, 1979. Finally, in the Consulative Committee meeting held on November 2, 1980, a consensus emerged in favour of creating an all-India judicial service in principle subject to appropriate mechanism being drawn up keeping all aspects in view.

3.3. After the amendment of article 312 by specific inclusion therein of all-India judicial service, steps were taken by the Central Government to elicit the views of the States in this behalf. The Chief Ministers of Kerala and Manipur had reservations about the proposal principally on the ground that if the control over the State Judiciary is transferred to the Union Government removing the control of the High Court as at present provided in article 235, independence of the judiciary would be undermined and its efficiency would be impaired. Government of India clarified the position that it was not its intention to transfer the control over the State judiciary to the Union Government and the control of the High Court as at present provided in article 235 over the subordinate judiciary would remain intact. The subject again cropped up at the time of the Ministers' conference in 1982. The main theme of the conference was 'arrears in lower courts' in respect of which the Law Commission had already submitted its recommendations contained in its Seventy-seventh Report. A consensus emerged in the conference. Majority of the Law Ministers favoured the establishment of an all-India judicial service in principle as it was of the view that such a judiciary common to Union and the States would attract talented people to Join the judiciary. The lone dissent came from the Law Minister of Tamil Nadu for the same reason for which earlier that State had opposed the proposal, namely, that the courts upto the level of District and Sessions Judge transact their business in the State language and that recruits on an All-India level would find it very difficult to acclimatise themselves with State language and in the process dispensation of justice would suffer.

Slowly but surely the States were veering round in favour of setting up Indian Judicial Service. Thirteen States and four Union territories favoured such setting up and eight States opposed it. The State of Kerala and the Union territory of Mizoram were non-committal.

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1. Law Commission of India, *Seventy-seventh Report*, Chapter 9, Para 9·6, p. 32.

The stand taken by the State of Jammu and Kashmir was equivocal in that it was said on its behalf that as the Constitution of Jammu and Kashmir had its own provision for subordinate judiciary and having regard to the local conditions and a special local language, it was not in favour of establishment of Indian Judicial Service[1].

3.4. Before the Law Commission can give shape and form to its views on the question of setting up of Indian Judicial Service, it is imperative that it gives full consideration to the views and comments of the states which have expressed their opposition to the proposal.

The opposition of the States to the setting up of Indian Judicial Service is founded substantially on three grounds:—

(A) inadequate knowledge of regional language would corrode judicial efficiency both with regard to understanding and appreciating parole evidence and pronouncing judgments;

(B) promotional avenues of the members of the State judiciary would be severely curtailed causing heart-burning to those who have already entered service and manning of the State Judicial Service would be adversely affected; and

(C) erosion of the control of the High Court over subordinate judiciary would impair independence of judiciary.

A. THE PROBLEM OF LANGUAGE

It is undoubtedly true that in exercise of the power conferred by section 272 of the Code of Criminal Procedure, 1973, and sub-section (2) of section 137 of the Code of Civil Procedure, 1908, most of the State Governments have declared local language to be the language of the court. Therefore, up to and inclusive of the court of District and Sessions Judge, the proceedings are conducted and the judgments are written in the local language. When a judicial service common to Union and the States is set up and recruitment is made at national level, it is distinctly possible that one who is educated and has cleared his examination in one State language may find his posting in another State with an entirely different local language. It is equally true that witnesses in every trial, civil or criminal, give evidence in the local language and even occasionally in local dialects. It is also true that judicial process requires thorough understanding of the oral evidence given in local language and documents drawn up in local language so as to render even-handed justice. It follows as a corrollary that a member of the Indian Judicial Service allocated to a particular State must be proficient and conversant in the local language. Giving maximum consideration to these genuine apprehensions, could it be said that the language presents an insurmountable obstacle which must render the concept of Indian Judicial Service impracticable?

Prior to the reorganisation of States in 1956, a composite State like Bombay comprised three major regions having distinct regional languages such as Marathi, Gujarati and Kannada. Similarly, the State of Tamil Nadu, then known as the State of Madras, had large areas speaking different local languages, such as Tamil, Telugu and Malayalam. Before Bihar was set up as a separate State and Orissa was carved out from Bengal, the composite State had three principal languages-Bengali, Hindi and Oriya. Such illustrations can be multiplied. Taking the illus-

1. Constitution of Jammu and Kashmir articles 109, 110, 111, and 113. Articles 109 to 113 have been bodily incorporated from articles 233 to 237 of the Constitution of India.

tration of the bigger bilingual Bombay and recalling the fact that the proceedings in the lowest court were always conducted in the local language, the difficulty was solved by making it obligatory for each member of the subordinate judiciary to pick up one more language over and above his mother tongue. To illustrate, a member of the subordinate service having Gujarati as mother tongue had to learn and pass an examination either in Marathi or Kannada. Later on, it was obligatory to pass Hindi examination. Such an arrangement also operated in the then Madras State. This arrangement worked well and a complaint was never heard that a member of the subordinate judiciary posted in an area where language other than his mother tongue is spoken, found it difficult to understand the witness, interpret the document drawn up in local language and render judgement. Members of Indian Civil Service were posted as District and Sessions Judges till the advent of independence and some of them continued in judiciary even thereafter. Only fresh induction was stopped. Some of these judges came to be posted in a State other than their State of birth or education. As Sessions judges, they had original trial jurisdiction. They heard and recorded evidence of witnesses given in local language. They presided over the court having jurisdiction to hear first appeal. They read, interpreted and dealt with documents drawn up in local language with overtones of dialects. Never a complaint was heard that there was miscarriage of justice attributable to the failure of the judge to understand local language other than his mother tongue. Even foreign recruits proved to be competent judges at that level.

Further, the members of the IAS and IPS are recruited from all over India and are allocated to States other than the one in which he or she may have been educated. IAS and IPS officers come in close and direct contact with the masses. As far as the court proceedings are concerned, ordinarily, there is always a lawyer to speak for the client. But officers of administrative services will have close contact with masses in rural areas and have to converse directly with them on all development and welfare projects. They are so trained that they pick up the local language. Would it then be very difficult for the recruits of IJS to be trained in the language of the State to which he or she is being allocated? The Government of West Bengal, while opposing the proposal for setting up of an All-India judicial service, conceded that 'it is true that the question of language does not present any problem in the case of IAS and IPS officers, but that would not hold good in respect of all-India judicial service officers because the nature of work required to be done by the judicial officers is quite different from that of the IAS and IPS officers. Accuracy of judicial decisions depends on proper reading, appreciation of documents, the language of which is very different from the spoken language. Again, recording of oral evidence given in courts in local language and dialect and proper assessment of it would need thorough knowledge of the language which we cannot expect from AIJS officers from other States.' The very statement concedes that language cannot be an insurmountable difficulty in the way of setting up IJS. The objection on the ground of inadequate knowledge of local language cannot be summarily dismissed or overlooked as unsustainable. It must be given due importance. However, picking up one additional language is not that difficult. Further, it must be remembered that there is always an interpreter like a lawyer in the court providing a link between the judge and the litigant: there is no such intermediarly in the case of officers of the administrative services who directly deal with the masses. Therefore, the formation of the Indian Judicial Service cannot be discountenanced on the ground that the recruits to the Service would not have sufficient or at any rate adequate knowledge of the local language of the State where he or she is allocated. At that young age, intensive training that is proposed to be imparted to the recruits to IJS for picking up one more language would certainly provide adequate and

effective knowledge of the local language of the State to which he or she is allocated.

B. THE MORALE ARGUMENT

The second ground on which the opposition is founded is that the promotional avenues of the members of the State Judicial Service would be severely curtailed causing heart-burning and frustration and, in final analysis, impairing the chances of recruiting bright young persons to the State Judicial Service. A member of the State Judicial Service who enters at the lowest level, such as, Munsif/Judicial Magistrate First Class/Civil Judge (J.D.) moves vertically upwards. Ordinarily, in most of the States, the post of the District and Sessions Judge is the second stage of promotion. In Maharashtra and Gujarat, a Civil Judge (J.D.)/J.M.F.C. is first promoted as Assistant Sessions Judge and Assistant Judge and next gets promotion as District and Sessions Judge. In some other States, a Munsif Magistrate is promoted as subordinate judge and then further promoted as Civil and Sessions Judge or Additional Sessions Judge and then promoted as District and Sessions Judge. All-India Judicial Service can be set up at the level not below the District Judge as the term is explained in article 236. By setting up of the All-India Judicial Service, the promotional avenues of the members of the lowest cadre are hardly likely to be impaired. Further, in most of the States, there is always a rule for direct recruitment at the level of District and Sessions Judge. Therefore, all posts in the cadre of District and Sessions Judge in a given State are not available to the promotees from the lower ranks. The judgment of the Supreme Court of India in *O.P. Singla* vs. *Union of India*[1] shows that direct recruitment to the cadre of District Judges was provided by rules for Delhi Higher Judicial Service. To the extent direct recruitment takes place in the higher judicial service, the chances of promotion of the subordinate ranks are proportionately reduced. This position is not likely to be materially altered when Indian Judicial Service is formed and set up. Undoubtedly, there will be direct recruitment to that service from fresh law graduates and the Bar, but a high percentage of posts would be reserved for promotion from subordinate State Judicial Service. Also, members of the subordinate State Judicial Service would be entitled to compete by appearing at the competitive examination for recruitment to Indian Judicial Service. A principle well established in service jurisprudence should not be overlooked. It is to the effect that a person already in service is not disqualified from taking examination for direct recruitment on the ground of being age-barred. Therefore, the apprehension that the formation of Indian Judicial Service will substantially reduce or impair the promotional avenues of the members of the subordinate State Judicial Service is wholly unfounded.

C. CONTROL OF HIGH COURT

The third ground of objection was founded on an erroneous belief that upon the setting up of the Indian Judicial Service, the control of the High Court over district courts and courts subordinate thereto would be impaired or weakened and thereby independence of the judiciary which is already severely curtailed would suffer further erosion. The control of the High Court over district courts and courts subordinate thereto has become all pervasive. The provisions contained in Chapter VI, Part VI, of the Constitution are aimed at insulating the subordinate judiciary and even the officers and servants of the court from the influence of the executive. The fasciculus of articles—233-237—under the heading, "Subordinate Courts" were designed to save the subordinate judiciary

1. AIR 1984 SC 1595.

from interference from the executive. The expression "control", as used in article 235, gave rise to a spate of litigation between the State executives and High Courts which was resolved by the Supreme Court keeping in view the high purpose of the particular provisions. The scope, the content and the width of the control is expanding from judgment to judgment of the Supreme Court. The expression, "control" received its flesh, bone and blood from various judgments of the Supreme Court. The Court held that the scope and ambit of control vested in the High Courts under article 235 covers the entire spectrum of administrative control and is not confined merely to general superintendence or to arranging the day-to-day work of the subordinate courts. Thus, the control envisaged by article 235 comprehends control over the conduct and discipline of district judges;[1] their future promotions and confirmations[2]; dispute regarding their seniority;[3] their transfers;[4] the placing of their services at the disposal of the Government for an ex-cadre post;[5] considering their fitness for being retained in service and recommending their discharge from service;[6] exercise of complete disciplinary jurisdiction over them including initiation of disciplinary enquiries;[7] and their premature retirement.[8] In a later decision, the court held that the members of the subordinate judiciary are not only under the control of the High Court but also under the care and custody of the High Court. The exclusion of executive interference in subordinate judiciary, i.e., grassroot justice, can prove a teasing illusion if the control over them is vested in two masters, namely, the High Court and the Government, the latter being otherwise stronger. Any interpretation of administrative jurisdiction of the High Court over its subordinate limbs must be aglow with the thought that separation of the executive from the judiciary is a cardinal principle of the constitution.[9] All these decisions were summarised by the court while interpreting article 222 of the Constitution which enables the President to transfer a judge of the High Court from one High Court to any other High Court. The majority, even while conceding that the power to transfer a High Court Judge vests in the President and is hedged in with the only condition that the power can be exercised in consultation with the Chief Justice of India, held that even if the opinion of the Chief Justice of India may not be binding on the President, it is entitled to a great weight and is normally to be accepted by the Government because the independence of the judiciary is a fighting faith of our founding document[10]. Unquestionably, these decisions spell out the all pervasiveness of the control of the High Court over the subordinate judiciary, simultaneously almost totally excluding executive interference in any overt or covert manner. The fundamental principle on which these constitutional provisions, as interpreted by the Supreme Court in its decisions, rest, cannot be allowed to be violated or diluted directly or indirectly while framing a scheme for setting up Indian Judicial Service.

Members of the Indian Judicial Service will be allocated to States. When posted in the States, they will be subject to article 235 save and except in the matter of initial recruitment. In the matter of discipline, suspension, etc., the control of the High Court would remain unimpaired with this difference that while

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1. *State of West Bengal* vs. *Nipendra Nath Bagchi*, AIR 1966 SC 447
2. *State of Assam* vs. *Kuseswar Sakia*, AIR 1970 SC 1616; and *Jogindar Nath* vs. *Union of India*, AIR, 1975 SC 511.
3. *State of Bihar* vs. *Madan Mohan Prasad* (1976) 1 SCC 529.
4. *State of Assam* vs. *Ranga Muhammad*, AIR 1967 SC 903.
5. *State of Orissa* vs. *Sudhansu Sekhar Misra*, AIR 1968 SC 647.
6. *Ram Gopal Chaturvedi* vs. *State of Madhya Pradesh* (1970) 1 SCR 472.
7. *Punjab and Haryana High Court* vs. *State of Haryana*, AIR 1975 SC 613.
8. *State of Haryana* vs. *Inder Prakash Anand* (1976) 2 SCC 977.
9. *Shamsher Singh* vs. *State of Punjab*, AIR 1974 SC 2192.
10. *Union of India* vs. *Sankalchand H. Sheth* (1977) (4) SCC 193.

at present it recommends various things such as promotion or disciplinary action to the Governor, it would be recommending the same to the National Judicial Service Commission which, in turn, would make necessary recommendation to the President of India but the President of India will act in the same manner as at present it is done by the Governor having regard to the almost binding character of the recommendations of the High Court. Therefore, the apprehension that setting up of Indian Judicial Service would impair the control of the High Court and, therefore, corrode, independence of the judiciary is more imaginery than real. On the contrary, when a National Judicial Service Commission is being recommended as part of this very report with power to deal with problems of Indian Judicial Service, it is legitimate to believe that the independence of subordinate judiciary would be further strengthened.

Having examined all the three limbs of the opposition independently on merits, the Commission remains unconvinced that any one or all of them would militate against the setting up of Indian Judicial Service if it is otherwise needed and helpful in improving and strengthening the administration of justice.

3.5. Next to the States, the views of the High Courts in the matter of formation of Indian Judicial Service would be of considerable importance. Amongst the High Courts which responded to the queries relevant to the question, six High Courts, that of Uttar Pradesh, Andhra Pradesh, Gujarat, Kerala, Bihar and Rajasthan favoured the formation of the Service. Barring Jammu & Kashmir High Court, rest of the High Courts in the country have either formally recorded their firm opposition to the proposal or have serious apprehensions about its feasibility and utility.

Before undertaking an indepth examination of the views of the High Courts, it would be proper to examine their collective wisdom as expressed in the latest resolution adopted at the Conference of the Chief Justices convened by the Chief Justice of India in January, 1985. The Resolution reads as under:—

> "This Conference is of the opinion that the constitution of an all-India judicial service will lead to various practical difficulties and that, therefore, such a service should not be constituted. The erosion of the High Court's salutary control over the subordinate judiciary and its impact on judicial independence are two of the prime reasons why an all-India judicial service should not be constituted. It was, however, felt that it was not possible for the Conference to express more definite opinion on the proposal in the absence of a fuller Scheme."

This resolution was conveyed by the Chief Justice of India to the Government. Their reservation stems from the apprehended erosion of the control of the High Court over the subordinate judiciary exposing them to executive interference which would run counter to the substantive provisions of the Constitution as well as one of the cardinal features of the Constitution. The approach lacks justification as pointed out hereinbefore.

Analytical evaluation of the views of High Courts opposing the formation of the Indian Judicial Service surfaces three broad grounds of objection. They are: (1) erosion of the control of the High Court corroding judicial independence, (2) uncertainty of the level up to which posts should be included in Indian Judicial Service; and (3) inadequacy of the knowledge of the local language likely to lead to inefficiency in discharge of duty as judicial officer. Ignoring the usual tendency to oppose any change especially by members of judicial fraternity having a preference for so-called certainty and continuity of law, *status quo* and

stare decisis, the legitimacy or otherwise of the aforementioned three objections may be examined to determine whether they have any validity.

There is absolutely no justification for apprehending erosion of control of the High Court as has been succinctly pointed out. In fact, as will be pointed out later on in this report, the formation of the Service is likely to strengthen independence of judiciary.

The objection founded on the possible misapprehension about the posts to be included in the Indian Judicial Service lacks validity because *Explanation* to article 236 clearly defines what posts are included in the expression "District Judge" as used in Chapter VI, Part VI, of the Constitution. This provision, when read with article 312 (3), clearly spells out the level and nature of posts that can be included in Indian Judicial Service. There is absolutely no uncertainty about this aspect.

One need not attach any importance to the vague apprehension of members of judicial service who generally manifest a tendency to oppose any change and, even though they complain about the present malaise in the administration of justice, they would be loathe to take any steps for improving the situation.

It is thus clear that the Commission has not come across any valid and formidable objections both from the States and the High Courts in the States against formation of Indian Judicial Service.

GENERAL PUBLIC APPREHENSIONS

3.6. There exists a body of local public opinion that any change in the judicial set up of the country must be concurred in by the States and the High Courts as also members of the legal fraternity, otherwise the change would be still-born. In Parliamentary democracy, a broad acceptance of any proposal introducing fundamental changes in age old institution by the vital interests affected by the change would certainly ensure a smooth transition, yet concurrence of the States or a majority of them is not an essential prerequisite. The composition of Rajya Sabha is founded on the principle of adequate equal representation to the States. A resolution of the Rajya Sabha supported by not less than two-thirds of the members present and voting would enable the Parliament to enact a legislation for setting up Indian Judicial Service. The very adoption of such a resolution would imply concurrence of a large number of States. Therefore, in the face of such a resolution, one cannot prescribe concurrence of States outside the Rajya Sabha as an essential prerequisite for setting up of Indian Judicial Service. Further, the resolution of the Rajya Sabha backed by requisite majority would enable the Government to enact legislation for setting up Indian Judicial Service which legislation again would have to be passed both in the Lok Sabha and the Rajya Sabha. This constitutional mechanism ensures concurrence by States expressed through their chosen representatives. However, during the debate on the resolution for the creation of the all-India Services of forestry, engineering, medical and health services in Rajya Sabha in the year 1961, the then Home Minister, late Shri Lal Bahadur Shastri, expressed an opinion that one need not take a narrow technical view of the provision of the Constitution and that after the requisite resolution is passed, the views of the State Governments concerned should be ascertained relevant to the question of formation of All-India Services. This view even today holds the field. Therefore, despite the constitutional provision, after the resolution of the Law Ministers' Conference, very recently the Government of India approached all the State Governments inviting their views and comments on the question of setting up Indian Judicial Service. The State Governments

were informed that they must also obtain the views of the respective High Courts. Broadly stated the majority of the State Governments and the administration of the Union territories and several High Courts favour the creation of Indian Judicial Service.

3.7. Turning to the response of the associations of judicial officers, vehement condemnation came from Rajasthan Judicial Service Officers' Association. Its Executive Committee resolution may be reproduced here:—

> "The fear that the Indian subordinate judiciary is feeling today is that if pick and choose method is adopted in the matter of absorption of existing strength of subordinate judiciary either by way of higher and lower judicial service or by way of length of service or by way of selection from the present strength, it will not only harm the interest of existing cadre of all States on the day of its formation but will be a life-long frustration in the mind of youngest member of the Service who had entered judicial service in any State with aspiration of better promotional avenues after undergoing tough competitive examination."

Usually, in every State there is direct recruitment at the level of district judge and it is at that level that the Indian Judicial Service is being formed. In some States, direct recruitment at the level of district judge is as high as 50%. It is, therefore, not correct to say that the promotion prospects of the members of the subordinate judiciary would be seriously curtailed on the formation of Indian Judicial Service. As pointed out earlier, provision would also be made for allowing members of the subordinate judicial service, apart from getting promotion in their quota, to contest in the competitive examination. The approach discloses the *status quoist* attitude. Apprehending that vociferous opposition, not founded on substantive grounds, would not carry conviction, the Association in the alternative suggested that the proposed service at the time of its initial constitution must absorb and include all cadres of subordinate State Judicial Service. In order to overcome the difficulty of integrating lower judicial service with higher judicial service, the Association suggested a dual seniority list—one for all-India service and one for State service. The suggestion is ill-conceived and betrays lack of knowledge of the constraints placed by article 312 (3) which prohibits inclusions of any post inferior in rank to that of a district judge, as explained in article 236, in the all-India judicial service. The remedy suggested, therefore, is unconstitutional and cannot be accepted.

The All India Judges Association favoured the creation of all-India Judicial service. Drawing sustenance from the views expressed by the Law Commission in its Fourteenth and Seventy-seventh Reports, it proceeded to state that all-India judicial service will foster national integration, improve the tone of judicial administration in the country, attract meritorious persons to the judicial service and create confidence in the judicial service officers. The Association is of the view that the promotion prospects, instead of being curtailed, are likely to be augmented by the setting up of Indian Judicial Service.

3.8. The officers of the Indian Administrative Service who responded to the query of the Commission suggested that there should be no separate Indian Judicial Service examination, but it should be a part of the normal Civil Service Examination conducted by U.P.S.C. and those who come at the top should be given an option either to opt for IAS or IJS. It was further suggested that intensive training be imparted to the recruits to IJS and during the period of training, they should man posts at the lowest level in the hierarchy of judiciary. In their view, degree in law should not be a pre-requisite for contesting for a

post in IJS. This will be considered at the appropriate place. Suffice to say that when the practice at the Bar is being dispensed with for entering into IJS, it would give a rude shock to many as an act of sacrilege if a degree in law is also dispensed with as a pre-requisite for competing at the examination to be held to recruit members of IJS.

CHAPTER IV

POSITIVE APPROACH

4.1. As the control over the district courts and courts subordinate thereto has been vested by article 235 in the High Court of the State, Judges of the High Court can be presumed to be well informed about the present position of the members of the subordinate judiciary manning district courts and courts subordinate thereto, the problems faced in recruitment, proportion and postings as well as a need for change if there be any. The Law Commission, in search of reliable and trust-worthy information, individually approached Chief Justice of each High Court and sitting Judges of all Courts in the country requesting each one of them personally to acquaint the Commission about, *inter alia*, the necessity, the feasibility, the advisability of setting up all-India judicial service. Further, as Bar has a vital role to play in moulding judiciary and, therefore, must have an important say in the matter of recruitment and conditions of service including promotional avenues as also efficiency, integrity and capability of the members manning the subordinate courts. Accordingly, the Commission addressed detailed letters to the President and Members of the All India Bar Council and Bar Council of each State. Coupled with this, the Commission also through the media invited everyone interested in the topic of setting up all-India judicial service to send their views and comments to the Commission. It is gratifying to note that there was widespread response to the enquiries of the Commission and, broadly speaking the emergent view favoured formation of all-India judicial service. While supporting the setting up of All-India judicial service, some reservations were expressed which may again be briefly dealt with. The most familiar and almost common to all responses were—

A. A lurking apprehension that the control conferred by article 235 and exercised by the High Court over the subordinate judiciary is so pervasive that it insulates subordinate judiciary against executive interference and any whittling down of this control would corrode independence of subordinate judiciary;

B. The handicap arising from lack of knowledge of language of the State in which an outsider is posted when recruitment is on all-India basis;

C. Posting outside the State would be a disincentive to the middle level senior members of the Bar from accepting direct recruitment as district judges which is in vogue in almost all the States of India: and

D. Recruitment from Hindi speaking belt will dominate the Service.

4.2. The Chief Justice of Calcutta High Court having noticed these apprehensions has supplied an effective answer and declared himself wholeheartedly in favour of setting up Indian Judicial Service. There was a broad measure of agreement with his views. As pointed out earlier, the apprehension about whittling down the control of the High Court over subordinate judiciary lacks legitimacy. It would remain intact and undisturbed. Lack of knowledge of local language has been dealt with earlier. Today it is even the declared policy of the Government of India concurred in by the Supreme Court of India and repeatedly re-

commended by the previous Law Commission that one-third of the Judges of each High Court should be from outside the jurisdiction.[1] A policy decision has been taken that one-third of the total strength of Judges of each High Court shall be from outside the State in which the High Court is functioning. Divergence is in respect of methodology of implementation of this decision. It is by transfer or at the time of initial recruitment. Further, the policy that the Chief Justice of each High Court shall be from outside the State is not only accepted but is being implemented *albeit* in fits and patches. That apart, it is too late in the day to worry about some members of the Bar being disinclined to accept judgeship either at the level of district judge or at some other level on the sole ground that he or she may be posted outside the State. We have moved far away from the halcyon days when persons were appointed from the Bar to the State judiciary in one's own State. Possible domination of the Service by the people from the Hindi speaking belt can be dismissed as mere figment of imagination.

4.3. On the other hand, it is conceded that an all-India service affords greater attraction to young persons and this will to a considerable extent outweigh the supposed disadvantages. The prospects of the higher judicial service being formed on all-India basis is likely to attract lawyers whose appetite for study and movement to different parts of the country has not been dulled by possible prosperity at the Bar. There is still discernible residual idealism to render service for a noble cause. It is not unknown that exceptionally successful lawyers have accepted judgeship at the district judge level and High Court level.

4.4. Before briefly referring to reservations disclosed by some Judges of the High Courts, a classic adage about Indian judiciary be recalled. As a general rule, members of Judiciary in their individual and corporate capacity are averse to any change. Precedent-oriented legal system and the principle of *stare decisis* combine to provide not only a myopic vision but an inbuilt resistance to any change. With this background, let us refer to the strong opposition to the concept of all-India judicial service emanating from some of the Judges of the High Court. It was said that 'the formation of all-India judicial service will give a death blow to the State Subordinate Judicial Service. If officers of all-India judicial service will become Chief Judicial Magistrates and District and Sessions Judges over the State subordinate judicial service officers, the effect will be devastating on the morale of the latter. Finding that they have no avenues for further promotion because there is a block created by the all-India judicial service officers, the lower judiciary will become restless, hopeless and may become corrupt. This apart, recruitment to the cadre of district judges directly from the Bar is to be stopped in case of formation of all-India judicial service'. The criticism, apart from being not well merited, is the outcome of lack of knowledge about how Indian Judicial Service will be formed, set up and manned. The Service conceived in this report is one in which there will be direct recruitment through competitive examination, there will be substantial promotion from State subordinate judicial service cadres and there will be an opening for direct recruitment from senior and experienced members of the Bar. The best features of the present situation will be retained and the ugly dispensed with. One other Judge strongly expressed himself against setting up of the Service. According to him, 'there is basic fallacy in equating judiciary with police or administrative officers where perhaps the principle of "catch them young" may be advantageous. But in the administration of justice, experience and knowledge of law and correct perspective is required. The formation of Indian Judicial Service is the thin end of a political wedge by which the judicial service may be brought

1. Law Commission of India. *Eightieth Report*, Chapter 6, Para 6·21, P. 25.

under political control and deprive the High Courts of the same. It will sound the death knell of an independent subordinate judiciary. Thus independent and cogent objections are grouped together. The first is 'catch them young' slogan is unsuited to a service where experience and knowledge of law and correct perspective is a must. Senior well placed members of the Bar are reluctant to accept judicial services a fact universally accepted. Service with poor or inadequate salary is hardly attractive to a lawyer who has started earning because he is aware that sky is the limit. This is true of every layer of judicial service. If experienced lawyer is impervious to judicial service or social accountability, why not catch people young and give them intensive training. A short practice hardly trains effectively. If, on the other hand, as is contemplated herein, intensive preservice training is given to the fresh young recruits, they will turn out to be better judges. There are countries in which practice at the Bar is not a pre-requisite or essential qualification to be eligible to become a Judge.[1] Undoubtedly, in common law countries practice at the Bar is a must to be a judge at any level. But experience shows that practice for a very short period say for a period of two to three years at the Bar hardly imparts such training so as to make him a good judge.

Second and more formidable objection is that formation of Indian Judicial Service is the thin end of a political wedge by which judicial service may, by a covert operation, be brought under political control. Is the State Judicial Service exposed to this possibility? If the answer is in the negative, it would all the more be impossible to penetrate political interference at all-India level. However, one can guard against this threat effectively by retaining the effective control of the High Court and setting up National Judicial Service Commission which is an integral part of the scheme.

CHAPTER V

JUSTIFICATION FOR SETTING UP INDIAN JUDICIAL SERVICE

5.1. The question that must now be posed is whether, having regard to the existing situation, four decades after the decision was taken to leave judicial service below the High Court to be handled by the States, a situation has arisen which calls for a radical departure from the existing pattern and provide for setting up a judicial service on an all-India basis. Commencing from the year 1958,[2] and continued through,[3] experts have consistently opined that in order to improve, tone up and raise the level, it is in the interest of the system that an all-India judicial service, called the Indian Judicial Service, be established. This expert opinion carries its own weight and formidable arguments and unanswerable objections will have to be advanced to negate this view. Having regard to the present state of the judicial service below the High Court, the malaise that has set in, the inadequacy of the talent being attracted, varying conditions of service from State to State, unattractive conditions of service and ineffective voice of the High Court in the matter of recruitment, failure of Public Service Commissions on this front, utter and total antipathy of State Governments have contributed in no uncertain measure to the falling standards in the State Judicial Service. Available evidence shows that they are totally dissatisfied with the existing situation. Silent march of civil judges and metropolitan magistrates in the capital not long ago is a grim reminder of the situation. Occassionally one hears of strike by them also. How do you repair or improve the situation? If the situation is allowed to stagnate, as the law

1. *Judiciary in France* by David Annoussamy, Vol. 8 (1981) JBCI 296.
2. Law Commission of India, *Fourteenth Report*, Vol. I, Chapter IX, Para 59, P. 184.
3. Law Commission of India, *Seventy-seventh Report*, Chapter IX, Para 9.6 and 9.6A, pp. 32-33.

stands today, States alone will be competent to repair or improve the rot. They are shown to be indifferent. Any expense on State Judicial Service will be classified as non-plan, non-productive expense even though millions are collected as court fees.[1] Law and justice project into the lives of all segments of society from bottom to top. Therefore, a national approach and perspective is a must. Futile litigation is time consuming and an unproductive expenditure luxury. The structure of judiciary has to some extent contributed to this undesirable situation. A fresh look from broader national perspective is pre-eminently necessary. If other services were organised on all-India basis for acquiring definite improvement in efficiency and productivity of service, why not judiciary by which everyone is vitally affected ? If administrative service, police service, forest service, medical service, engineering service, accounts and audit service, etc., could be more effectively organised on an all-India level, one fails to find adequate justification for not attempting to organise judicial service on all-India basis. Further, the cost benefit structure clearly tilts the balance in favour of all-India service. The objections against setting up the same which are merely repetitious in character have been effectively answered earlier and fully dealt with hereinbefore. The benefits flowing from the constitution of judicial service on all-India basis would far outweigh some minor adjustments that may have to be made. Having, therefore, regard to all the aspects of the matter, the Commission is of the firm view that the judicial service within the parameters of article 312(3), i.e., at the level of district judge, as the term is defined by an inclusive definition in article 236 below the High Court in each State which is at present called State Judicial Service must be organised on an all-India basis, meaning thereby a service common to States and the Union and to be styled as Indian Judicial Service.

PRELIMINARY STEPS FOR THE CONSTITUTION OF SERVICE

5.2. While accepting that the independence of the Judiciary is a cardinal feature of our Constitution and therefore the framers of the Constitution took adequate and effective steps for insulating judiciary from outside pressures and interference, yet in the matter of judiciary subordinate to the High Court, it was not given effective protection in Part VI, Chapter VI, of the Constitution which deals with subordinate courts. The assumption underlying the sketchy provisions is that the High Court would stand as a bulwark against any attempts at undermining the independence of subordinate judiciary. In fact the flesh and blood have been infused into the skeleton provisions of articles 233, 234, 235 and 236 by numerous decisions of the Supreme Court of India. One view was that even a provision with regard to setting up Indian Judicial Service with all its ramifications should have found its place in Part VI, Chapter VI, of the Constitution. Be that as it may, time has now come to take all effective and concrete steps towards setting up Indian Judicial Service.

Article 233 provides that appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Article 233 (2) provides that a person not already in service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. Article 234 provides that appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State 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.

1. Material collected by the Government of India to examine the proposal for abolition of court fees.

Both these articles will have to be suitably amended to provide for setting up of Indian Judicial Service. Article 234 will have to be amended for removal of State Public Service Commission even in the matter of appointment to State Judicial Service. Let it be recalled that the amendment would be by an ordinary law as article 312(4) ensures that the law providing for the creation of an all-India judicial service as per the resolution of the Rajya Sabha may contain such provisions for the amendment of Chapter VI, Part VI, as may be necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of the Constitution for the purposes of article 368.

Article 233 and 234 would need suitable amendments to provide for setting up of Indian Judicial Service, its initial constitution, further recruitment and a body charged with a duty to take steps for future recruitment to the Service. Article 233 will have to be amended to confer power on the President to appoint members of Indian Judicial Service on the recommendation of National Judicial Service Commission. Article 234 will have to be amended for the purpose first indicated herein above.

INITIAL CONSTITUTION OF SERVICE

5.3. In view of the provision contained in article 312(3), the oft-repeated suggestion that the Indian Judicial Service should include two tiers of service from grassroot to that of the district judge must be rejected as untenable. Article 312(3) bars inclusion of any post in Indian Judicial Service inferior to that of a district judge as defined in article 236. Therefore, at the time of initial constitution of the Service, the existing posts which are comprehended in the expression 'district judge', as defined in article 236, can alone be taken into consideration for inclusion in Indian Judicial Service. The expression 'district judge' has been defined in article 236(a) to read as under:—

> 'the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge'.

Designation of various layers of judicial service up to the cadre of district judge differ from State to State. However, most of the States have divided State Judicial Service into what are designated as higher or superior judicial service and subordinate or lower State judicial service. In most of the States, entry at the grassroot level is to the cadre of munsif or district munsif (as in Tamil Nadu) and Civil Judge (Junior Division) (as in Maharashtra and Gujarat). As the proposed Indian Judicial Service will have also promotional quota from the State Judicial Service, it is absolutely necessary to rationalise the designations and cadres in judicial service below the Indian Judicial Service. It may be designated as State Judicial Service. Having regard to earlier recommendation,[1] the entry cadre in State Judicial Service should be designated as Civil Judge (Junior Division) and Judicial Magistrate first class. In this cadre, the incumbent will have pecuniary jurisdiction on the civil side not exceeding Rs. 20,000 and on the criminal side will have all the powers conferred on judicial Magistrate First Class by the Code of Criminal Procedure, 1973. If pecuniary limit is considered a legacy of the past, the other way to organise and prescribe jurisdiction is to specify heads of disputes amenable to the jurisdiction of the incumbent in service at entry level leaving the rest to the first promotional stage court. The next promotional stage should be Civil

1. Law Commission of India, *Fourteenth Report*, Vol. I, Chapter IX, Para 21, P. 169.

Judge (Senior Division)/a Judge of the Small Causes Court/Metropolitan Magistrate. The designation would be functional depending upon the assignment of work in the scheme of things. The posts with the aforementioned designations will be comprehended in the service to be designated State Judicial Service.

The posts bearing the designation District Judge, Assistant District Judge, Chief Judge of Small Causes Court, Chief Metropolitan Magistrate, Sessions Judge, Additional Judge, and Assistant Sessions Judge will be comprehended and included in Indian Judicial Service. These are functional designations drawn from various statutes like the Code of Civil Procedure, the Code of Criminal Procedure, the Presidency and Provincial Small Causes Courts Act etc.

The law to be enacted pursuant to the resolution of Rajya Sabha for setting up Indian Judicial Service will specify a date, to be styled as appointed date, on which day Indian Judicial Service will be constituted. At the time of the initial constitution of the Service, persons holding posts in higher judicial service in various States, and, where no such designation as higher judicial service exists, all those persons holding the posts having the designation set out in article 236, or their equivalent posts, will be included in Indian Judicial Service. They will all become members of Indian Judicial Service from the date of initial constitution. In the event of a dispute or disagreement about equivalence of posts, the matter should be referred to the National Judicial Service Commission whose decision will be final.

There were suggestions that a screening committee should be set up even in respect of those who are members of the State higher judicial service or holding the posts having various designations as set out in article 236 to screen such persons to weed out the incompetent and unsuitable. That would necessarily create heart-burning in view of the fact that such persons must have already reached the stage by promotion and have become members of the higher judicial service where such designations exist. Where no such designations exist, our scrutiny shows that the holders of designated posts as set out in article 236 have come usually by a second stage of promotion. Therefore, at the time of initial constitution of service, no screening need be done. In order to facilitate movement from State Judicial Service to Indian Judicial Service, it is advisable to retain the designations of various posts included in the expression "district judge" as set out in article 236 save and except changing Chief Presidency Magistrate and Additional Chief Presidency Magistrate[1] to mean Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate respectively. All States thereafter will have common designations for posts included in Indian Judicial Service as set out in article 236. Necessary provisions will be incorporated in the legislation for setting up Indian Judicial Service. This will also determine the initial strength of the Service being the sum total of members holding posts included in the expression "district judge", who would become members of Indian Judicial Service.

The strength can be varied in future depending upon the needs of the Service by the President of India who would undertake a review of the strength and the needs of Service at regular interval of five years in consultation with National Judicial Service Commission. Review must be statewise and cadre strength of each State must be determined depending upon various factors such as workload, rate of disposal, arrears and average time taken in disposal of causes and controversies.

1. Code of Criminal Procedure, 1973, sec. 6.

FUTURE RECRUITMENT TO SERVICE

5.4. Every State has framed and promulgated rules for recruitment to the State Judicial Service. In view of the provision contained in article 234, ordinarily recruitment is made to the entry cadre at the lowest level in State Judicial Service by the State Government in consultation with the Public Service Commission as also in consultation with the High Court exercising jurisdiction in relation to such State. The State Judicial Service provides vertical promotion up to, and inclusive of, the post of district judge. In every State, there is some kind of direct recruitment to the post of District Judge. The percentage of direct recruitment to the total strength of the cadre of district judge varies from State to State. But cases are not unknown where such direct recruitment to the cadre of district judge is as high as 50%. In any case, in no State it is lower than 25%[1]. It would be highly unjust and iniquitous to provide for direct recruitment by competitive examination to the tune of 100% in the Indian Judicial Service. Such an approach would be destructive of the State Judicial Service and it would be a disincentive to anyone joining State Judicial Service. While examining the relevance and the pertinence of the objections that the very formation of Indian Judicial Service would be causing frustration to the members of the subordinate judicial service, it was indicated that a fair proportion of the posts in Indian Judicial Service would be reserved for promotion from members of the State Judicial Service. It is, therefore, imperative to ascertain a just and fair proportion of percentage of posts to be reserved for being filled in from the sources, namely, direct recruitment by competitive examination and promotion from State Judicial Service. While working out the fair proportion, a singular feature of the judicial service, namely, that some senior members of the Bar are directly recruited as district judges must be kept in view. This source of availability of experienced members of the Bar to man posts of district judges and thereby to enrich the service should be kept open. Accordingly, we will have to take into account this third source of recruitment. However, as a fairly high percentage of posts in Indian Judicial Service are being reserved for direct recruitment by competitive examination, the percentage of posts to be reserved for direct recruitment from experienced members of the Bar as district judges should be worked out by keeping in view the existing situation in various States. While meticulously examining this question of division of posts for recruitment from three independent sources with some anxiety, we came upon various suggestions in this behalf. A draft scheme for constitution of all-India judicial service proposed by the Government of India to the Conference of Chief Ministers, Law Ministers and Chief Justices of High Courts convened by the Ministry of Law and Justice proposed that 50% of the sanctioned strength of posts in Indian Judicial Service should be filled in by direct recruitment by competitive examination and the remaining 50% by promotion from State Judicial Service. This arithmetic of equal division between two services overlooks the existing fact that why State has provided for direct recruitment to the cadre of District Judge from the experienced and senior members of the Bar. Such experienced members are not likely to appear at competitive examination. This fruitful source of recruitment would be dried up if this scheme is accepted as a whole. The scheme proposed by the High Court of Himachal Pradesh presided over by Chief Justice, Shri P. D. Desai, who submitted a detailed note in this behalf, suggested that 50% of the total strength of posts in Indian Judicial Service should be filled in by promotion from the members of the State Judicial Service: 25% of the posts by competitive examination and 25% by selection from amongst members of the Bar. This approach strikes at the very *raison d'etre* of setting up Indian Judicial Service. The whole purpose behind setting up of Indian Judicial Service is

1. In the State of West Bengal direct recruitment has been done away with by statute.

to attract to the judiciary capable young graduates fresh from universities, from all over the country so that the cream of talented men being drawn into administrative service may find an attractive diversion to Indian Judicial Service. They will be free from local prejudices, caste and community divisions and local attachments. The suggestion that only 25% of the posts should be available to young talented fresh graduates for recruitment to Indian Judicial Service leaving 75% to the present method of recruitment would not create an impact solely needed for rejuvenating the subordinate judicial service. The genesis of this suggestion appears to be that in IAS 75% of the posts are filled in on the result of competitive examination leaving 25% of posts to be filled in by promotion from State Civil Service. Law Commission of India recommended that 40% of the posts should be reserved for direct recruitment by competitive examination and of the remaining 60%, 30% of the posts should be filled in by promotion from the members of the State Judicial Service and the balance of 30% of posts should be filled by direct recruitment from the members of the Bar of sufficient seniority and standing[1]. Numerous different proportions have been suggested in this behalf such as 66-2/3% by promotion, 33-1/3% by direct recruitment by Chief Justice of Calcutta High Court.

Having regard to all the aspects of the matter and to strike a just balance between competing interests, the Commission is of the view that 40% of the sanctioned strength of posts in Indian Judicial Service shall be filled in by direct recruitment on the result of a competitive examination to be held by a body styled as National Judicial Service Commission. Of the remaining 60% of posts, 40% shall be filled in by promotion from the State Judicial Service to be made on the recommendation of the High Court keeping in view the quota of posts allotted to each State by the National Judicial Service Commission. The remaining 20% of posts shall be filled in by direct recruitment from amongst senior and experienced members of the Bar who have put in not less than seven years of practice on the recommendation of the High Court of each State by the Naional Judicial Service Commission.

Rigid adherence to quota rule has caused untold harm to the services. Flexibility in this behalf is the need of the day. Therefore the law for setting up Indian Judicial Service must provide that the quota prescribed must be adhered to as far as possible keeping in view the exigencies of service. If the quota allotted to a source remains unutilised, recruitment be made from the remaining sources raising the quota proportionately for the year. At any rate carry forward of vacancies must be avoided.

Recruitment to Indian Judicial Service is thus to be from three sources:—

(1) direct recruitment by competitive examination to the extent of 40% of sanctioned strength;

(2) promotion from State Judicial Service to the extent of 40% of the sanctioned strength;

(3) recruitment from senior experienced members of the Bar who have put in not less than seven years of practice to the extent of 20%.

DIRECT RECRUITMENT

5.5. 40% of the posts in Indian Judicial Service shal be filled in by direct recruitment on the result of a competitve examination and *viva voce test.* National Judicial Service Commission will make all arrangements for holding a

1. Law Commission of India, ***Fourteenth Report***, Vol. I, Chapter IX, para 67, p. 187

competitive examination year to year. Anyone who has been awarded a degree in law by a recognised university will be eligible to appear at the examination. At present, subject to the universities which have introduced five years' course after higher secondary examination, anyone can obtain a degree in law after he has graduated in any discipline. In fact, there are two facets of a law degree. A two years' course after graduation enables one to obtain a general degree in law but this does not qualify the person for practising as a lawyer. In order to qualify for being enrolled as an advocate, one has also to obtain a degree after one more year's course, called special degree in law. Till the introduction of five years' course by Bar Council of India, anyone desiring to acquire a degree in law enabling him to enrol as an advocate, had to pass Secondary School Certificate Examination, and take up three years' degree course in any discipline, and thereafter three years' law degree course. He had thus to spend six years after passing Higher Secondary School Examination. The new curriculum introduced by the Bar Council of India provides for a five years' degree course after higher secondary examination for obtaining a degree in law. He saves one year in new dispensation. Anyone who has obtained a degree in law, in second class, will be eligible to appear at the competitive examination to be held for recruitment to Indian Judicial Service. In recommending eligibility criterion as merely a degree in law, in second class, which itself is a minimum qualifying standard, we are not unmindful of the suggestion of an outstanding legal academic that a first class in degree of law should be the minimum qualification. There was another suggestion that the candidate must have a Master's degree in law before he should be considered eligible for taking a competitive examination. While these are weighty suggestions which would bring in higher talent, we fear that the field of choice would hereby be unduly curtailed making the choice rather difficult. Even in competitive examination as I.A.S. and I.P.S., the eligibility criterion is the graduate's degree. Therefore, while we appreciate the anxiety of persons who made the suggestions, we would like to prescribe a second class degree in law as eligibility criterion.

In the scheme of things, a reasonably intelligent person would be able to acquire degree in law at the age of 22 years. There is nothing objectionable in permitting him to appear at the competitive examination. But an upper age limit must be fixed beyond which no one would be eligible to appear at the examination. Having regard to all the circumstances of the case, the upper age limit should be fixed at 30 years. The Government, in consultation with National Judicial Service Commission will issue orders made for the benefit of scheduled castes, scheduled tribes, women and other handicapped classes with regard to relaxation in upper age limit, reservation in service and allied matters.

RECRUITMENT BY PROMOTION

5.6. Members of the State Judicial Service who have put in not less than ten years of service would be eligible for being considered for promotion to Indian Judicial Service. Depending upon the sanctioned strength of the Indian Judicial Service for each State, 40% of the posts shall be filled in by promotion from State Judicial Service. In order to select eligible persons for promotion, a small committee of two persons from amongst the members of the National Judicial Service Commission will be set up for each State. To this committee, the Chief Justice of the High Court having jurisdiction in the State wherein candidates are to be selected for promotion will be co-opted. The promotion will be on the basis of a written test and *viva voce* examination. The written test shall be conducted on an all-India basis. The committee as herein indicated will conduct the *viva voce* test. At one stage it was suggested that the High Court of the concerned State should be charged wih a duty to make recommendation. Without any disrespect, this approach is likely to attract the criticism

that it may have the inbuilt tendency to promote regionalism and parochialism and, even in some States, casteism. In order to put the matter beyond the pale of controversy, the *viva voce* test should be conducted by the commitee as herein indicated. The annual confidential reports maintained by the High Court of each State for the members of the State Judicial Service shall also be taken into consideration. On a combined reading of the performance at the written test, *viva voce* and the annual confidential reports, the candidates would be selected for promotion to Indian Judicial Service. Unless a case of outstanding merit is made out, those selected at one time would retain their *inter se* seniority as in the cadre from which they are being promoted.

DIRECT RECRUITMENT FROM THE BAR

5.7. The remaining 20% of the posts in Indian Judicial Service shall be filled in from amongst the senior and experienced members of the Bar who have put in not less than seven years of practice at the Bar. Though this is the constitutional requirement, selection from this area should desirably be confined to those who have put in practice at the Bar for a period of ten years and above. The selection should be made by interview to be conducted by the committee as recommended in the just preceding paragraph.

In the matter of selection from the Bar, one suggestion made was that the upper age limit should be fixed at 50 years. In our opinion, for recruitment from this source, upper age limit is not required to be fixed. If an experienced senior member of the Bar is willing to become a member of the Indian Judicial Service at any age, there is no reason why he should be disqualified on the ground of being too old. Maturer the experience, better would be the service rendered by him. But at any rate, those below 35 years of age should ordinarily not be selected as direct recruits from the Bar to the Indian Judicial Service.

In prescribing the period of practice and the age, what has weighed with us is that when recruitment is from three different sources, there must not be such disparity in age while entering the service as to provide a fertile field of unfair competition for promotion to the next higher office of a High Court Judge.

INFRASTRUCTURE FOR HOLDING EXAMINATION

5.8. The next aspect which must engage our attention is about the body to be charged with a duty not only to hold the examination but to be wholly responsible for all the aspects of effectively implementing the scheme of introducing and managing the service. Union Public Service Commission, having the expertise to hold examinations for various all-India services, was, according to some persons, quite competent to undertake this task. One view was that the examination for recruitment to Indian Judicial Service must not be separetly held but it must be a part of the examination to be held for recruitment to IAS and allied services with some special subjects in law.

Judicial service has a speciality of its own. It is not a service, it is a way of life. It has been conceded on all hands that those who have served the judiciary are pre-eminently suited to participate in the process of recruitment to judiciary. Even though article 234 of the Constitution provides that recruitment to judicial service of a State other than the cadre of district judge shall be made by the Governor after consultation with the Public Service Commission and the High Court exercising jurisdiction in relation to such State, it has been judicially noticed that even where the power to recommend persons for recruitment to State Judicial Service vests in the Public Service Commission, usually at the

time of selecting candidates for State Judicial Service, the Public Service Commission invites a sitting or retired Judge of the High Court as an expert and the advice given by such expert High Court Judge who also participates in the *viva voce* test is generally accepted. However, cases are not unknown where this advice is sometimes ignored. The Supreme Court frowned upon this departure by observing that such practice is undesirable and does not commend to the Supreme Court.(1) The court recommended that when selections to the judicial service are being made, a sitting judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting judge comes as an expert who by reason of the fact that he is a sitting High Court judge knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted unless there are strong and cogent reasons for not acepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission. The Supreme Court gave a direction to the Public Service Commissions in every State that the finest talent should be recruited to the judicial service and that can be secured only by having a real expert (sitting judge of the High Court) whose advice constitutes a determinative factor in the selective process.[2] In the matter of selection of members of the Bar to be appointed as district judges, the High Court has a preponderent voice as required by article 233. It need not be recalled that article 217 accords the place of preeminence to the Chief Justice of the High Court and the Chief Justice of India in the matter of selection of High Court Judges. Finally, in the matter of appointment of a judge of the Supreme Court, the power is conferred on the President to appoint a person as a Judge of the Supreme Court after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necesary and that in the matter of appointment of any Judge of the Supreme Court except Chief Justice of India, the latter shall always be consulted. (See article 124 of the Constitution) It cannot, therefore, be gainsaid that in the matter of appointment to judicial service, personnel manning the judiciary at various levels have not only a decisive voice but they are considered pre-eminently suitable for this task. Once therefore, the function to hold competitive examination for direct recruitment to Indian Judicial Service is handed over to Union Public Service Commisison, this pre-eminence would be displaced or abrogated. Only non-judicial personnel would be recommending persons for recruitment to judiciary which would run counter to the spirit of the Constitution (articles 124, 217, 233 and 235). Therefore, it is absolutely indispensable that a body composed of judges, lawyers and legal academics should be charged with a duty to conduct examinations to hold *viva voce* test for recruitment to Indian Judicial Service. Such a body, when formed, can be charged with a duty to look after the management of the service also. It is, therefore, recommended that National Judicial Service Commission should conduct the examination.

For holding the examination, the National Judicial Service Commission shall draw up a syllabus. While leaving the prescription of the detailed syllabi to such a body of experts composing the National Judicial Service Commission, broadly it must be stated that the same should include papers on—

(a) Constitution of India;

(b) sociology of law and inter-disciplinary correlations;

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1. *Ashok Kumar Yadav* vs. *State of Haryana* (1985) 4 S C C 417.
2. *Ibid.*, p. 457.

(c) procedure—civil and criminal;

(d) legal aid;

(e) goals of justice system, conciliation; methodology and expeditious resolution of disputes, and participatory justice;

(f) Judicial discretion, sentencing process, interim orders; costs, and

(g) modern court management techniques and inter-relation with jail, bails, Bar, social activists and legal educational institutions.

This list is illustrative and not exhaustive. Those who qualify at the written test by obtaining 60% of the total marks would be eligible for being called for *viva voce* test which shall be of 100 marks. On the combined result of the written test and the *viva voce* test, a merit list must be drawn up.

SCALES OF PAY

5.9. The Service shall consist of two scales—the senior scale and the junior scale.

A. Senior Scale.—The holders of the following posts shall be eligible for the senior scale:—

(i) District and Sessions Judge;

(ii) Joint/Additional District and Sessions Judge; and

(iii) (a) Chief/Principal Judge of City Civil Court;

(b) Additional Chief/Additional Principal Judge of City Civil Court and

(c) Judge of the Civil Court.

B. Junior Scale.—The holders of the following shall be in the junior scale:—

(i) Assistant Judge and Assistant Sessions Judge;

(ii) Chief/Additional Chief Metropolitan Magistrate; and

(iii) Chief Judge, Small Causes Court.

All persons recruited to the Indian Judicial Service upon the result of a competitive examination shall be placed in the junior scale initially. Those recruited by promotion to Indian Judicial Service from the State Judicial Service and those directly recruited from amongst the senior and experienced members of the Bar upon the recommendation of the High Court shall be placed in the senior scale.

National Judicial Service Commission shall devise the senior and the junior scales of pay for the members of the Indian Judicial Service keeping in view the comparable scales in the Indian Administrative Service and in no case they shall be lower than comparable scales in the Indian Administrative Service or Central Civil Service, Class I, whichever is higher.

INITIAL POSTING

5.10. While a detailed scheme for the training of the persons recruited to Indian Judicial Service upon the result of a competitive examination is being

prescribed in a separate report to be submitted just following the present one in order to acquaint them fully with the methodology of work and decision making process in every post of judicial service functionally so designated as to make them fully eligible to be appointed substantively as District and Sessions Judge, it is necessary that a direct recruit on completion of his pre-service training, should be successively posted and required to work as under:—

(1) the first posting should be as munsif/sub-judge (junior division)-cum-judicial magistrate for a period of two years;

(2) at the second stage, they must be posted as civil judge (senior division)/metropolitan magistrate or judge of the small causes court for a period of two years; and

(3) thereafter, they must be posted as assistant judge and assistant sessions judge/chief metropolitan magistrate/chief judge, small causes court for a period of three years.

At the end of first year, they must be required to pass local language test to be held by the High Court. National Judicial Service Commission will prescribe number of opportunities to be given for passing the test.

After a service of first four years, these direct recruits who are working in the junior scale should be promoted to the senior scale.

SENIORITY

5.11. Detailed rules for determining *inter se* seniority of the members of the Indian Judicial Service will have to be formulated by the National Judicial Service Commission keeping in view the broad principles generally judicially accepted. Some Chief Justices suggested that the seniority of the members appointed to the Service at its initial constitution shall be fixed in accordance with the date of entry into State Judicial Service, whether on an *ad hoc*, temporary or officiating capacity, subject to the rule of continuous officiation. This approach leaves many areas uncovered. It is founded on the assumption that the members of the Indian Judicial Service will have only State level seniority. It is implicit in an all-India service that it will have an all-India seniority. Some broad outlines governing the rules of inter se seniority may be accordingly indicated:—

(1) At the time of initial constitution of the service, the *inter se* seniority of members of State Judicial Service who have become members of the Indian Judicial Service shall be retained without any disturbance;

(2) While integrating those members of the State Judicial Service coming from different States who would become members of the Indian Judicial Service at the time of initial constitution, the inter se seniority of all such persons shall be regulated by the date of holding the post which enables each one of them to become members of the Indian Judicial Service subject to the rule of continuous officiation;

(3) Persons who officiate in the post which is included in the Indian Judicial Service at the time of its initial Constitution from the same date will have *inter se* seniority regulated by age, the older becoming senior to the younger. In the case of a tie even in this situation, the National Judicial Service Commission will prescribe criterion for *inter se* seniority;

(4) Persons appointed by direct recruitment from the senior and experienced members of the Bar shall always be senior to the promotees and direct recruits of that year. Their *inter se* seniority will be determined by the merit list prepared by National Judicial Service Commission according to merit;

(5) *Inter se* seniority of promotees from State Judicial Service will be regulated according to the place assigned in the select list by the National Judicial Service Commission which will regulate placement according to merits. In the event of two candidates being found equal, the date of entry in the State Judicial Service will regulate *inter se* seniority. In the event of date being common, the age will determine seniority; and

(6) Persons recruited as a result of the competitive examination in a given year shall as a bloc be junior to promotees from the State Judicial Service in the year in which examination is held.

Having broadly indicated the principles governing seniority and leaving to the proposed National Judicial Service Commission to draw up detailed rules governing *inter se* seniority, it would be worthwhile to point out that the rules should conform to the judicial dicta as laid down in *A. Janardhan* vs. *Union of India*, [1] *P. S. Mohal* vs. *Union of India*[2] *O. P. Singla* vs. *Union of India*, [3]*G. S. Lamba vs. Union of India*,[4] and the recent judgment in *Narender Chadha & Others* vs. *Union of India & others*.[5] Broadly they lay down that unless exigencies of service require, a person already rendering service, may be as a promotee to a cadre in which a direct recruit comes much later, the promotee should not be made to go down below late coming direct recruit. Cases are not unknown where a promotee who has been regularly promoted to the cadre had to yield his place in seniority to the later direct recruit, who at that time may be a schoolean if not in embryo, by the unjust and iniquitable application and interpretation of rules. It was succinctly pointed out that the time has come to recast service jurisprudence on more just and equitable foundation. While making the rules for the proposed Indian Judicial Service, care must be taken not to comit the error over again.

PROBATION

5.12. Every person recruited to Indian Judicial Service either by way of direct recruitment on the result of a competitive examination or by promotion from State Judicial Service shall be put on probation for a period of two years. In the case of direct recruit from the senior and experienced members of the Bar, the period of probation should not extend over one year. It would be open to the National Judicial Commission to extend the period of probation upon a report of the High Court under whom the concerned person is working for a period not exceeding two years.

A probationer may be discharged from service or reverted to his substantive post, as the case may be,—

(1) if he fails to pass the departmental examination, if any, within the prescribed attempts on the completion of his training period but before the expiry of the extended period of probation, if any;

1. (1983) 3 SCC 601.
2. (1984) 4 SCC 545.
3. (1984) 4 SCC 450.
4. (1985) 2 SCC 604.
5. (1986) 2 SCC 157.

(2) upon a report of the High Court under whom he is posted certifying that the probationer concerned lacks character and integrity and acts in a manner unbecoming of a judicial officer or has not the requisite capacity to discharge the functions of his office.

The probationer shall be discharged upon an order made by the President of India upon the recommendation of the National Judicial Service Commission which would be entitled to collect every material requisite for reaching the decision one way or the other from the High Court under whom the probationer has been posted and has worked.

TRAINING

5.13. Term No. 5 of the Terms of Reference in the context of studying judicial reforms requires the Law Commission to prescribe a course of training for judicial officers. The Law Commission hopes to submit, closely following this report, a detailed report on the question of training of judicial officers both for pre-service and in-service training. Therefore, the present outline for the training of judicial officers indicated here has to be read in conjunction with detailed report that is being submitted to the Government. In the meantime, the Government of India, Ministry of Law and Justice, has forwarded to the Law Commission a blueprint for the establishment of an academy for the training of judicial officers prepared by the Chief Justice of India for its consideration and views. That aspect is also being dealt within the report herein indicated.

Way back in 1958, the Law Commission, after quoting with approval, an observation of the Civil Justice Committee, observed[1] that in order to remove the undesirable tendency of a munsif being overawed by his munasarim or reader, it is necessary to provide for pre-service training to the new entrants to the Service. The broad feature of the scheme for training of judicial officers must enable the probationer to familiarise himself with (a) actual trial work—civil and criminal, (b) revenue work, (c) conduct of cases, and (d) administrative work. They should be put in charge of a senior District and Sessions Judge whose duty would be to guide them during the period of training and report on their working[2]. The Law Commission, about two decades after, in 1978, reiterated that the judicial officers have to face all kinds of situations in courts, including difficulties created by obstructionist and cantankerous litigants and over-bearing and agressive counsel. To enable them to meet such situations and equip them properly for the discharge of the responsibilities, it is essential that there should be a course of training for all judicial officers before they start functioning as judicial officers.[3] The pattern and period of training was devised bearing in mind that the recruitment even at the grassroot level from the Bar requires a minimum three years' standing at the Bar. While recommending constitution of Indian Judicial Service, a bold step is taken to make a total departure from the earlier view that a minimum practice at the Bar is a pre-requisite to become a judicial officer. To the extent that a fresh law graduate, after qualifying at the competitive examination, would enter judicial service, the importance of pre-service training, both as to pattern, subject and duration, has been considerably increased. This training must be for a minimum period of two years, one of which will be spent in the academy to be set up for the pur-

1. Law Commission of India, *Fourteenth Report*, Vol. 1, Chapter IX, para 42, p. 178.
2. Law Commission of India, *Fourteenth Report*, Vol. I, Chapter IX, para 44, p. 179.
3. Law Commission of India, *Seventyseventh Report*, Chapter XIII, Para 13·2., p. 46.

pose and another year to be spent by sitting in the court with munsif/civil judge (junior division)-cum-judicial magistrate, first class for a period of three months, civil judge (senior division) for a period of three months, Chief Metropolitan Magistrate for a period of six weeks, chief judge, small causes court for a period of six weeks and last three months to be spent at the administrative headquarters of the district court under the direct supervision of the District and Sessions Judge.

The curricula and the detailed heads of training with the aid of case method system for a period of one year at the academy will be set out in the report just to follow.

It is equally necessary to provide for in-service training at an interval of five years for a period of three to six weeks. The justification for the same will also be offered in the proposed report. To set out the same here would be mere duplication.

In order to ascertain that the trainee has taken full advantage of the training period during which he will get the minimum of the junior scale, a departmental examination to be held by the National Judicial Service Commission will have to be cleared by him.

APEX BODY TO BE IN OVERALL CHARGE OF JUDICIAL SERVICES

5.14. Judicial service is not a service so-called. It is a way of life. There used to be some kind of reverence for judges because the seat of justice was described as seat of God. And yet the judicial service did not have an apex body composed of experts to deal with it. Supreme Court of India has no superintendence over High Courts. Each High Court in its own State deals with its own problems. Local hue and colour paint the scenario. Its ugly features are that over a period, regionalism, parochialism and in some cases even narrow casteism reared their ugly head in judicial service causing loss of status, prestige and credibility of the service. To arrest these tendencies, in 1982, the Ministry of Law and Justice is reported to have taken a policy decision that the Chief Justice in each High Court shall be from outside the jurisdiction. The policy is being implemented in fits and patches. This policy was said to be supported on the plea that it would advance national integration, arrest fissiparious and parochial tendencies and generally be conducive to the healthy growth of judicial service. The person coming from outside the jurisdiction would be free from local bias, local prejudice and local undesirable atmosphere.

Working of the Constitution for nearly three and a half decades has belied, *albeit* partially, some of the assumption underlying some provisions of the Constitution: to with article 233 which involves States Public Service Commission in the matter of recommending candidates to many posts in subordinate judiciary below the level of the district judge. It does not require a long argument to affirmatively assert that State Public Service Commissions generally have lost their credibility. Way back in 1958, the Law Commission observed that 'the evidence given by members of the Public Service Commissions in some of the States does create the feeling that they do not deserve to be in the responsible posts they occupy. In some of the southern States, 'the impartiality of the Commissions in making selections to the judicial service was seriously questioned."[1] Recently in Ashok Kumar Yadav,[2] the High Court

1. Law Commission of India, *Fourteenth Report*, Vol. I, Chapter IX, para 27, p. 171.
2. *Ashok Kumar Yadav* vs. *State of Haryana* (1985) 4 S C C 417.

of Punjab and Haryana held that 'the Chairman and Members of the Haryana Public Service Commission have been appointed purely on the basis of political partisanship and caste considerations and that they did not satisfy the stringent test of being men of high integrity, calibre and qualifications.' Undoubtedly, the Supreme Court did not approve of these remarks but, in the concluding para of its judgement, the Supreme Court observed that when the Public Service Commissions undertake the task to recommend candidates for judicial service, in every State a sitting judge of the High Court must be invited as an expert to judge the quality and character of each candidate appearing for the interview and the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and Members of the Public Service Commission. The rot that has set in, as noticed in 1958, has further accentuated as transpires from the aforementioned observations. Therefore, a time has come to set up a body composed of experts in the judicial service to take over the functions of setting up, manning, running and dealing with judicial service from the grassroot to the top level. The Law Commission has in its time table plans to submit a detailed report in this behalf because, while examining the question of delay in disposal of cases from various angles, one defect that has come to its notice is the delay in making appointment of justices to the High Courts and Supreme Court of India. The delay in making appointments varies from three years as in the case of Andhra Pradesh High Court to around one year on an average and around ten months in the Supreme Court of India. The delay in making appointments may be on account of complex multiple reasons but its fall out is that it acts as a brake in the disposal of causes and controversies in the courts as whole and piles up backlog of cases. This will be dealt with in detail in the proposed separate report.

Now that a judicial service at an all-India level is being proposed and recommended, it is necessary to set up a National Judicial Service Commission. Its *raison d'etre, composition*, powers, functions and duties will be set out-in detail in a separate report dealing with this aspect. Broadly it must be composed of a recently retired Chief Justice of the Supreme Court of India, one or two retired Justices of the Supreme Court, three to five retired Chief Justices of the High Courts, one to two retired Judges of the High Court, two outstanding members of the Bar, President of the Bar Council of India and two to three outstanding legal academics. The body shall be constituted by the President of India.

CHAPTER VI

REMOVAL OF DIFFICULTIES

6.1. While discussing the concept, the format and the ancillary aspects of setting up of Indian Judicial Service, apart from the apprehensions voiced, it was seriously suggested that the scheme would face formidable difficulties in the way of its implementation and, therefore, it is better to leave the situation undisturbed. If the fear of possible difficulties would thwart every attempt at change, no change is possible. The present situation is admittedly frustrating and exasperating. To say that no solution can be found is to proclaim bankruptcy of talent and intellect which can indicate change and innovation. Every change may experience some difficulties. They have to be solved but they cannot be allowed to be road blocks in the path of progress.

6.2. The first apprehended difficulty is a possible imbalance in the age factor between persons coming from three independent sources of recruitment which may cause frustration and dejection. This is a very superficial view of

the matter. If any one enters the State service in the age between 25 and 30 and hopes to get promotion at the end of every year, to the Indian Judicial Service, he could be anywhere between 32 and 37 while entering the service. A member of the Bar who has put in about 10 years of practice would enter the service at about the same age. A person coming by way of direct recruitment through competitive examination would be anywhere between 23 to 25 years of age. He would have to undergo two years training. There after he would have to put in seven years' service at different levels to be eligible to man the post of District Judge. He would also be in the same age group with minor variations which exist even at present. It is at that level that the real competition would start for elevation to the Bench of the High Court. And all have equal opportunity. This difficulty is more imaginary than real.

Two illustrations should set at naught any anxiety on this account. There are three well known cases of persons joining as civil judge or munsif at the lowest level who came to be elevated to the Supreme Court of India. Two other known cases are of persons who came to be recruited as district judges from the Bar, reached the Supreme Court. Two others who entered as district civil court judges were elevated to Supreme Court. For selection of High Court Justices, talent plays an important part and age is a secondary factor. Therefore, the Commission would dismiss this difficulty as unreal.

6.3. Some associations of judicial officers viewed the setting up of the administrative tribunals under the Administrative Tribunals Act, 1985, as a thin end of a wedge for interfering in the judicial services. They say that the moment Indian Judicial Service is set up, the President will acquire power similar to that which he enjoys with regard to other all-India services. The Service will then be treated as a Central Government service. Consequently, administrative tribunals would exercise jurisdiction corroding not only the independence of judiciary but even whittling down the control of the High Court.

In the matter of control of the High Court, care is taken to see that it is in no way whittled down. A specific provision can be made while setting up the service in section 2 of the Administrative Tribunals Act, 1985, that the Administrative Tribunals, will have no jurisdiction over the service. Even in the absence of such a specific exclusionary clause, the Supreme Court having regard to various provisions in the Constitution ensuring independence of judiciary, denied jurisdiction to Andhra Pradesh Administrative Tribunal over subordinate judiciary and the staff of the High Court.[1]

6.4. Thus, having regard to all the aspects of the matter and having regard to the deleterious effects visible on State Judicial Services, it is time that an all-India judicial service is set up. It is so recommended.

(D.A. DESAI)
Chairman

(S.C. GHOSH)
Member

(V.S. RAMA DEVI)
Member Secretary

New Delhi, dated the 27th November, 1986.

1. Chief Justice, Andhra Pradesh High Court *Vs.* L.V.A. Dikshitulu, AIR 1979 SC 193.

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