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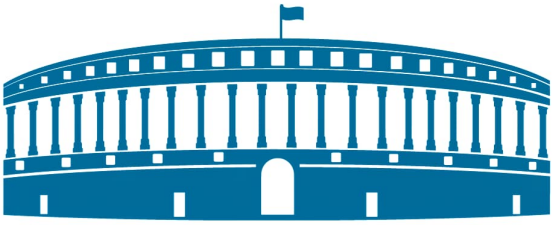

LOK SABHA

AGENDA: REFORMS TO THE INDIAN JUDICIAL SYSTEM.

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LETTER FROM THE EXECUTIVE BOARD

Dear Parliamentarians,

Welcome to the simulation of Lok Sabha at Techfest World MUN 2020. Go through this background guide and make note of the same as it shall be of utmost importance in ensuring a fruitful debate during committee proceedings and it shall be expected that the parliamentarians steer the discussion on these lines. The given list of topics is not exhaustive, and it is not intended to be. The list is simply indicative of pressing issues and topics of concerns which must be addressed and will give you a bird's eye view of the gist of the issue. The parliamentarians are at full liberty to bring up any other relevant point for discussion. We understand that such simulations can be an overwhelming experience for first timers and a tiring one for those who are familiar with the concept. We strongly suggest the first-time participants to participate fully in the conference and if any doubt persists in their minds (either substantive or related to procedure), they do not hesitate to clarify the same with the Executive Board.

The success of Lok Sabha as a committee will depend on each parliamentarian. Apart from the research on the agenda that shall be required of all the parliamentarians in the committee, we would like to emphasize the importance of ensuring that the parliamentarians are aware of their portfolio's background and current status.

We're expecting an issue sensitive deliberation of the agenda. Civilized and appropriate behaviour is anticipated.

All the very best and prepare well.

Regards,

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INTRODUCTION TO THE INDIAN JUDICIAL SYSTEM

India's commitment to law, a country where the legal system and jurisprudence stretches back into the centuries, is constituted in the Constitution of India; which thus declared India to be a a Sovereign Democratic Republic, containing a federal system with Parliamentary form of Government in the Union and the States, an independent judiciary, guaranteed Fundamental Rights and Directive Principles of State Policy containing objectives which though not enforceable in law are fundamental to the governance of the nation[1]. India followed the path of parliamentary democracy, wherein the British Parliamentary system left a big expression. However, when it comes to judiciary and the concept of 'Freedom of Judiciary' was taken up from the United States of America; upholding the doctrine of separation of powers[2]. Therefore, to ensure good governance- an essential part of welfare states today, a responsive judicial system that dispenses justice in a just and fair manner and keeps a check on the functioning of the government, becomes an essential part[3].

At the apex of the Indian Judicial system exists the Hon'ble Supreme Court of India, below that there are High Courts for every state or group of states. Below High Court there is the hierarchy of the subordinate courts in India; Panchayat Courts also function in some States under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. to decide civil and criminal disputes of petty and local nature. Each State is divided into judicial districts presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction and can try all offences including those punishable with death. The Sessions Judge is the highest judicial authority in a district. Below him, there are Courts of civil jurisdiction, known in different States as Munsifs, Sub-Judges, Civil Judges and the like. Similarly, the

[1] GOVERNMENT OF INDIA, SUPREME COURT OF INDIA, https://main.sci.gov.in/constitution (last visited Oct. 10, 2020).
[2] Walekar Dasharath, *Changing Equation Between Indian Parliament and Judiciary*, Vol. 71 IJPS 163, 163-164 (2010), https://www.jstor.org/stable/42748377.
[3] JUSTICE Y.K. SABHARWAL, ROLE OF JUDICIARY IN GOOD GOVERNANCE, https://highcourtchd.gov.in/sub_pages/left_menu/publish/articles/articles_pdf/goodgovernance.pdf (last visited Oct. 10, 2020).

criminal judiciary comprises the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class[4].

HISTORICAL PERSPECTIVE

The method of appointing High Court and Supreme Court Judges is incorporated under Art 124 and Art. 217 of the Constitution of India. Article 124 states establishment and constitution of Supreme Court of India and Article 217 states the appointment and conditions of the office of a Judge of a High Court. The method of appointing judges which has been incorporated under the above mentioned articles of the constitution is after considering the recommendations made by several committees appointed before independence. They're as follows

1. **Recommendations by the Sapru Committee:**

The Constitutional Proposals of the Sapru Committee commonly referred to as the Sapru Committee Report was published in 1945. It was prepared by a committee appointed by the Non-Party Conference in November 1944. Tej Bahadur Sapru, a well-renowned lawyer, convened the first meeting of the Non-Party Conference in 1941. This group consisted of individuals who represented a variety of interests except those of the dominant political parties which were the Indian National Congress, Muslim League and the Communist Party. The Report was 343 pages long excluding twenty appendices and contained detailed expositions on various aspects of India's constitutional future. One of the appendices - 'Recommendations' – distilled the report in the form of the legal-constitutional document. This document consisted of four parts including one titled - 'Leading Principles of a New Constitution' which was structured like a constitution and contained provisions relating to the executive, legislature, judiciary, public services etc.[5] The recommendations for the judiciary were as follows:-

[4] *Supra* note 1.

[5] SAPRU COMMITTEE REPORT, CONSTITUTION OF INDIA, https://www.constitutionofindia.net/historical_constitutions/sapru_committee_report__sir_tej_bahadur_sapru__1945__1st%20December%201945 (last seen Oct. 19, 2020).

(1) There shall be a Supreme Court for the Union and a High Court in each of the Units.

(2) The strength of Judges in each of these Courts at the inception of the Union as well as the salaries to be paid to them shall be fixed in the Constitution Act and no modification in either shall be made except on the recommendation of the High Court, the Government concerned and the Supreme Court and with the sanction of the Head of the State provided, however, that the salary of no Judge shall be varied to his disadvantage during his term of office.

(3) (a) The Chief Justice of India shall be appointed by the Head of the State and the other Judges of the Supreme Court shall be appointed by the Head of the State in consultation with the Chief Justice of India.

(b) The Chief Justice of a High Court shall be appointed by the Head of the State on the ground of misbehaviour or of infirmity of mind Chief Justice of India. (c) Other Judges of a High Court shall be appointed by the Head of the State in consultation with the Head of the Unit, the Chief Justice of the High Court concerned and the Chief Justice of India.

4. A Judge of a High Court or a Supreme Court shall be appointed for life subject to an age-limit prescribed by the Constitution Act but he may by resignation addressed to the Head of the State resign his office.

5. (a) A Judge of a High Court may be removed from office by the Head of the State on the ground of misbehaviour or of infirmity of mind or body, if on reference being made to it by the Head of the State, the Supreme Court reports that the Judge ought on any such grounds to be removed.

(b) A Judge of the Supreme Court may be removed from office by the Head of the State on the ground of mis-behavior or of infirmity of mind or body, if on reference being made to it by the Head of the State, a special tribunal appointed for the purpose by him reports that the Judge ought on any such grounds to be removed. 6. As regards other matters connected with the appointment and functioning of the Judiciary, the provisions embodied in Part IX of the Government of India Act of

1935 seem suitable with such modifications as may be required for being fitted into the framework of the new Constitution.[6]

2. Recommendations of the High Powered Committee appointed by the Constituent Assembly:

The Constituent Assembly appointed a high-powered ad hoc committee consisting of outstanding jurists of the country for recommending the best method of selecting Judges for the Supreme Court. The committee submitted a unanimous report opining that it would not be desirable to leave the power of appointing Judges of the Supreme Court with the President alone. It recommended two alternative methods in that behalf, namely,

(i) the President should, in consultation with the Chief Justice of the Supreme Court (so far as appointment of puisne Judge is concerned), nominate a person whom he considers fit to be appointed as Judge of the Supreme Court and the nomination should be confirmed by a majority of at least seven out of a panel of eleven (composed of some of the Chief Justices of the High Courts, some members of both the Houses of Central legislature and some of the law officers of the Union);

(ii) the said panel of eleven should recommend three names out of which the President, in consultation with the Chief Justice, may select a Judge for appointment. The same procedure should be followed for the appointment of Chief Justice of the Supreme Court except of course that in his case there should be no consultation with the Chief Justice. [B. Shiva Rao : The Framing of India's Constitution. Vol.2 at p. 590].[7]

[6] CONSTITUTIONAL PROPOSALS OF THE SAPRU COMMITTEE, Appendix Pg. xi, (1945).
[7] NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, SUPERIOR JUDICIARY 707 (2001).

3. Recommendations by BN Rau:

Mr. BN Rau was the constitutional advisor to the constituent assembly. Rau subsequently prepared a Memorandum on the Union Constitution, along with a draft of several constitutional provisions that would ultimately form the basis of India's Constitution.[8] Even Dr. Babasaheb Ambedkar praised Mr. BN Rau for his contribution towards drafting the Constitution of India. He said "The credit that is given to me does not really belong to me. It belongs partly to Sir B. N. Rau, the Constitutional Adviser to the Constituent Assembly who prepared a rough draft of the Constitution for the consideration of the Drafting Committee"

Mr. BN Rau gave some suggestions on the appointment of judges. In his Memorandum on the Union Constitution, Shri B.N. Rao, the Constitutional Advisor suggested that appointment of judges should be made by the President with the approval of at least two-thirds of the Members of the Council of States, which was proposed to be constituted to advise the President in exercise of his discretionary functions and of which the Chief Justice of the Supreme Court was to be an ex-officio member.[9]

4. Recommendations by Federal Court

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

[8] NLUJAA, APPOINTMENT OF JUDGES IN THE HIGHER JUDICIARY IN INDIA: AN ANALYTICAL STUDY, http://www.dlnluassam.ndl.iitkgp.ac.in/handle/123456789/172 (last seen Oct. 19, 2020).
[9] NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, SUPERIOR JUDICIARY 713-715 (2001).

STEPS TAKEN TOWARDS THE ADVANCEMENT OF JUDICIAL SYSTEM

A) Three Judges Case

(i) First Judges Case (SP Gupta Vs. Union Of India, 1981 Supp SCC 87)

The SP Gupta Case played a key role in the case that paved way for Judicial Independence that consequently resulted into creation of the collegium system for appointment of judges. A 7-judge bench of P.N. Bhagawati, A.C. Gupta, Syed Murtaza Fazal Ali, V D. Tulzapurkar, D.A. Desai, R.S. Pathak and E.S. Venkataramiah, JJ decided the case that is famously known as the 'First Judges Case' or the 'Judges Transfer case'.[10]

The court in the verdict held that under the scheme of Article 217 the power to appoint a Judge of a High Court is vested in the President. However, If there are conflicting opinions the President has to weigh them after giving due consideration to each of them and take a decision on the question. Further it was held that the opinion of each of the three constitutional functionaries is entitled to equal importance and weight. The opinion of the Chief Justice of India wont have primacy over the opinions of other two functionaries and if primacy is to be given to the opinion of CJI, it would amount to concurrence because it would mean that the opinion of the CJI will prevail over the opinion of the Chief Justice of High Court and Governor of the State because the central government must accept the opinion.

The court said that the power of appointment in the hands of the executive won't affect the independence of judiciary as the executive won't have any means to interfere with the work of a judge. This increased the power of the executive to appoint judges. In the case, it was for the first time the word 'collegium' was used. The idea to control the appointment of judges of the High Court or the Supreme Court through a collegium system was tabled for the first time.

[10] SCC ONLINE BLOG, A WALK DOWN THE MEMORY LANE ON SP GUPTA'S (SENIOR ADVOCATE) 90TH BIRTHDAY, https://www.scconline.com/blog/post/2019/03/15/a-walk-down-the-memory-lane-on-sp-guptas-senior-advocate-90th-birthday/ (last visited Oct. 19, 2020).

(ii) Second Judges Case (Supreme Court Advocate-on-Record Association Vs. Union of India, 1993 4 SCC 441)

The judgment was delivered with 7:2 majority overruled its earlier decision in ***S.P. Gupta*** and held that in issues regarding the appointment of judges in higher judiciary the opinion of CJI must be given primacy in order to minimize the executive influence in the Judicial functions. The majority judgment was delivered by Justice Verma on behalf of Ray, Anand, Dayal & Bharucjajj. while Kuldeep Singh and S.R. Pandian jj. delivered separate but concurring opinion and Ahmadi & Punchhi jj. giving the minority opinion.[11]

The court overruling its decision of ***S.P. Gupta*** held that the largest importance must be given to the recommendation of the Chief Justice of India formed after taking into consideration the opinion of 2 senior most judges of the Supreme Court. Therefore, this judgment saving the spirit of article 50 of the Constitution minimized the executive influence in judicial appointments. Further, the judgment thereby reduced the political influence and personal favoritism from the appointment procedure. The court also expanded the scope of the word "***Consultation"*** by construing it in equivalent terms with "***Concurrence***".

The minority opinion by Ahmadi & Punchhi JJ. was that if as per majority's view the primacy is to be given to the CJI then as a result of this upper hand the role of other constitutional functionaries discussed in the relevant provision of appointment procedure would become minimal and close to negligible. This erosion of power will result in an injury irreversible to the basic facet of Constitution i.e. Separation of Power. In their opinion if this would be the case then there is way too much levy on the part of the Judiciary and this inequality in the panel would often result in biasness, conflict and finally to chaos.

[11] LAW TIMES JOURNAL, SUPREME COURT ADVOCATE-ON-RECORD ASSOCIATION V. UNION OF INDIA, http://lawtimesjournal.in/supreme-court-advocate-on-record-association-v-union-of-india-second-judges-case-case-summary/ (last visited Oct. 19, 2020).

The majority along with delivering this landmark judgment also provided guidelines which must be followed in future in the procedure of appointment of judges in higher judiciary. The guidelines framed by the court are as follows:

1. The CJI's opinion must be given primacy but he must consult with his two senior-most colleagues.
2. All the constitutional functionaries involved in the appointment process must participate harmoniously.
3. Transfer of Judges cannot be challenged in the courts.

(ii) Third Judges Case (re Special Reference 1 of 1998, (1998) 7 SCC 739)

In 1998, the then President K.R. Narayan issued a Presidential Reference for the word 'consultation' in Article 217(1) and 222(1). The question was whether the consultation with the CJI was enough or the CJI and other judges be consulted for the process of consultation to be complete.

A nine-judge bench held that the word consultation meant consultation with the plurality of judges including the CJI, the sole opinion of the CJI does not suffice and encompass the term consultation under these articles.

The Apex court held that the CJI shall consult a collegium, which consists of 4 other senior most judges. The Composition then becomes, CJI + 4 senior most judges of the Supreme Court. It was also held that if two of these other 4 judges give adverse opinion to the CJI, then the CJI shall not recommend the names to the government. Other condition was that the Collegium must include the next CJI as well, which as mentioned above is based on seniority and fitness to hold office.

In cases of transfer of a judge of a high court to another high court, the judicial review only lies (save for exceptions) when the other 4 judges have not been consulted by the CJI or the Chief Justice of any High Court concerned is not consulted. Concerned High Court here means the High Court where the transfer takes effect from and the High court to where the transfer is sought.[12]

B) Law Commission Reports On Judicial Reforms

(i) 14th Report of the First Law Commission

On 26th September, the Chairman of the first law commission of Indian Republic, Shri M.C Setalvad, Forwarded to the Minister of Law the fourteenth Report of the Commission. The Report was an authoritative review of then existing machinery of justice in India with valuable suggestions for remedying the defects that the commissions inquire disclosed. It runs into two volumes and 1282 pages divided into two appendices with two separate notes by Mr. V.K.T Chari and Dr. N.C. Sen Gupta.[13] The Law Commission Report, inter alias, regarding the proper selection of the judges in the Supreme Court observed thus: "It is obvious that the selection of the judges constituting a Court of such pivotal importance to the progress of the nation must be a responsibility to be exercised with great care. The constitution of the Court must command the confidence not only of people but also the Judiciary and the Bar as a whole, sitting as it does in appeal on matters decided by the High Courts in the several States. The Court must consist of Judges who taken as a body are, as lawyers and men of vision, superior to the body of Judges manning the High Courts. Such a result can be achieved and maintained only by the exercise of courage, vision and

[12] LATEST LAWS, THE COLLEGIUM SYSTEM IN INDIA, https://www.latestlaws.com/articles/the-collegium-system-in-india-history-status-quo-and-alternatives-by-samarth-luthra/ (last visited October 9, 2020).

[13] INDIAN LAW INSTITUTE, THE REPORT OF THE LAW COMMISSION ON THE REFORM OF JUDICIAL ADMINISTRATION, http://14.139.60.114:8080/jspui/bitstream/123456789/15279/1/037_The%20Report%20of%20the%20Law%20Commission%20on%20the%20Reform%20of%20Judicial%20Administration%20%28331-341%29.pdf (last visited Oct. 10, 2020).

imagination in the selection of Judges made with an eye solely to their efficiency and capacity."[14]

The Law Commission in its report inter alias held out following recommendations regarding appointments of Judges to the Supreme Court of India:-

(1) Communal and regional considerations should play no part in the making of appointments to the Supreme Court.

(2) An effort should be made to recruit distinguished members of the Bar directly to the Supreme Court Bench by inviting them to accept the appointment at a time when they can look forward to a fairly long tenure on the Bench.

(3) In the interests of stability of judicial administration, a Judge of the Supreme Court should have tenure of at least ten years.

(4) It is not desirable to raise the retiring age of Supreme Court Judges.

(5) A person appointed as Chief Justice of India should have a tenure of at least five to seven years.

(6) The practice of appointing the senior-most puisne Judge of the Supreme Court as Chief Justice of India is not desirable. Instead, the most suitable person whether from the Court, the Bar or from the High Courts should be chosen.

(7) The pensions payable to judges of the Supreme Court should be increased so that a puisne Judge who retires after serving for 15 years (including service as a High Court Judge) has a pension of at least Rs. 2,500 and a Chief Justice Rs. 3,000.

(8) The pension may be proportionately less for a shorter period of service.

(9) The leave privileges of the Judges of the Supreme Court should be at least as liberal as those of the Judges of the High Court.

[14] LAW COMMISSION OF INDIA, FOURTEENTH REPORT-REFORM OF JUDICIAL ADMINISTRATION, Vol. 1 Pg. 33 (1958).

(10) It is not consistent with the dignity of the Judges of the Supreme Court to start chamber practice after retirement.

(11) The Judges of the Supreme Court should be barred from accepting any employment under the Union or a State after retirement, other than employment as an *ad hoc* Judge of the Supreme under Article 128 of the Constitution.

(12) It is not necessary to enlarge the jurisdiction of the Supreme Court in criminal matters.

(13) Although the exercise of the jurisdiction under Article 136 of the Constitution by the Supreme Court in criminal matters sometimes serves to prevent injustice, yet the Court might be more chary of granting special leave in such matters as the practice of granting special leave freely has a tendency to affect the prestige of the High Courts.

(14) The file of the Supreme Court is being clogged with appeals on labour matters and relief should be given to that Court by enabling parties to file appeals in these matters either to the High Court or to a special tribunal constituted for the purpose.

(15) No constitutional amendment is necessary in the matter of separate and dissenting judgments or opinions being delivered by the Supreme Court.

(16) The Court may consider the desirability of instituting a system of preliminary hearing in Article 32 petitions and of enlarging the powers of a single Judge or of a Division Bench, to deal with contested interlocutory and miscellaneous matters.[15]

The recommendations regarding the appointment and conduct of High Court and the High Court Judges in the 14th Report of the First Law Commission can be summarized as follows:-

(1) There has been a large increase of arrears in the High Courts and disposals have fallen short of what they should be in a properly regulated court.

[15] *Supra note 14*, Pg. 55-57.

(2) The arrears can be partly attributed to the increase in both the normal work of the High Court and also the expansion of its special jurisdiction under various Acts.

(3) The coming into force of the Constitution has also greatly added to the work of the High Courts.

(4) The strength of the High Courts was not increased in time to prevent the arrears from accumulating.

(5) Any proposals made by the Chief Justice of a State for increasing the strength of the High Court, if it has the concurrence of the Chief Justice of India, should be accepted without demur or delay.

(6) The difficulty arising from a shortage of judges has been aggravated by the delays in making appointments to vacancies as have occurred.

(7) The frequent deputation of Judges for non-judicial work without the provision of a substitute is also responsible for the High Courts being undermanned and if such deputation is likely to last for a substantial period of time, arrangements should be made to appoint a substitute.

(8) Many unsatisfactory appointments have been made to the High Courts on political, regional and communal or other grounds with the result that the fittest men have not been appointed. This has resulted in a diminution in the out-turn of work of the Judges.

(9) These unsatisfactory appointments have' been made notwithstanding the fact that in the vast majority of cases, appointments have been concurred in by the Chief Justice of the High Court and the Chief Justice of India.

(10) Consultation with the State executive is necessary before appointments are made

to the High Court.

(11) While it should be open to the State executive to express its own opinion on a name proposed by the Chief Justice, it should not be open to it to propose a nominee of its own and forward it to the Centre.

(12) The role of the State executive should be confined to making its remarks about the nominee proposed by the Chief Justice and, if necessary, asking the Chief Justice to make a fresh recommendation.

(13) It would be advisable for the Chief Justice of a State to send a copy of his recommendation direct to the Chief Justice of India to avoid delays.

(14) Article 217 of the Constitution should be amended to provide that a Judge of a High Court should be appointed only on the *recommendation* of the Chief Justice of that State and with the *concurrence* of the Chief Justice of India.

(15) The senior puisne Judge should not be automatically appointed as the Chief Justice unless he possesses the qualifications we have referred to.

(16) While there is no need to have a rule that the Chief Justice of a State shall always be from outside the State, yet when a vacancy arises in the office of the Chief Justice of a High Court, the fittest person should be selected, if necessary from outside.

(16A) The appointment of the Chief Justice of a High Court should be with the concurrence of the Chief Justice of India.

(17) The decreasing respect in governmental circles for the judiciary and the courts has to some extent made recruitment to the High Court bench difficult.

(18) Ill-informed criticism of the judiciary by responsible persons has adversely

affected its prestige.

(19) The existing salaries of High Court Judges are not so inadequate as to deter competent men from accepting judgeships, except perhaps in Calcutta and Bombay.

(20) The difficulty caused by the low salaries of judges can be counteracted by offering judgeships to rising junior members of the Bar at a comparatively early age.

(21) However, indiscriminate invitations to junior members of the Bar overlooking the claims of seniors tend to destroy respect for the Judges and subsequently deter competent seniors from accepting judgeships.

(22) There should be a convention or condition of service that a High Court Judge should not decline to accept the office of a Supreme Court Judge if called upon to do so.

(23) The retiring age of High Court Judges should be raised to sixty-five, in the case of appointments to be made hereafter.

(24) The pension of the Chief Justice of a State High Court should be fixed at Rs. 2,000 per month and that of a puisne Judge at Rs. 1,750 per month for 12 years of service.

(25) The Judges of the High Court should be allowed to draw their full salary for the period for which they are entitled to leave on full allowances and half salary for the period of leave on half allowances.

(26) High Court Judges should not be permitted to practise in any court after retirement.

(27) The Constitution should be amended to bar a Judge of a High Court from accepting any employment other than as a Judge of the Supreme Court after

retirement either under the Union or under the State.

(28) Sub-clause (a) of clause 2 of Article 217 should be amended so as to permit the appointment to the High Court of only those judicial officers who have exercised for at least three years judicial functions as a district judge.

(29) The permanent strength of the High Courts should be refixed after taking into consideration the recent increase of their work.

(30) The strength so fixed should be reviewed at intervals of two to three years.

(31) All proceedings pending in a High Court beyond the period specified in

(32) Additional Judges should be appointed for the sole purpose of clearing these arrears within a period of two years.

(33) Such Judges should not be diverted to the disposal of current work. These additional Judges should be appointed from amongst the most competent persons available at the Bar or in the service.

(34) For the purposes of such recruitment the entire country should be treated as one unit.

(35) An effort should be made to persuade suitable senior practitioners to accept judgeships for at least a short period as a public duty.

(36) An *ad hoc* body presided over by the Chief Justice of India should be created to draw up a panel of names of persons suitable for appointment to the High Court.

(37) Legislation should be immediately undertaken for transferring all First

(38) Appeals valued below Rs, 10,000 now pending in the High Courts to the district

courts. The measures set out in detail by us in the Chapter on Civil Appeals to meet the situation created by such transfer should be undertaken.

(39) The available judge-power of the High Courts should be conserved and used in an economic manner by increasing the power of Single Judges and resorting to other methods which we have set out in detail elsewhere.

(40) The Judges should be assigned to deal with those branches of work in which they are most competent.

(41) The work of admission should be entrusted to senior and specially competent Judges.

(42) Cases should be admitted only after careful scrutiny.

(43) The High Courts should work for at least 200 days in the year. Once this is done, it should be for the High Courts to regulate their vacations as they think best.

(44) Legislation for regulating the vacations of the High Courts is undesirable.

(45) The Judges should sit in court and do judicial work for at least five hours on every working day.

(46) Judges should not be required to sit in court on Saturdays as these are not really free days for them.

(47) The Judges of the High Courts should set an example of strict punctuality on the bench.

(48) The practice of retiring to chambers for dictating judgments or doing administrative work during court hours is not desirable.

(49) It is not desirable to have an all-India cadre of High Court Judges in the sense that Judges should be easily transferable from one High Court to another.

(50) The other measures suggested by us should however suffice to bring Judges from various parts of the country to the bench of one High Court.

(51) The zones might serve as a common recruiting ground for the Judges of the High Courts in that zone.

(52) Judges should bear in mind that their office demands from them a certain reserve and restraint in their social life.

(53) While Judges should control the hearing of the case they should guard themselves against intervening too much and too often.

(54) The High Court Judges should realise that the task of supervision and control of subordinate courts, that is, administrative work is a very important branch of their duties.

(55)Setting up of benches of the High Court at different centres in a State is undesirable.[16]

[16] *Supra* note 14, Pg. 105-109.

(ii) 80th Report of the Eighth Law Commission

The 8th Law Commission of India in its 80th Report dwelled upon the issue of "appointment of Judges" of the High Courts and Supreme Court. The subject was taken up by the Commission for consideration, pursuant to reference made by the Union Government to the Commission. The report was mainly prepared by Mr. Justice H.R. Khanna when he was the Chairman of the Commission. As he resigned before the Report could be signed, the Report does not bear his signature.[17]

Highlighting the importance of independent judiciary, the report said that adjudication of disputes should proceed as per rule of law and each and every citizen deserves an equal treatment under laws. This is only possible if the judiciary is impartial and independent. The report noted that wrong appointments have had an adverse affect over the image of the courts in the country. It has also reduced the confidence and faith which the people of India keep in the judiciary. The judiciary is considered to be the weakest organ of the state because it neither has financial resources nor the ability to enforce its decisions but the reason it enjoys respect from all walks of life is because of the role it plays in the rendering justice. If the people lose confidence in the courts would have serious consequences over the democratic structure of polity as people might turn to extra legal methods of redress of their grievances and for the settlement of their disputes. Wrong appointments have a long term affect over the image of the judiciary thus it becomes very essential to eliminate any kind of partiality and favoritism.[18] The commission analyzed the appointment of judges in different countries.

The Law Commission made the following recommendations for the appointment of judges in the High Court

(1) In case of normal vacancies in the High Court, the initiative (for filling up the vacancy) should be taken by the Chief Justice at least 6 months before the expected

[17] LAW COMMISSION OF INDIA, 80TH REPORT- METHOD OF APPOINTMENT OF JUDGES, Pg. i (1979)
[18] LAW COMMISSION OF INDIA, 80TH REPORT- METHOD OF APPOINTMENT OF JUDGES, Pg. 1 (1979).

date of the vacancy, in order to obviate the possibility of the vacancy remaining unfilled for a long time after the retirement of the previous incumbent.

(2) When making a recommendation for appointment of a judge of a High Court, the Chief Justice should consult his two senior-most colleagues. The Chief Justice, in his letter recommending the appointment, should state the fact of such consultation and indicate the views of his two colleagues so consulted.

(3) Any recommendation of the Chief Justice which carries the concurrence of his two senior most colleagues should normally be accepted.

(4) In a judge, maturity is as much essential as are other proficiencies. Maturity normally comes with years, brilliance and quick up-take being no substitute for it. In view of this, the minimum age at which a person should be appointed a judge of the High Court should be 45.

For persons selected from the bar, there should be an upper age limit of 54.

Though there have seen distinguished judges in the past who were appointed at a younger age, they constituted exceptional cases.

The age limit indicated above should be ordinarily adhered to; a departure can, however, be made in exceptional cases and for reasons to be stated by the authorities concerned.

(5) Other points to be kept in view for selecting persons as High Court judges are their competence, reputation for integrity and hard work, attitude of sobriety, balanced approach and dignity.

Income-tax returns for the last 3 years (in case of members of the bar) would also be relevant.

(6) The Commission is, in principle, against selection to the High Court Bench on ground of religion, caste or region. Merit should be the only consideration. Even when matters of State policy make it necessary to give representation to persons belonging to some religion, caste or region, every effort should be made to select the best person. The number of such appointments should be as few as possible.

(7) While sending the name to the Chief Minister, the Chief Justice should also state

the views of his two senior-most colleagues, as already stated.

(8) There should be an outside limit of 6 months (as already recommended in the 79th Report, paragraph 3.11) within which the recommendation of the Chief Justice should be processed and completed in the State Government. The recommendation of the Chief Justice should engage the prompt attention of the Chief Minister and should not be kept pending for more than a month. If exchanges of correspondence become necessary, efforts should be made to see that because of such exchange, the matter does not become stuck up.

(9) No rigid rule need be laid down as to whether personal meetings between the Chief Justice and the Chief Minister to discuss appointments to the High Court should be avoided. The difficulties that sometimes arise can be sorted out more quickly by a personal meeting than by correspondence. It would essentially depend upon the personal equation between the Chief Justice and the Chief Minister. Every such meeting would not result in some kind of bargaining, as is sometimes assumed.

(10) At the same time, as already indicated, a recommendation made by the Chief Justice with which both his senior most colleagues agree should normally be accepted.

(11) On the question whether the role of the Chief Minister should be that only of commenting on the name recommended by the Chief Justice, or whether the Chief Minister can also suggest another name, a decision has already been taken and nothing further need be said in the matter.

(12) The suggestion that the Chief Justice, while making the recommendation, should suggest a panel of names is not accepted, as it would have the effect of diluting the recommendation of the Chief Justice.

(13) Whatever has been said above about the avoidance of delay at the level of the Chief Minister should also hold equally good at the subsequent stages.

(14) In regard to the appointment of the Chief Justice, normally the senior-most judge of the High Court should be appointed. Recommending a junior judge for appointment as Chief Justice would lead to the undesirable practice of junior judges

cultivating a personal relationship with the Chief Minister and would undermine the independence of the judiciary and affect the image of the court. The role of the Chief Minister should be confined to taking the initiative for appointment of the Chief Justice and expressing views about the suitability of the senior most judge for appointment as Chief Justice.

(15) If the senior most judge is not considered suitable for the office of Chief Justice, a junior judge should not be appointed, but the proper course would be to appoint some judge from outside. The judge so appointed should have been on the bench of the court for a long time and should have that much seniority (as a judge) as not to cause embarrassment to the other judges. Care should also be taken to see that the appointment of outside judge as Chief Justice does not block the chances not only of the senior most judge, but also of the other judges of the High Court. Of course, arithmetical exactitude in these matters cannot be insisted upon.

(16) It is desirable to ensure that no incumbent of the office of Chief Justice of the High Court normally holds that office more than six years. While long tenures may give an element of continuity to the court, yet in a majority of cases it has the effect of introducing certain weaknesses and undesirable traits.

(17) There should be a convention according to which one-third of judges in each High Court should be from another State. This would normally be done through initial appointment, and not by transfer. The process will have to be gradual; it would take some years before the proportion is reached.

Such a convention would not only foster national integration, but would also improve the functioning of High Courts. It would inspire a feeling that a dispassionate approach underlies their decisions. The advantages gained by having persons from other States as judges would be much greater compared with the possible disadvantages.

(18) Though a number of persons would be reluctant to be appointed outside their State, a certain percentage of persons would have no objection to such an appointment. In case of District Judges, the prospect of promotion would be enough

inducement. In case of members of the bar, they can practise in the State High Court wherein they were practising earlier.

(19) Since the suggestion for All-India Judicial Service, made earlier has been turned down, it is all the more imperative to find out some other modality to ensure the appointment of one-third of judges from outside the State. The outside, States should normally be in the same zone[2] in which the State in which a person is to be appointed is situated.

(20) For this purpose, the Chief Justices may meet when necessary, or settle the name of the person to be appointed by correspondence.

(21) Care should, however, be taken to see that reciprocity in numbers (in matters of appointment of judges from other States) is maintained as far as possible.

(22) There is nothing rigid about the above modality. Once the principle is accepted, there should be no difficulty in devising a method for bringing out the desired result.

(23) The proposal for constituting a consultative panel—which had been described in the Questionnaire issued by the Law Commission as a "Judges Appointments Commission"—has not been favoured by most of the High Courts in their replies to the Questionnaire issued by the Commission and is accordingly dropped. It may, however, be stated that the idea was not to have a body like the Public Service Commission, but to associate a high level panel consisting of persons known for their integrity, independence and judicial background in the matter of appointments, to eliminate extraneous considerations and to ensure dispassionate scrutiny.

(24) At the same time, the Law Commission recommends that whenever it is proposed to pass over the senior most judges for appointment to the office of Chief Justice of the High Court, the matter should be placed before a panel consisting of the Chief Justice of India and his four senior most colleagues.

The claim of the senior most judge should not be ignored unless the aforesaid panel finds sufficient cause for such a course. In case of difference of opinion amongst the panel, the view of the majority may be taken as the view of the panel. Such a procedure will avoid discontent and controversy, and preserve the image of the High

Court.

(25) Normally a judge should continue in the High Court where he is appointed, except where appointed Chief Justice of another High Court. But there are occasions—though rare—when the image and good name of the judiciary make it incumbent that a judge should be transferred, though the extreme remedy of impeachment may not be called for.

(26) To prevent abuse of the power of transfer, it is recommended that no judge should be transferred without his consent from one High Court to another unless a panel consisting of the Chief Justice of India and his four senior most colleagues finds sufficient cause for such a course. In case of difference between members of the panel, the view of the majority be taken to be the view of the panel.

(27) Constitutional amendment may be required to implement the above recommendation for consultation with a panel consisting of Chief Justice of India and his four senior-most colleagues (in the matter of supersession or transfer of a High Court judge).

Normally, the Law Commission is averse to recommending a constitutional amendment. But such a panel is necessary to ensure that controversy does not arise in regard to such action (as is indicated above) in respect of high judicial office.[19]

Following recommendations were made by the commission for the appointment of judges in Supreme Court

(1) Having regard to the importance of the role assigned to the Supreme Court under the Constitution and the nature and amplitude of its jurisdiction, it is necessary that persons of the highest calibre should be appointed judges of that court and no other consideration except that of merit should weigh in this regard. The fact that the Supreme Court sits as a court of appeal against the judgments of the High Court makes it imperative that its judges should be persons of such high stature and command such great esteem that even when it reverses a judgment of the High Court,

[19] *Supra* note 17, Pg. 32-35.

the judges of the High Court should feel that the reversal has been done by a court which, because of the acumen of its judges, is superior to the High Court.

(2) Only persons who enjoy the highest reputation for independence, dispassionate approach and detachment should be elevated to the bench of the Supreme Court and any revelation of a tendency to hobnob with Ministers should be a disqualification.

(3) While affiliation in the remote past with a political party should not constitute a bar in itself, no one should be appointed to the Supreme Court, unless, for a period of not less than seven years, he has snapped all affiliations with political parties and unless, during that period, he has distinguished himself for independence and freedom from political bias or leanings.

Taking into account Indian conditions and the importance which we attach to independence and dispassionate approach and the role of the Supreme Court, this safeguard is necessary.

(4) The Chief Justice of India, while recommending the name of a person for appointment as a judge of the Supreme Court, should consult his three senior most colleagues and should, in the communication incorporating his recommendation, specify the result of such consultation and reproduce the views of each of his colleagues so consulted regarding his recommendation. The role of these colleagues would be confined to commenting on the recommendation of the Chief Justice. Such consultation would minimise possible arbitrariness or favoritism.

(5) Persons appointed as judges of the Supreme Court should not only have legal acumen and sound knowledge of law, but also have within them that great quality which eludes description but which comes with the passage of years and after long contemplation and reflection—the quality imparting maturity. Therefore, the proper age for appointment as judge of the Supreme Court should be between the age of 54 and 60 years. Though, in the past, there have been judges who were appointed at an age less than 54 years and who have distinguished themselves, yet looking to the facts, no appointment should be made to the bench of the Supreme Court at an age less than 54 years.

(6) The principle of seniority should be observed in the appointment to the office of the Chief Justice. Departure from this principle in the past has aroused controversy and has affected the image of the office of the Chief Justice. The vesting of unbridled power in the executive to depart from this principle may be abused and may also make inroads into judicial independence and affect the approach of the judges. Where, in an individual case, the Government proposes to depart from this principle, the matter should be referred to a panel consisting of all the sitting Supreme Court judges, and the departure should be made only after this panel finds sufficient cause for such a course. In case of difference of opinion, the decision of the majority would be the decision of the panel.

(7) Even where, in the matter of appointment to the Supreme Court, regard is had for representation of different regions, the best person from the region should be appointed to the Court.[20]

[20] *Supra* note 17, Pg. 35-36.

(iii) 121st Report of the Eleventh Law Commission

11th Law Commission of India in its 121st Report on "A New Forum for Judicial Appointment" dealt with the question of power and area of consultation in the matter of appointments to Superior Judiciary.[21]

The report stressed upon the reducing political interference and influence from judiciary and remarked that judicial independence is thus prized as a basic value and so naturally and inevitably it has come to be regarded and so ingrained in the life and thought of the people that it is now almost taken for granted and it would be regarded as an act of insanity for anyone to think otherwise.[22]

The law commission posed a number of questions after taking full stock of the system of appointing judges in Higher Judiciary. The questions are as follows

(1) Is the judicial strength regularly reviewed to keep pace with mounting court dockets?

(2) Are first rate persons of high intellect, unquestioned integrity and character and efficient in discharge of duties being selected by making the mechanism operational?

(3) Are the vacancies filled within reasonable time which is the obligation of the President?

(4) A citizen of this country has a constitutional right to have a forum easily accessible for the resolution of the disputes by efficient Judges and within a reasonable time. Is this object achieved?[23]

The commission noted that vital changes are necessary in the existing model which will be aimed that eliminating infirmities and make the system functionally operative.[24]

It suggested that to ensure the voice of the executive in dealing with the problems of the judiciary, a body known as National Judicial Service Commission shall be formed.[25] The functions of the commission shall be as follows

[21] Law Commission of India, 121st Report- A New Forum For Judicial Appointments (1987).
[22] *Supra* note 21, Pg. 6.
[23] *Supra* note 21, Pg. 25.
[24] *Supra* note 21, Pg. 39.
[25] *Supra* note 21, Pg.41.

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

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

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

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

(iv) scale of values and awareness of the perceived needs of the society These are illustrative and not exhaustive.

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

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

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

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

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

(7) By numerous decisions of the Supreme Court of India, the control over the subordinate judiciary vests in the High Court. As has been oft-repeated the provisions

of the Constitution relating to judiciary were devised to insulate judiciary against executive interference. As, a sequel, a disciplinary proceeding against a member of the subordinate judiciary, though formally held in the name of the Governor, is, substantially and for all practical purposes, held by the High Court or by an officer nominated by the High Court[3]. In the event the individual is found guilty of misconduct, it is the High Court which decides the quantum of punishment and the Governor has to act according to the recommendation of the High Court. Now if a member of the subordinate judiciary wants to question the correctness of the decision of the High Court, he has to file a petition on the judicial side of the High Court. A grievance is voiced that when the High Court, as a full court, on its administrative side decides whether the charge is held proved and also determines the quantum of punishment, it becomes embarrassing for the delinquent judicial officer to challenge this finding on the judicial side of the High Court. A feeling is often entertained that this is an appeal from Ceaser to Ceaser's wife. This grievance is not without justification, though no disrespect is meant to any High Court. This grievance can be adequately remedied if the National Judicial Service Commission sets up a small body from amongst members of the judiciary, to be styled as Judicial Disciplinary Committee, before which decisions of the High Court in disciplinary matters on its administrative side can be questioned. The Commission will thus be fulfilling the felt needs of the time. It must, therefore, be one of its functions to set up such a Committee.[26]

[26] *Supra* note 21, Pg. 43-44.

(iv) 214th Report of the Eighteenth Law Commission

The 18th Law Commission of India headed by Hon'ble Dr. Justice A.R. Lakshmanan, Former Judge, Supreme Court of India presented 214th Report on 21.11.2008 on "Proposal for Reconsideration of Judges cases I, II and III - S. P. Gupta Vs UOI reported in AIR 1982 SC 149, Supreme Court Advocates-on-Record Association Vs UOI reported in 1993 (4) SCC 441 and Special Reference 1 of 1998 reported in 1998 (7) SCC 739".

The commission noted that the Supreme Court has re-written Article 124 and Article 217 of the Indian Constitution[27]. It held that the word 'collegium' used by the Supreme Court in the first judges case appears nowhere in the constitution and any additional works addition of words in the constitution would not be permissible under the interpretive jurisdiction of the Supreme Court. The Supreme Court has to interpret the constitution as it is[28].

The Commission examined the law on the subject. Various recommendations of Parliamentary Standing Committees and law of foreign jurisdiction like America, Australia, Canada and Kenya, where the executive is the sole authority to appoint Judges or the executive appoints in consultation with the Chief Justice of the Country were considered.[29] The commission noted that there is an urgent need to reconsider all the three judgements delivered by the Hon'ble Supreme Court in order to bring clarity and consistency in the appointment of judges[30]

Further it said that the government had two options One is to seek a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of the executive to make the appointments.[31]

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[27] Law Commission of India, Report 214- Proposal for Reconsideration for Judges Case I, II, III, Pg. 42 (2008). t
[28] *Supra* note 27, Pg. 44.
[29] *Supra* note 27, Pg. 6.
[30] *Supra* note 27, Pg. 53.
[31] *Supra* note 27, Pg. 60.

CONCLUSION

The Indian Judiciary is a product of the implementation of the doctrine of separation of power, and has vast powers and functions assigned to it to ensure the effective functioning of the system of checks and balances. At one hand, where this system takes it inspiration from the judicial model in the United States of America on the other time and again it has faced changes in its functioning or recommendations to change the way the functioning takes place. With the multiple recommendations and steps taken up by various governments, we believe that, keeping into mind a holistic perspective, an overview is necessary to establish the reforms in this system, whether reforms should take place or not. If yes, then what kind of reforms should take place? If they are taking place, then how they should the reforms take place? So, on and so forth. We look forward to a fruitful debate emphasizing on multiple unanswered questions and addressing their relevance.