
EIGHTIETH REPORT
ON
THE METHOD OF APPOINTMENT OF JUDGES

D.O. No. F.2(12)/77-L.C.

Mr. Justice S. N. Shankar

**MEMBER
LAW COMMISSION
GOVERNMENT OF INDIA**

‘A’ Wing, 7th Floor,
Shastry Bhavan, New Delhi-110 001.
August 10, 1979.

My dear Minister,

I send herewith the Eightieth Report of the Law Commission relating to the method of appointment of Judges. The subject was taken up by the Commission for consideration, pursuant to a reference made by the Union Government to the Commission. Details of the relevant correspondence are given in the first chapter of the Report.

The Report was mainly prepared by Mr. Justice H. R. Khanna, when he was Chairman of the Commission. As he resigned before the Report could be signed, the Report does not bear his signature. However, it may be stated that the Report bears his full concurrence.

The Commission would like to place on record its appreciation of the assistance rendered by Shri P. M. Bakshi, Member-Secretary of the Commission in the preparation of this Report.

With kind regards,

Yours Sincerely,

Sd./-

(S. N. SHANKAR)

Shri S. N. Kacker,
Minister of Law, Justice & Company Affairs,
New Delhi.

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CHAPTER 1 INTRODUCTORY

1.1. According to letter dated 29th December, 1977, from the Secretary, Reference Ministry of Law, Justice and Company Affairs, to the Member-Secretary, Law to the Law Commission, the Prime Minister directed that the question of the appointment of Judges of the High Courts and the Supreme Court be examined, and the Law Minister was of the view that this question should be referred to the new Law Commission so that the Commission might study the problem in depth and explore the possibilities of improvement. The letter also made reference to a suggestion that there should be an informal Consultative Panel consisting, perhaps, of three retired Chief Justices of the Supreme Court, and pointed out that there might be constitutional difficulties in having a Consultative Panel. There was also a reference in the letter to papers prepared by the Ministry on the subject.

1.2. On receipt of the letter, those papers were sent for and perused by the Law Commission. The Chairman of the Commission sent a letter on January 24, 1978, to the Minister of Law, Justice and Company Affairs, containing his view (with which the Member-Secretary broadly agreed) regarding various points. The views of the Chairman were incorporated in five paragraphs which read as under :

“(1) As the provisions of the Constitution stand at present, the appointment of an Informal Consultative Panel in connection with the appointment of Judges of the High Courts and the Supreme Court is of doubtful constitutional validity.

(2) In case it is decided to amend the provisions of the Constitution, we must guard against putting the whole matter of appointment of Judges at large and thus open Pandora's box. The attempt should be to plug the loopholes in the present system with a view to eliminate favouritism or the impact of any political or party consideration in the matter of appointment rather than to make any radical changes. Radical changes would be necessary if we find the method devised by our Constitution for the appointment of Judges to be basically wrong and intrinsically defective. In case, however, we find that the scheme of our Constitution for appointment of Judges is by and large sound but some defects or lacunae have come to surface in the actual working of the scheme, in that event what would be required is not radical change but such modification as may strengthen the scheme and eliminate the defects and lacunae. As at present advised, I think that the scheme for appointment of Judges in our Constitution belongs to the latter category. By and large, the method devised for this purpose by our founding fathers was well considered. Defects, no doubt, have been noticed in the working of the scheme, but they are of such a character as can be rectified without throwing overboard the whole scheme. Efforts should, therefore, be made to rectify the defects and plug the loopholes.

“(3) After we have crossed the constitutional hurdles, the appointment of the Panel referred to in the above-mentioned letter, in my opinion, is desirable.

“(4) The Panel (or whatever be the name given to it: perhaps it would be better to call it Judges Appointment Committee or Judges Appointment Commission) should consist of :

- (a) Chief Justice of India (ex-officio);
- (b) Minister of Law, Justice and Company Affairs (ex-officio); and
- (c) three persons, each of whom has been Chief Justice or a Judge of the Supreme Court.

The members of the Panel in category (c) should be appointed for a period of four years. To prevent appointment of persons who have, with the passage of time, lost touch with Judges and the lawyers, the persons belonging to category (c) should be normally those who have been on the Bench of the Supreme Court within six years of their appointment on the Panel. The suggestion that those on the Panel under category (c) should consist only of

retired Supreme Court Chief Justices is not feasible because this would circumscribe the choice within a very narrow limit which would perhaps be not desirable.

"The sitting Chief Justice should be the Chairman of the Panel. The Panel should express its views to the Government about the suitability of persons to be appointed as Judges and Chief Justices of the High Courts and the Supreme Court. In case of any difference between the members of the Panel, the view of the majority should be considered to be the view of the Panel.

"The consultation with the Panel would be in addition to the present practice in accordance with the existing constitutional provisions. The consultation with the Panel would take place at the final stage before the President is advised to appoint a person.

"One effect of the above proposal would be that the Chief Justice of India would come into the picture at two stages: one, earlier in accordance with the constitutional provisions and the practice prevailing at present and, second time, as Chairman of the Panel. This cannot, in the very nature of things, be helped. The Chief Justice in the meeting of the Panel can apprise the other members of facts which might have come to his notice. He might also clarify some matters. It would be open to the Panel, in case they consider it proper in any particular matter, to informally consult any of the members of the Bar, including the Attorney-General, Solicitor-General and the Advocate-General.

"(5) Apart from the above, I make the following suggestions :

- (i) In case of the appointment of a Judge of the High Court, the Chief Justice of the High Court, before making recommendation, should consult his two seniormost colleagues. In the communication, containing the recommendation, the Chief Justice should state that he has consulted the two seniormost colleagues and what has been the view of each of them in respect of the recommendation. Normally, a recommendation in which the two seniormost colleagues concur with the Chief Justice, should be accepted.
- (ii) Similar course should be adopted in case of the appointment of a Judge of the Supreme Court.
- (iii) In the matter of the appointment of the Chief Justice of the High Court, no junior Judge should normally be appointed in supersession of the seniormost Judge.
- (iv) If the seniormost Judge is considered not suitable for appointment as Chief Justice, in that event, a Chief Justice or a Judge from another High Court should normally be appointed as Chief Justice.
- (v) Apart from that also, we should more frequently appoint a Judge from outside as Chief Justice of the High Court. The disadvantage of this proposal is that an outsider Chief Justice would not have full knowledge about the local talent. The advantage, however, would be that he would not suffer from any personal likes or dislikes from which a local person having long association with others, might suffer. It should not also take the outsider long to acquire knowledge of the local talent. An outsider is also likely to bring greater detachment and dispassionate approach to the office of the Chief Justice. The advantages may thus outweigh the disadvantages.
- (vi) We should also have a convention according to which one-third of the Judges in each High Court should be from another State. This would normally have to be done through process of initial appointments and not by transfer. It would, in the very nature of things, be a slow and gradual process and take some years before we reach the proportion.

Once the principle of having a certain percentage of persons from outside the State as Judges of the High Court is accepted, the modalities to bring about the desired result can be worked out. One suggestion can possibly be that every Chief Justice, while proposing the name of a person for appointment as High Court Judge should mention in the communication as to whether that person agrees to be appointed outside the State. In the case of District Judges proposed to be appointed, the prospect of promotion would, in most cases, be enough inducement and thus outweigh the possible inconvenience of being

posted outside the State. As regards lawyers, some might consider it advantageous to be appointed outside the State so that after retirement they can resume, if they so desire, the practice in the State wherein they were practising earlier.

"(vii) In the matter of appointment of Chief Justice of the Supreme Court, the normal convention should be to appoint the seniormost judge. There should be no departure from this convention unless such a course is approved by the Consultative Panel.

"The above proposals, which are of a broad character, would have the effect of not only eliminating political interference in the appointment of Judges, they would also more or less do away with the possibility of any Chief Justice bringing his personal likes or dislikes into the picture."

Towards the end of his letter, the Chairman wrote :

"In case, however, the entire matter of appointment of Judges of the High Court and the Supreme Court, including the Chief Justices, is to be reopened, and it is desired that the matter be examined in detail and at greater length, in that event the matter would have to be considered in the light of the practice prevailing in different countries. The views of the Judges of the Supreme Court and the High Court as also of the members of Bar and other concerned would have to be ascertained. A detailed report can thereafter be sent in the matter. Some material for this purpose has already been collected."

1.3. On March 1, 1978, the Minister of Law, Justice and Company Affairs Letter of wrote a letter to the Chairman, Law Commission,¹ the material part of which the Minister of Law to Chair reads as under :—

"Thank you for your letter dated 24th January, 1978, on the question man. of improvement of procedures for the appointment of Judges. You have mentioned in the concluding portion of your letter that if the matter is to be considered in detail it would have to be considered in the light of practice prevailing in different countries. I shall be grateful if the matter is considered in depth and a detailed report furnished to us."

2. I am also enclosing extracts from a memorandum received from the Bombay Bar Association. In this extract there is a suggestion for the establishment of a Judicial Appointments Commission to consider appointment to the office of the Chief Justice of India."

The present report is furnished in pursuance of the above letter.

1.4. It may be mentioned that during the period from March 1, 1978, the Commission invited suggestions from all the High Courts, the Supreme Court, the State Governments and the Bar Associations about the appointment of judges. While some suggestions were received promptly, others took considerable time. Some suggestions were received in June 1979. Some Courts and Governments² also refrained from expressing their views. The questionnaire which was sent in this connection is printed as an Appendix to this Report.³

1.5. As the receipt of suggestions was going to take time, the Commission during the period from March 1978 till the date of this Report dealt with other matters and sent Reports about them. Two of the important Reports sent by this Commission during this period were the seventy-seventh Report which dealt with delay and arrears in the trial courts and the seventy-ninth Report which dealt with delay and arrears in High Courts and other appellate courts.

¹Letter of the Minister of Law, Justice and Company Affairs, 1st March, 1978.

²E. g. S. No. 87 in Law Commission file.

³See Appendix 2.

CHAPTER 2

IMPORTANCE OF THE SUBJECT

Role of High Courts and Supreme Court.

2.1. Under the scheme of our Constitution, very important role has been assigned to the High Courts and the Supreme Court. Apart from the ordinary civil and criminal cases, as also cases under special laws, these Courts have to deal with vital issues of public importance involving interpretation of the Constitution. The citizens have also a right to approach the courts in case they find that any act of the State to their prejudice contravenes the provisions of the statute or the Constitution. The variety of cases which come up before these Courts, the constitutional issues—some having major political repercussions—dealt with by them, the duty laid upon them to provide protection against infringement of the citizens rights, necessitate that the Judges who constitute these Courts should be of the right calibre, well-versed in the Constitution and the laws and known for their independence and integrity. For this purpose, it becomes essential that utmost care be taken at the time of initial appointment that the right type of persons are appointed as Judges. Criticism has occasionally been levelled that the selection has not been proper and has been induced by ulterior considerations. There are also complaints of executive interference in the appointment of Judges. Official spokesmen have also not been lacking, at least in one period of our history, when a plea was strongly put forward for the appointment of those who may be described as “committed Judges”. Besides that, charges of favouritism have been levelled not only against the Chief Ministers but also, on occasions, against Chief Justices.

Importance of independent judiciary.

2.2. It is needless to emphasise the importance of an independent judiciary. The basic postulate of democracy is that the adjudication of disputes both between citizen and citizen as also between the citizen and the State ought to proceed on the basis of law and not on extraneous considerations. Justice must be done, as the judicial oath has it, without fear or favour, affection or illwill. Citizens must have an assurance of equal treatment under the laws. Such assurance can only emanate from a general feeling that the forum which is to adjudicate upon the rights and liabilities of parties would keep the scales even and be imbued with a sense of utmost impartiality. An independent judiciary is absolutely indispensable for ensuring the rule of law. Experience tells us that attempt to undermine the independence of the judiciary is preceded by an attack upon the judiciary. Such attacks are symptomatic of the feeling of indignation and chagrin arising out of the inability to control the judiciary. Such attacks would also reveal on occasions a design to browbeat and overawe the judiciary. As observed by a writer :¹

“[And] in a free democracy like ours, the principal function of the law is to protect the weak from the strong—whether the strong take the shape of the Crown, feudal barons, iron-masters, multination corporations—or trade unions. Whenever such groups begin to whine about the unfairness of the law or the judges, that is a sure sign not that they are weak, but that their power has grown to a point where the law must begin to control it—because in the interest of the community at large, they can no longer be trusted to exercise the necessary control themselves.”

Wrong appointments—adverse effects.

2.3. Wrong appointments of Judges have affected the image of the courts. They have also undermined the confidence of the people in the courts. The stake of the community in the preservation of the courts as dispensers of justice is tremendous. Of the three organs of the State, the Legislature, the executive and the judiciary, the judiciary is considered to be the weakest. It has neither the power of the sword nor that of the purse. It has neither the financial resources nor can it by itself enforce its decisions. Even for such purposes it has to depend upon the other organs. Despite that, the courts, especially the superior courts, have enjoyed high esteem and commanded great respect of the people. This has been so because of the moral authority they would and because of the role they play as dispensers of justice in any dispute between the rich and the poor, the mighty and the weak, the State and the citizen, without fear

¹Guardian, Gazette, extracted in (2nd August 1977), New Zealand Law Journal, 304.

or favour. Any undermining of the broad confidence of the people in the courts or any detraction from the image of the courts as dispensers of even-handed justice poses a grave danger for the well-being and security of the society, for inevitably it must turn people to extra-legal methods for redress of their grievances and for settlement of their disputes. This would not only disturb the even flow of the life of the community, but would also in the long run erode the democratic structure of our polity. Nothing rankles more in the human heart than a brooding sense of injustice. Any feeling or consciousness of the incapacity of the lawful agencies to afford relief for the wrongs and injustice, supposed and real, takes people's thought to dangerous channels and drives them to seek recourse to methods which are other than legal and smack of a state of jungle or the rule of tooth and claw. It is, therefore, essential to ensure that nothing is done to detract from the image of the courts and the broad confidence of the people in the courts by wrong and undesirable appointments of judges.

2.4. Nothing counts more for the judiciary than the confidence it commands As observed by a writer¹ while dealing with a great American Judge :—

"What is it, indeed which makes a Judge ? In the ultimate sense, the greatest of judges are those in whom is placed the greatest confidence as judges. And this confidence goes to the judge who inspires in his brethren on the bench, at the bar, and among the public whom he serves, the conviction that the decision of every question, the weighing of every argument, the resolution of every discretionary issue, will be made selflessly, fearlessly, wisely in so far as wisdom is given to him, and to the best of his understanding of the law which binds him as well as the litigants."

Confidence commanded by the judiciary.

2.5. A person appointed not on merit but because of favouritism or other ulterior considerations can hardly command real and spontaneous respect of the bar. Anyone who is familiar with the working of the courts, can bear testimony to the fact that unless we have persons presiding over the courts who command real and spontaneous respect of the bar, the court proceedings are liable to run into difficulties. In any system of dispensation of justice, much depends upon the personality of judges; the most well-drafted codes and laws would prove to be illusive if those concerned with construing and implementing those laws are lacking in right calibre. The presiding officers' efficiency, tact, devotion, diligence, mastery of law or lack of them can make all the difference in the way the court proceedings are conducted and the cases are handled in courts. It is common experience for the members of the bar to find that some case before one judge takes two hours and before another judge two days. Indeed, in quite a number of cases, the counsel feels more satisfied before the former judge. It would also not be correct to assume that judges who take less time are impatient or do not allow the counsel to put forth full arguments or present necessary facts. While striking a note of caution against the tendency to show undue hurry or impatience in disposal of cases, the Commission would point out that very often the length of time taken in the hearing of a case depends upon the up-take of the judge, his capacity to quickly grasp the points of law and facts and his ability to wade through the maze of facts and legal propositions to the crucial point.

2.6. In the above context, it will be pertinent to repeat what was said by us in the 79th Report of this Commission²—

Observations in 79th Report.

"3.15. We are also of the opinion that every effort should be made to see that the best persons available are appointed to serve on the High Court Bench. The overriding consideration for this purpose should be the merit of the individual. All other considerations must be subordinated to the paramount necessity of having the best available person for the post. Experience tells us that wrong appointments not only affect the image of the courts, they also undermine the confidence in, and respect for, the High Court amongst the litigants, the members of the Bar and the general public. A wrong appointment also affects the quantum of output and the quality of disposal. Cases have also not been unknown when one wrong appointment has deterred competent persons from joining the Bench subsequently despite the entreaties of the Chief Justice.

¹Charles A Horsky, "Augustuz Noble Hand", in (1935) 68 Harvard Law Review, 1118, 1119.

²79th Report, paragraphs 3.15 and 3.16.

"3.16. Also, with a view to attracting persons of the right calibre to the Bench, something may have to be done to improve the service conditions. This might also take into account the benefits, including pension, to which they would be entitled after retirement. While it is true that the pay-scales of the judges cannot be wholly divorced from the general pattern of pay structure of the country at the higher levels, it has also to be borne in mind that bright and capable members of the Bar by sticking to the profession can earn much more. In the eyes of some there may be a halo around the office of judgeship. The halo has, however, been getting dimmer and dimmer with the efflux of time, the rising spiral of prices and the disparity between the professional income and the salary of judges. We must take note of the fact that some measures have recently been adopted to improve the service conditions of the High Court Judges by providing them rent-free house and giving them a conveyance allowance. However, having regard to the existing tax laws, the steps taken in this respect may perhaps not provide adequate relief."

Earlier Law Com- of merit, the Law Commission headed by Shri M. C. Setalvad in its Fourteenth Report observed¹ :—

"The selection of a person on considerations other than of merit has far-reaching repercussions. Such a Judge would naturally not receive from members of the Bar, who would be no strangers to his capacity, the full measure of co-operation which is needed for the proper administration of justice; nor would a Judge so appointed generally have that amount of confidence in himself which alone can contribute to the efficient discharge of his duties. These circumstances are bound to affect adversely the quantity and the quality of the work turned out by such a Judge. It is axiomatic that the lowering of judicial standards must adversely affect the efficient administration of justice. It has been stated in some quarters that the larger the number of Judges, the lower is the proportionate output of work. We are of the view that such a generalisation is not based on any acceptable data; but what seems to have led to lower output of work by Judges is the appointment of persons who are not satisfactory. Whether a Judge of a High Court is selected from the Bar or from the service, he should be the fittest person available to hold that office. If this cardinal principle is over-looked in making the appointment and persons of indifferent capacity are appointed, the work turned out by such persons will naturally not come up to the proper standards. If, therefore, there has been in some cases a proportionately lower output of work when a larger number of Judges are appointed, the fall in the work is clearly attributable to the circumstances that the persons added were not fitted for the office. The inevitable effect of appointments of this character to the High Court Bench on the disposal of work and the mounting arrears is obvious."

Effect of wrong appointment. **2.8.** The effect of wrong or improper appointment is felt not only for the time being; its repercussions are felt long thereafter. It also quite often has the effect of dissuading other suitable persons from subsequently accepting offers for appointment. It, therefore, becomes essential to eliminate, as far as possible, the chances of favouritism and plug other loopholes with a view to ensure that in future persons of the right calibre are appointed and that the consideration which might weigh should be of merit alone.

¹14th Report, Vol. 1, page 70, paragraph 9

CHAPTER 3

POSITION IN VARIOUS COUNTRIES

3.1. The provisions as to the appointment of Judges in the other countries afford some interesting material. It would be tedious to discuss here the position in each country in this regard. But a few major countries may be dealt with.

3.2. Under the constitutional scheme in several countries, the appointment of judges to the superior courts is made by the Government in the name of the Head of the State, and there is no special provision for consultation with any other person or authority. In this category fall Australia^{1,2}, Canada and the United Kingdom—to mention some of the principal examples in the Commonwealth.

3.3. In the United Kingdom, all the superior Judges,—that is to say, the United Judges of the House of Lords (the Lords of Appeal, who sit in the House of Lords), Judges of the Court of Appeal, Judges of the High Court, Circuit Judges and Recorders,—are appointed by the Crown acting on the advice of the appropriate Minister. The Prime Minister nominates the Law Lords, the Lord Justices of Appeal, the Lord Chief Justice, the Master of the Rolls and the President of the Family Division.³ It is commonly assumed that the Prime Minister is guided in this respect by the Lord Chancellor.⁴

The Lord Chancellor nominates ordinary (puisne) Judges of the High Court, Circuit Judges, Recorders and Deputy High Court and Circuit Court Judges.⁴

3.4. In Australia,⁵ Judges of the High Court and other Courts created by Parliament shall be appointed by the Governor-General-in-Council and shall not be removed except by the Governor-General-in-Council on an address from both the Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity.

3.5. Each State in Australia has a Supreme Court and a system of subordinate courts with a variety of names. A distinguished writer⁶ has stated the position relating to the appointment of judges in these terms:—

"Supreme Court judges, like High Court justices are appointed by the executive,⁷ but can be removed only by the respective parliaments..... No important party has ever advocated elective judges or magistrates."

As to State Courts in Australia, it has been stated⁸—

"State courts are created by State law; their existence depends upon State law; that law, primarily at least, determines the constitution of the court itself, and the organization through which its powers and jurisdictions are exercised."

3.6. Recently, Sir Garfield Barwick, Chief Justice of Australia, made the following suggestion⁹ as to the manner of selection of the judiciary and as to the need of restraint upon executive appointment of the judiciary:—

"In my view, the time has arrived in the development of this community and of its institutions when the privilege of the Executive Government in this area should at least be curtailed. One can understand the reluctance of a government to forgo the element of patronage which may inhere in the appointment of a judge. Yet I think that long term considerations in the administration of justice call for some binding restraint of the exercise of this privilege."

¹Section 72, Commonwealth of Australia Constitution Act, 1900.

²See, however, paragraph 3.6, *infra* as to Australia.

³Jackson, Machinery of Justice in England (1977), Pages 859-460.

⁴Jackson, Machinery of Justice in England (1977), page 460.

⁵Section 72, Commonwealth of Australia Constitution Act, 1900.

⁶Geoffrey Sawar, Australian Government Today, Fifth Edition—revised (1957), page 42.

⁷Note the plural.

⁸*Le Mesurier v. Cannon*, (1929) 42 C.L.R. 481, 495-496.

⁹Sir Garfield Barwick, "The State of the Australian Judicature" (July, 1977) Vol. 51, Australian Law Journal, 480, 494 (19th Australian Legal Convention, Sydney).

I make bold to suggest that, in all the systems of Australia where appointments to judicial office may be made by Executive Government, there should be what is known in some systems as a judicial commission—but the nomenclature is unimportant—a body saddled with the responsibility of advising the Executive Government of the names of persons who, by reason of their training, knowledge, experience, character and disposition, are suitable for appointment to a particular office under consideration. Such a body should have amongst its personnel judges, practising lawyers, academic lawyers and, indeed, laymen likely to be knowledgeable in the achievements of possible appointees. Such a body is more likely to have an adequate knowledge of the qualities of possible appointees than any Minister of State is likely to have. Some may prefer to pass the actual choice of appointees to such a body: others may prefer that recommendations only may be made by it; yet others may prefer to require the submission by that body of a short panel of names, outside of which the Executive Government may not go: or may not go without public explanation of the reason for doing so.

“It is not for me to express here my own preferences. It should suffice that I say with a degree of emphasis that the time is here when some restraint should be placed upon and accepted by the Executive Government in its choice of judicial appointees.”

Canada.

3.7. In Canada,¹ judges of the superior courts are appointed by the Governor General and hold office during good behaviour, but are removable by the Governor General on the address of the Senate and House of Commons.¹

According to a statutory provision,² “the Supreme Court shall consist of a Chief Justice to be called the Chief Justice of Canada and eight puisne judges who shall be appointed by the Governor-General-in-Council by letters patent under the Great Seal”.

3.8. In the U.S.A., the selection of the Chief Justice and Judges of the Supreme Court of the United States is made by the President and is required to be approved by the Senate.³

3.9. As regards (Federal) Courts of Appeal in the U.S.A., the Constitution requires the same procedure.³ Recently, by Presidential Order, a “Circuit Judges Nomination Commission” has been established to supply the President with names of the “best qualified persons for appointment to the U.S. Courts of Appeal”. Details of the relevant provisions of the Order will be found in an Appendix.⁴

3.10. As regards judges of superior courts in States in the U.S.A., the position has been thus stated in a fairly recent study:⁵

“Judicial Selection in the States

In the states, judges are selected by election, by appointment, or by a combination of both methods. The practice of electing judges was one of the bequests of Jacksonian democracy. Prior to 1832 only one state elected all its judges, but every state admitted to the Union from 1846 to 1959 has provided for the election of all or most of its judges. In 1971 election was the principal method of judicial selection in twenty-seven states (on partisan ballot in fourteen states and nonpartisan in thirteen); the legislatures elected the judges in four states; there was executive appointment in nine states; and a ‘merit plan’ existed in eleven states.

“The merit plan, also called the Missouri plan, is a compromise between appointing and electing judges. Under this arrangement several commissions are established to nominate judges at different court levels. The appellate commission consists of seven members; the chief justice of the state, three lawyers elected by the state bar association, and three persons appointed by

¹Sections 96 to 99, British North America Act, 1867.

²Revised statutes of Canada (1970), Chapter S-19, section 4; Gall, The Canadian Legal System (1977), page 107.

³Constitution of U. S. A., Article II, Section 2 and Article III, section 1.

⁴See Appendix 1.

⁵Murphy & Pritchett, Courts, Judges and Politics (1974) page 163.

the governor, none of whom can be a public office holder or an official of a political party. With the exception of the chief justice, these members serve for six years, with their terms staggered so that two retire every other year. The commission nominates three men for each judicial vacancy. The governor must appoint one of the three. At the first election after the new judge has served for twelve months, his name is put on the ballot with the question whether he should be retained in office. If elected, he serves a definite term—twelve years for an appellate judge, six years for a trial judge. At the end of this term he is eligible for re-election. Whether the Missouri plan really recruits judges on the basis of merit is open to question. (Reading 6.8). What is clear is that selection is no less political although the political arena tends to be that of bar associations, rather than a public forum in which citizens have a check if not a voice.”

3.11. In the U.S.S.R., the Constitution of 1977 provides as follows:— U.S.S.R.

“*Article 151.* In the U.S.S.R. justice is administered only by the courts.

“In the U.S.S.R. there are the following courts: the Supreme Court of the U.S.S.R., the Supreme Courts of Union Republics, the Supreme Courts of Autonomous Republics, Territorial, Regional, and city courts, courts of Autonomous Regions, courts of Autonomous Areas, district (city) people's courts, and military tribunals in the Armed Forces.

“*Article 152.* All courts in the U.S.S.R. shall be formed on the principle of the electiveness of judges and people's assessors.

“People's judges of district (city) people's courts shall be elected for a term of five years by the citizens of the district (city) on the basis of universal, equal and direct suffrage by secret ballot. People's assessors of district (city) people's courts shall be elected for a term of two and a half years at meetings of citizens at their places of work or residence by a show of hands.

“Higher courts shall be elected for a term of five years by the corresponding Soviet of People's Deputies.¹

“The judges of military tribunals shall be elected for a term of five years by the Presidium of the Supreme Soviet of the U.S.S.R. and people's assessors for a term of two and a half years by meetings of servicemen.

“Judges and people's assessors are responsible and accountable to their electors or the bodies that elected them, shall report to them, and may be recalled by them in the manner prescribed by law.

“*Article 153.* The Supreme Court of the U.S.S.R. is the highest judicial body in the U.S.S.R. and supervises the administration of justice by the courts of the U.S.S.R. and Union Republics within the limits established by law.

“The Supreme Court of the U.S.S.R. shall be elected by the Supreme Soviet of the U.S.S.R. and shall consist of a Chairman, Vice-Chairman, members, and people's assessors. The Chairmen of the Supreme Courts of the Union Republics are *ex-officio* members of the Supreme Court of the U.S.S.R.

“The organisation and procedure of the Supreme Court of the U.S.S.R. are defined in the law on the Supreme Court of the U.S.S.R.

“*Article 154.* The hearing of civil and criminal cases in all courts is collegial; in courts of first instance cases are heard with the participation of people's assessors. In the administration of justice people's assessors have all the rights of a judge.

“*Article 155.* Judges and people's assessors are independent and subject only to the law.

“*Article 156.* Justice is administered in the U.S.S.R. on the principle of equality of citizens before the law and the court.”

3.12. In France, there is provision for consultation by the head of the France. State with a high-powered body, which advises the head of the State on the appointment of judges of the superior courts.

The provisions of the Constitution of the Fifth French Republic (1958), appearing in the Title relating to “Judicial Authority”, are quoted below in so far as they are material:²

¹As to Soviets of People's Deputies, see Article 89.

²Constitution of the Fifth French Republic (1958), Title VIII, Articles 64 and 65.

"Article 64. The President of the Republic shall be the guarantor of the independence of the judicial authority.

"He shall be assisted by the High Council of the Judiciary.

*"Article 65. The High Council of the judiciary shall be presided over by the President of the Republic. The Minister of Justice shall be its Vice President *ex-officio*. He may preside in place of the President of the Republic.*

"The High Council shall, in addition, include nine members appointed by the President of the Republic in conformity with the conditions to be determined by an organic law.

"The High Council of the Judiciary shall present nominations for judges of the Court of Cassation (Supreme Court of Appeal) and for First Presidents of Courts of Appeal. It shall give its opinion, under the conditions to be determined by an organic law, on proposals of the Minister of Justice relative to the nomination of the other judges. It shall be consulted on questions of pardon under conditions to be determined by an organic law.

*"The High Council of the Judiciary shall act as a disciplinary council for judges. In such cases, it shall be presided over by the First President of the Court of Cassation."*¹

West Germany. **3.13.** In (West) Germany, we find two separate methods of appointment of judges prescribed by the Constitution. As regards the Federal Constitutional Court,² which is not an ordinary court of appeal but deals only with questions relating to interpretation of the Constitution and the validity of laws, the Constitution provides as follows:—

"94(1). The Federal Constitutional Court shall consist of federal judges and other members. Half of the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not belong to the Bundestag, the Bundesrat, the Federal Government, or the corresponding organs of a Land."

Besides the Federal Constitutional Court, there is the Supreme Court of Germany established "to preserve the uniformity of federal law", by deciding cases in which the decision is of fundamental importance for the uniformity of the administration of justice by the high federal courts. The constitutional provisions as regards the appointment of judges of this Court read as follows³:—

"The judges of the Supreme Federal Court shall be selected jointly by the Federal Minister of Justice and a committee for the selection of judges consisting of the Land Minister of Justice and an equal number of members elected by the Bundestag."

Japan. **3.14.** The position in Japan is as follows:⁴

The Judges of the Supreme Court of Japan are appointed by the Cabinet, except the Chief Justice (described in the Constitution as "Chief Judge") who is formally appointed by the Emperor after nomination by the Cabinet.

The Constitution further provides—

"The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10 years) and in the same manner thereafter."

*"In cases mentioned in the foregoing paragraph, when the majority of the voters favours the dismissal of a judge, he shall be dismissed."*⁵

3.15. Equally interesting are the provisions in the Constitutions of some countries that have newly acquired independence from British rule—countries which were previously British colonies. In these countries, Judicial Service Commissions are provided for in the Constitution. Their functions, in general, are to give advice on the appointment of superior Judges (other than the Chief Justice and the President of the Court of Appeal, if any), and to exercise control in regard to inferior Judges.

Certain Commonwealth countries providing for Judicial Service Commission.

¹See also Constitution of Italy, Articles 104-105.

²Article 94(1), Basic Law of the German Federal Republic.

³Article 95(3), Constitution of the German Federal Republic.

⁴Articles 6 and 79, Constitution of Japan.

⁵Constitution of Japan, Article 72(2), (3).

The Constitution of Malawi¹⁻² affords an example. The relevant provisions read :

"63. (1) The Chief Justice shall be appointed by the President.

"(2) The Judges shall be appointed by the President after consultation with the Judicial Service Commission.

"67. (1) There shall be a Supreme Court of Appeal for Malawi which, subject to the provisions of this Constitution, shall have such jurisdiction and powers as may be conferred on it by this Constitution or by any other law.

(2) The Justices of the Supreme Court of Appeal shall be —

(a) the Chief Justice, "as President";³

(b) such number of Justice of Appeal (if any) as may be prescribed by Parliament; and

(c) the other Judges of the High Court for the time being holding office.

.....

"71. There shall be a Judicial Service Commission which shall consist of —

(a) the Chief Justice, who shall be Chairman;

(b) the Chairman of the Public Service Commission or such other member of that Commission as may for the time being be designated in that behalf by the Chairman of that Commission; and

(c) such Justice of Appeal or Judge as may for the time being be designated in that behalf by the President acting after consultation with the Chief Justice."

3.16. The earliest precedent for Judicial Service Commission is to be found (Sri Lanka) in the erstwhile Constitution of Ceylon (now Sri Lanka).⁴ Ceylon.

According to articles 52 to 56 of that Constitution, the Chief Justice and puisne judges of the Supreme Court and the Commissioners of Assize were required to be appointed by the Governor-General, while other judicial officers were required to be appointed by the Judicial Service Commission consisting of the Chief Justice, a judge of the Supreme Court and one other person.

3.17. Then, the Constitution may contemplate that the head of the State may consult a body which does not consist entirely of the judiciary, and which is also not a branch of the Legislature.⁵ Consultation with other bodies.

3.18. It would be useful to analyse the material contained in the above discussion. The various provisions fall into the following broad groups:—

- (a) no special provision for consultation before appointing judges;
- (b) provision for consultation with the Chief Justice or other members of the judiciary before appointing judges;
- (c) provision for consultation with a judicial council, judicial service commission or other similar body;
- (d) provision for consultation with the legislature, or a body elected by it, or approval of the legislature;
- (e) provision for consultation with, or approval of, an agency not falling within the above category; and
- (f) election of the Judges.

¹Constitution of Malawi, Articles 63, 67 and 71.

²See also Constitution of Uganda, Articles 90, 91, 97; Jamaica, Session 11; Kenya, Section 174 (1); Malaysia, Article 138; Sierra Leone, Sections 76(1), (2), 80(1), (2) and 85; Trinidad, Sections 75 and 79.

³Deleted by the Constitution of Malawi (Amendment) Act No. 39 of 1966.

⁴Paragraphs 52(1), 53, 54, 55, 56, Ceylon Constitution Order in Council. Peaseless Constitutions of Nations, 2nd Ed. (1956), Vol. 1, pages 464, 465.

⁵Constitution of Nepal, Articles 69, 23(1) and 23(2).

CHAPTER 4
HISTORICAL BACKGROUND
I. GOVERNMENT OF INDIA ACT, 1935

**Govern-
ment
India
Act,
1935.** **4.1.** The Government of India Act, 1935 contained no specific provisions of about the persons who had to be consulted before appointment of Federal Court Judges and High Court Judges. Sub-sections (2) and (3) of section 200 of the Act, which dealt with appointment of Federal Court Judges, provided :¹

“(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains age of sixty-five years :

Provided that—

(a) a judge may by resignation under his hand addressed to the Governor-General resign his office;

(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(a) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(a) has been for at least five years a judge of a High Court in British India or in a Federal State; or

(b) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(c) has been for at least ten years a pleader of a High Court in British India or in a Federal State or of two or more such Courts in succession :

Provided that—

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader; and

(ii) in relation to the Chief Justice of India, for the references in paragraphs (b) and (c) of this sub-section to ten years there shall be substituted references to fifteen years.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included.”

4.2. Sub-sections (2) and (3) of section 220 of the above-mentioned Act related to the appointment of High Court Judges, and were in the following terms :²

“(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years :

Provided that—

(a) a judge may, by resignation under his hand addressed to the Governor resign his office;

“(b) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

¹Section 200(2) and 200(3), Government of India Act, 1935.

²Section 220(2), and (3), Government of India Act, 1935.

(c) the office of a judge shall be vacated by his being appointed by His Majesty to be a judge of the Federal Court or of another High Court.

"(3) A person shall not be qualified for appointment as a judge of a High Court unless he —

(a) is a barrister of England or Northern Ireland, of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing, or

(b) is a member of the Indian Civil Service of at least ten years standing, who has for at least three years served as, or exercised the powers of, a district judge ; or

(c) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge, or judge of a small cause court; or

"(d) has for at least ten years been a pleader of any High Court, or of two or more such Courts in succession :

Provided that a person shall not, unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a Judge of a High Court.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which the person has held judicial office after he became a barrister, a member of the Faculty of Advocates, or a pleader, as the case may be, shall be included.

II. CONSTITUENT ASSEMBLY AND ITS COMMITTEES

4.3 There was considerable discussion in the Constituent Assembly, and ^{Discussions in the various Committees which were appointed in connection with the appointment of Judges and other allied matters. Almost simultaneously with the constituent} Committee of the ^{Constituent} Assembly ^{—Union} set up to consider and report on the constitution and powers of the Supreme Court. This Committee consisted of S. Varadachariar, former Judge of the Federal Court, Alladi Krishnaswami Ayyar, B. L. Mitter, K. M. Munshi (all ^{Committee, and} three of them distinguished advocates) and B. N. Rau, the Constitutional Adviser ^{ad hoc} who had also earlier held high judicial office. This Committee, in its report ^{on} sent on May 21, 1947, apart from ² dealing with the jurisdiction of the Supreme Court, suggested two alternative procedures for appointment of Judges to the Supreme Court. The Committee was emphatic in its opinion that the appointment of Judges should not be left to the unfettered discretion of the executive.

One suggested procedure was that for the appointment of puisne judges, the President should, in consultation with the Chief Justice of the Supreme Court, make a recommendation and such recommendation should be confirmed by at least seven out of a panel of eleven persons composed of some of the Chief Justices of the High Courts, members of the Central Legislatures and some law officers of the Union. The alternative suggestion was that the panel should put forward three names for every vacancy, leaving it to the President to make the final choice in consultation with the Chief Justice of the Supreme Court. The same procedure with the necessary modification that the Chief Justice would not be consulted was also to apply in the matter of the appointment of the Chief Justice of the Supreme Court. In order to ensure that the panel would be independent and would command confidence, it was suggested that the panel should not be an ad hoc body but should function for a period of ten years.

The extract from the report of this Committee in this respect reads :

"We do not think that it will be expedient to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Union. We recommend that either of the following methods may be adopted. One method is that the President should, in consultation with the

¹Ad hoc Committee on Supreme Court.

²Ad hoc Committee on Supreme Court (21st May, 1947), Report, being the appendix to the Report of the Union Constitution Committee; B. Shiva Rao, The Framing of India's Constitution (1967), Vol. 2, pages 587, 590.

Chief Justice of the Supreme Court (so far as the appointment of *puisne* judges is concerned), nominate a person whom he considers fit to be appointed to the Supreme Court and the nomination should be confirmed by a majority of at least 7 out of a panel of 11 composed of some of the Chief Justices of the High Courts of the constituent units, some members of both the Houses of the Central Legislature and some of the Law Officers of the Union. The other method is that the panel of 11 should recommend three names out of which the President, in consultation with the Chief Justice, may select a Judge for the appointment. The same procedure should be followed for the appointment of the Chief Justice, except, of course, that in this case there will be no consultation with the Chief Justice. To ensure that the panel will be both independent and command confidence, the panel should not be ad hoc body but must be one appointed for a term of years.

Memorandum of Constitutional Adviser.¹ in his memorandum dated May 30, 1947 suggested that the appointment of Judges should be made by the President with the approval of at least two-thirds of the Council of State. The Council of State, according to him, was to be a body in the nature of a Privy Council for advising the President on certain matters on which decisions were required on independent non-party lines. The Council of State was to include the Chief Justice of India among its members and its composition was to be such as to secure freedom from party bias. Such a Council of State, it was suggested by the Constitutional Adviser, would be a satisfactory substitute for the panel recommended by the Special Committee.²

4.5. The Union Constitution Committee³ did not accept the proposal of the Constitutional Adviser for setting up of a Council of State, and suggested that the procedure for the appointment of judges should be that the President should consult the Chief Justice and such other judges of the Supreme Court as might be necessary.

4.6. It may be appropriate at this stage to refer to an amendment suggested by the Drafting Committee.⁴ According to the suggestion, an Instrument of Instructions was to be issued to the President. One of the provisions proposed to be included in the Instrument of Instructions was the setting up of an Advisory Board consisting of not less than 15 members of Parliament. The procedure contemplated for the appointment of Supreme Court Judges was:⁵

- (1) in the case of the Chief Justice of India, the President would consult the Judges of the Supreme Court and the Chief Justices of all High Courts other than those in Part III States (the Indian States);
- (2) in the case of other judges he would consult the Chief Justice of India, the other judges of the Supreme Court and the Chief Justices of the High Courts, other than those in Part III States;
- (3) the recommendations of the judges so consulted would be placed before the Advisory Board for its advice. The functions of the Board were consultative and the final decision rested with the executive, but in any case where the Board's advice was not accepted it could insist that its dissent should be recorded and placed before Parliament with a memorandum explaining the reasons for not accepting the advice tendered by the Board."

4.7. In the course of discussion which followed in the Constituent Assembly, Dr. Ambedkar⁶ dealt with two suggestions. The first suggestion was that the appointment of Judges of the Supreme Court should be with the concurrence of Chief Justice. The second suggestion was that the approval of Parliament or, alternatively, of the Council of States would be necessary to these appointments. Dr. Ambedkar did not accept any of these suggestions. According to him, to make appointment subject to the veto of Parliament would be cumbersome and might involve the possibility of political pressures being exerted. He also expressed the view that to give any individual,—even an

¹Constitutional Adviser, Memorandum dated May 30, 1947; B. Shiva Rao, *The Framing of India's Constitution*, Main Volume (1968), pages 338, 339, 485.

²Para. 4.3, *supra*.

³Union Constitution Committee, Report, Clause 18; B. Shiva Rao, *The Framing of India's Constitution* (1967), Vol. 2, pages 583, 600; Main Volume, pages 335, 383, 485.

⁴Drafting Committee (February 1948), Draft Constitution Article 103(2); B. Shiva Rao, *The Framing of India's Constitution* (1967), Vol. 3.

⁵B. Shiva Rao (1968). Main Vol., page 491.

⁶Dr. Ambedkar in the C. A. Debates, Vol. 8, pages 257-260 at page 258 (24th May, 1948).

eminent person like the Chief Justice,—a power of veto might be a dangerous proposition. Dr. Ambedkar in this context observed:

"With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, offices of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States. It seems to me, in the circumstances in which we like today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are, *ex hypothesi*, well qualified to give proper advice in matters of this sort and my judgment is that this sort of provision may be regarded as sufficient for the moment.

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

III. HIGH COURT JUDGES

4.8. Regarding the appointment of High Court Judges, there was general agreement that as in the case of Supreme Court Judges, the appointment of ^{High Court Judges.} Judges of the High Court should also not be left to the unfettered discretion of the executive government. The Constitutional Adviser, in his memorandum of May 30, 1947 on the Provincial Constitution,¹ included a general suggestion that provisions of the Government of India Act, 1935 regarding High Courts might be adopted with necessary changes. On the specific question of appointment of High Court Judges, his proposal was that the High Court Judges should be appointed by the Governors with the approval of two-thirds of the members of the Council of State.²

4.9. The Provincial Constitution Committee³ accepted this proposal. In ^{In Provincial} the meantime, the proposal to set up a Council of State was abandoned. The ^{Constitu-} Committee accordingly proposed that the Judges of the High Court should ^{tion Com-} be appointed by the President of the Federation in consultation with the Chief ^{mittee.} Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court, except when the Chief Justice himself was to be appointed.⁴

¹Constitutional Adviser, Memorandum dated 30th May, 1947; B. Shiva Rao, *The Framing of India's Constitution* (1968), Main Volume, page 497.

²The Council of State as proposed was a body in the nature of a Privy Council. See para. 4.4, *supra*.

³Provincial Constitution Committee Report, Part II, para 1; B. Shiva Rao, *The Framing of India's Constitution* (1967), Vol. 2, pages 656, 662, (June-July 1947).

⁴For various suggestions received, see B. Shiva Rao, *The Framing of India's Constitution* (1967), Vol. 2, pages 629-630.

CHAPTER 5

CONSTITUTIONAL PROVISIONS AND THE PRESENT PRACTICE

Articles 124 and 217. **5.1.** The constitutional provisions as they finally emerged on the subject of appointment of Judges of the Supreme Court and of the High Courts are contained in articles 124 and 217. According to article 124, every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for this purpose and shall hold office until he attains the age of 65 years, provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. The article also provides that a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or is, in the opinion of the President, a distinguished jurist.

5.2. Article 217 provides that every Judge of a High Court shall be appointed by the President by a warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office, in the case of an additional or acting Judge, as provided in article 224 and in any other case, until he attains the age of sixty-two years. (This age was initially 60, but was raised to 62 as a result of subsequent amendment). Clause (2) of article 217 provides that a person shall not be qualified for appointment as a judge of the High Court unless he is a citizen of India and has for at least ten years held a judicial office in the territory of India; or has for at least ten years been an advocate of a High Court or of two or more such Courts in succession; or is, in the opinion of the President, a distinguished jurist. The provision according to which the President could also appoint a person who, in his opinion, was a distinguished jurist was added in article 217 as a result of the 42nd amendment, and has since then been deleted by the 44th Amendment.

Article 224- Additional Judges. **5.3.** Article 224, to which there is a reference in article 217, provides for the appointment of additional and acting Judges of the High Court and states that if by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional judges of the Court for such period not exceeding two years as he may specify. It is further stated that when any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has assumed his duties. No person appointed as an additional or acting Judge of a High Court shall, however, hold office after attaining the age of sixty-two years.

Present practice. **5.4.** The manner in which the constitutional provisions regarding appointment of Judges are worked can be best understood if we describe the present practice. For the appointment of a Judge of the Supreme Court, whenever a vacancy occurs, the Chief Justice of India intimates that fact to the Minister of Law and Justice and recommends the name of a suitable person for filling up the vacancy. If the Minister of Law and Justice agrees with the recommendations of the Chief Justice of India, he, with the concurrence of the Prime Minister, advises the President of the selection. In case the Minister has some reservations about the person recommended by the Chief Justice of India, he can consult such Judges of the Supreme Court and the High Court as he may deem necessary and, after the consultation, may bring any point to the notice of the Chief Justice of India or suggest the name of any other person not recommended by the Chief Justice of India. On obtaining the views of the Chief Justice, the Minister of Law and Justice, with the concurrence of the Prime Minister, advises the President of the selection.

5.5. Whenever a permanent vacancy is expected to arise in the office of the Chief Justice of India, action is taken by the Minister of Law and Justice. There has also been a convention for the outgoing Chief Justice of India to make a recommendation regarding the appointment of his successor though, under the Constitution, no such recommendation is required.

5.6. Regarding the appointment of High Court Judges, the present practice has been summarised in the report¹ of the Study Team on Centre-State Relations of the Administrative Reforms Commission and the same reads:

“13.5. According to a Memorandum of Procedure drawn up as a drill to implement this provision, when a permanent vacancy is expected to arise in the office of a Judge, the Chief Justice communicates, as early as possible, to the Chief Minister of the State his views as to the person to be selected for permanent appointment. The Chief Minister, in consultation with the Governor, forwards his recommendation to the Union Minister of Home Affairs, along with full details of the person recommended. When the Chief Minister or the Governor proposes to recommend a person different from the one put forward by the Chief Justice, the Chief Justice is informed accordingly and his comments invited. These comments are forwarded along with the communication from the Chief Minister to the *Union Minister of Home Affairs*,² who, in consultation with the Chief Justice of India and the Prime Minister, advises the President as to the selection. The same procedure is observed with regard to the appointment of the Chief Justice except that the recommendation for the appointment of a Chief Justice originate from the Chief Minister.

“13.6. The correspondence between the Chief Justice and the Chief Minister and the correspondence between the Chief Minister and the Governor is made in writing and copies of the correspondence are forwarded to the Union Minister of Home Affairs along with the Chief Minister's recommendation. The Chief Justice has, however, recently (and after consideration of the Law Commission's report) been authorised to send directly to the Union Minister of Home Affairs and the Chief Justice of India a copy of his correspondence with the Chief Minister.

“13.7. As soon as the appointment is approved, the Home Secretary informs the Chief Minister, who obtains from the person selected—

- (a) a certificate of physical fitness signed by the Civil Surgeon or the District Medical Officers ; and
- (b) a certificate of the date of his birth.

“The Chief Minister forwards the documents to the Ministry of Home Affairs. Medical certificates are obtained from all persons selected for appointment whether they are at the time of appointment in the service of state government or not. After the warrant of appointment is signed by the President the appointment is announced and the Home Ministry issues the necessary notification in the Gazette of India.

“13.8. The procedure for the appointment of additional judges is substantially the same. The general policy is not to appoint members of the Bar as acting judges and to appoint them as additional judges only if they are likely to be appointed to permanent vacancies during their period of tenure as additional judges.

“13.9. According to Article 163 of the Constitution, the Council of Ministers with the Chief Minister at the head is to aid and advise the Governor in the exercise of his functions, except in those cases where the Governor is required to exercise his functions or any of them in his discretion. In the matter of appointment of judges of a High Court, the Governor acts not in his discretion but on the advice of the Chief Minister.”

5.7. It may be mentioned that some variation in the practice has been made in the case of appointment of a Judge to a High Court which is common to two or more States having a common Governor as well as to a High Court which is common to two or more States, each having a separate Governor. In such cases the Chief Minister of each of such States as well as the common

Variation in
above descrip-
tion in
regard to
High Court
common to
two States.

¹Study Team of the Administrative Reforms Commission on Centre-State Relations (1967), Vol. 1, pages 182-184, para. 13.5 to 13.9.

²Minister of Law and Justice has now been entrusted with the above functions of the Minister of Home Affairs in pursuance of the recommendations of Administrative Reforms Commission.

Governor or each one of the Governors, as the case may be, comes in the picture and has to be consulted.

View expressed by Chief Justice Madras in 1947. **5.8.** It may be mentioned that in 1947, the then Chief Justice of the Madras High Court expressed misgivings about the procedure relating to the appointment of Judges as, according to that procedure, the Ministers were also brought into the picture, as against the earlier procedure in which the Governor or Governor-General acted without taking the advice of the Minister in this matter. Sardar Patel, who was the Home Minister, defended the change made in the procedure in his letter dated 8th December, 1947 to the Governor-General of India,¹ in the course of which he observed:

“.....obviously the previous procedure becomes out of date and in the new order of things recommendations must go from the provincial Ministers or Prime Minister to the Minister concerned in the Central Government. To assign those respective roles to the Governor and the Governor-General would be casting upon them the burden of explaining proposals or decisions, interim or final, with which they may not be wholly in sympathy but which nevertheless they are bound to accept on advice. This in my opinion is neither fair nor proper. I am quite clear in my mind that the procedure which we have devised does full justice to the constitutional position which obtains now and places responsibility fairly and squarely where it should be placed..... Indeed the procedure which has been devised is calculated to reduce practically to vanishing point, favouritism of all forms, be it of the Chief Justice or of the politicians, by making the final appointment the result of deliberations between the Chief Justice, the Prime Minister and the Governor of the province and the Chief Justice of India, the Home Minister, the Prime Minister and the Governor-General of the Dominion. In such a situation it is ridiculous to entertain apprehensions such as the Chief Justice has done.”

Impression about appointment of Judges to the High Court. **5.9.** The impression, nevertheless, has prevailed that the appointment of the Judges to the High Court has not been always made on merit and that this has affected the image of the High Courts. This impression was strengthened by the fourteenth Report of the Law Commission under the Chairmanship² of Shri M. C. Setalvad sent on September 26, 1958. The Commission, while noting 14th Report, that most of the appointments had been made with the concurrence of all concerned, including the Chief Justice of the High Court and the Chief Justice of India, observed that with the prevailing procedure the Chief Justices of the High Courts gave their concurrence to prevent awkward situations arising from the appointment of persons not recommended by them or from the rejection by the executive of the persons recommended by them. In the view of the Commission, many unsatisfactory appointments were made to the High Courts on political, regional, communal or other grounds with the result that the fittest men were not appointed. This resulted, the Commission found, in dimunition in the out-turn of the work of the Judges. The Commission all the same expressed the view that the practice of consultation with the State executive should be adhered to and was necessary before appointments were made to the High Court. The Commission made in this connection the following recommendations³:

(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.”

¹Sardar Patel, letter dated 8th December, 1947.

²For summary, see 14th Report, Vol. 1, pages 105-107, para. 82.

³14th Report, Vol. 1, page 106, para. 82.

5.10. The Report of the Law Commission was discussed by the ~~Parlia-~~ ^{Debate in} ~~Rajya~~ ^{Rajya} ~~Sabha on~~ ^{on} November, 1959. Intervening in the debate¹ in the Rajya Sabha on November 24, 1959, the then Home Minister referred to the fact that since 1950, 211 appointments had been made and out of them all except one, i.e., 210 out of 211, were made on the advice or with the consent or concurrence of the Chief Justice of India. Of these, 196 were with the support of all persons who were connected in the matter. The Home Minister also pointed out that there were 15 cases in which there had been difference of opinion between the Chief Justice and the Chief Minister or the Governor.

5.11. The Government of India considered the recommendations of the Law Commission reproduced above and mentioned as recommendations 11, 12 and 14 and rejected all three of them. In rejecting the first two recommendations, the Government relied on the fact that no nominee was considered without taking into consideration the views of the Chief Justice of the High Court concerned, and in all cases the recommendations of the Chief Justice of India had been accepted. The third recommendation of the Law Commission that all appointments should be made with the concurrence of the Chief Justice of India was rejected on the ground that it departed from the spirit of the Constitution and fettered the ultimate decision of the Government of India.

5.12. The procedure for the appointment of the Judges of the High Court was gone into again by a Study Team on Centre-State Relations of the Administrative Reforms Commission.² This team was also headed by Shri M. C. Setalvad. This team considered the three recommendations of the Law Commission referred to earlier. The team urged that the recommendations nos. 11 and 12 might be accepted by the Government. It was pointed out by the Study Team that the recommendations did not amount to bypassing the constitutionally elected representatives. The President, as the head of the Executive, it was stated, would, even in the arrangement visualised by the Commission, make appointment on the advice of the constitutionally elected Government at the Centre. These two recommendations, in the opinion of the Team, envisaged a change only in the role of the State executive which was sought to be restricted to commenting on the Chief Justice's proposal instead of making one. The Study Team further suggested that the constitutional provision be amended to dispense with the obligation to consult the Governor. The fact that the budget of the High Court was debited to the State account was not, in the opinion of the Team, a sufficient reason for giving the State executive a say in these appointments. The Team felt that the State Government's comment on a candidate should be restricted to—

- (a) his local position;
- (b) his character and integrity; and
- (c) his affiliations.

5.13. Emphasising the fact that its recommendation would strengthen the independence of the judiciary, the Study Team pointed out that the principle underlying its recommendation was that State Governments should not have, and should not insist upon having, any constitutional right in the matter of appointments to the High Courts. Nepotism by the Chief Justice, in the opinion of the Team, was still possible, but would be less likely and less frequent, as, being outside politics, he was less vulnerable to pressure. The Study Team expected that if its first two recommendations were accepted, political influence exerted at the State level in the appointment of Judges would decline and less blame would attach to the political executive for the unsatisfactory appointments. It would also, in the opinion of the Team, result in greater regard being given to the professional competence.

Regarding the third recommendation no. 14 of the Law Commission that all appointments should have the concurrence of the Chief Justice of India, the Study Team conceded that there was merit in the reasoning of the Government of India in rejecting the recommendation. The Study Team, therefore, did not support the recommendation of the Law Commission in this respect.

¹Rajya Sabha Debates, 24th November, 1959, Vol. 27, Part 1, pages 285, 289 (Shri G. B. Pant).

²Study Team on Centre-State Relations of the Administrative Reforms Commission Report (1967), Vol. 1, page 180 *et seq.*, Chapter 13.

View of Administrative Reforms Commission. **5.14.** The recommendations of the Study Team were considered by the Re-Administrative Reforms Commission.¹ The Administrative Reforms Commission did not agree with the Study Team and felt that the existing procedure and method of appointment of High Court Judges should continue. The Administrative Reforms Commission, however, recommended that the role of the Ministry of Home Affairs should be taken over by the Ministry of Law. This recommendation of the Administrative Reforms Commission was accepted by the Government. Since 1971, a separate Department of Justice has been formed to deal, *inter alia*, with matters relating to appointment of Judges. The Home Secretary is currently designated as Secretary, Department of Justice. The Minister in charge of the Department is, however, the Minister of Law, Justice and Company Affairs. The procedure for appointment of Judges was not, however, changed.

View of High Courts Arrears Committee. **5.15.** The High Courts Arrears Committee headed by Justice J. C. Shah also went into the question and re-iterated in its report the recommendation made by the Law Commission. The Committee also observed :²

“We may recommend that the recommendation with regard to the appointment of a Judge may be sent by the Chief Justice directly to the Governor of the State, and if, within a time to be fixed by convention, say, not exceeding a month, no objection is received to the appointment, the Governor must be deemed to have accepted the recommendation, and the matter may be referred to the Central Government. The Central Government also should take expeditious steps to clear the steps for early appointment before the date on which the vacancy occurs. The scheme of consultation with the Chief Justice of the High Court and the Chief Justice of India in appointment of judges of the High Court will function smoothly if the recommendation made by the Chief Justice of a High Court for appointment of a judge is treated as cleared by the Governor if no objection has been raised by him within a month from the date when the recommendation was received by him and the Central Government will be entitled to deal with the recommendation on that footing.”

The above recommendation was not accepted by the Government as, in its opinion, article 217 made consultation with the Governor mandatory and the ‘‘Governor’’ had been interpreted as acting on the advice of the Chief Minister.

¹Administrative Reforms Commission Report (1969, June) H. D. 24 (Ordinary) Chapter VII, pages 39 and 40.

²High Courts Arrears Committee Report (1972), page 80, para. 128.

CHAPTER 6

RECOMMENDATION AS TO METHOD OF APPOINTMENT OF HIGH COURT JUDGES

I. GENERAL

6.1. We have set out above the historical background of the constitutional provisions relating to the appointment of judges of the High Courts and the Supreme Court, the actual modalities which are adopted in working out those provisions and the various suggestions which have been made off and on for making changes in the working of the scheme and the decision taken on those suggestions. Most of the High Courts to which a reference was made by the Law Commission¹ about the existing scheme of appointment of judges have, in their replies to the Questionnaire, expressed the view that the existing scheme is, by and large, sound.²

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

II. HIGH COURTS: INITIATION OF THE PROCESS

6.3. So far as the appointment of High Court judges is concerned, the initiative in the matter is to be taken, as would appear from the above, by the Chief Justice of the High Court. In order to prevent delay in the appointment and keeping in view the fact that the various steps take considerable time before the matter reaches the final stage, we recommend that in case of normal vacancies arising as a result of retirement the initiative for the purpose should be taken by the Chief Justice not less than six months before the date when the vacancy is going to fall due. Although the period of six months may at first sight appear to some to be too long, taking into account the past experience and the difficulties that quite frequently arise because of the difference of opinion between different authorities who come into the picture, it appears to us to be much more realistic that the initial steps for the purpose are taken six months before the date of vacancy. Adherence to this time schedule would obviate the possibility of vacancies remaining unfilled for a long time after the previous incumbent retires.

6.4. We may in this connection refer to our seventy-ninth Report,³ wherein we observed :

"As mentioned earlier, though the sanctioned judge strength of the High Courts in the country during the year 1977 was 352, only 287 judges on an average were in position. Likewise, in the year 1976, even though the sanctioned strength was 351, only 292 judges were in position. Leaving aside the judges who were entrusted with work outside their normal duties, the fact remains that the number of judges in position in both the years was less than the sanctioned strength. This disparity between the sanctioned strength, and the number of judges in position was apparently due to the fact that vacancies in the posts were not filled in as soon as they occurred. It is our considered opinion that delay in filling in the vacancies is one of the major controlling factors responsible for the piling accumulation of arrears. In our opinion, when a vacancy is expected to arise out of the retirement of a judge, steps for filling in the vacancy should be initiated six months in advance. The date on which such a vacancy will normally arise is always known to the Chief Justice of the High Court and also to others concerned. It should be ensured

¹See Appendix 2.

²See Appendix 3.

³79th Report, para. 3.10.

that necessary formalities for the appointment of a Judge to fill the vacancy are completed by the date on which the vacancy occurs."

Consultation by High Court, the Chief Justice, in our opinion, should also consult his two senior-most colleagues. In the letter containing the recommendation for the appointment, the Chief Justice should state that he has consulted his two senior-most colleagues and also indicate the views of each of those colleagues in respect of the person being recommended. We are conscious of the fact that the Constitution does not make it obligatory for the Chief Justice to consult his colleagues when making the recommendation. Despite the absence of such a requirement, we understand that in some courts the Chief Justice before making the recommendation does consult his two senior-most colleagues while in other courts no such practice is in vogue. Consultation with the two senior-most colleagues, in our opinion, would have a healthy effect and considerably minimise the chances of any possible favouritism. Incorporation of the views of the two senior-most colleagues in the recommendation of the Chief Justice would also enable the other authorities, who come into the picture and who in very nature of things would not have as much personal knowledge about the suitability of the person recommended, to know as to how two other senior colleagues of the Chief Justice feel about the recommendation. It is plain that the two senior-most colleagues of the Chief Justice would generally have as much knowledge about the suitability of the person recommended as would the Chief Justice. At the same time, we would like to emphasise that the views of the senior colleagues of the Chief Justice shall be confined only to comments on the suitability of the person recommended. It would not be open to them to suggest another name for appointment.

Any recommendation of the Chief Justice¹ which carries the concurrence of his two senior-most colleagues should normally be accepted.

III. AGE AND OTHER FACTORS RELATING TO ELIGIBILITY

Age appointment to High Court. for 6.6. We may next deal with the question of age group within which a person may be appointed a judge of the High Court. While considering this aspect, we wish to emphasise that maturity is as much essential in a judge as are the knowledge of law, experience and other proficiencies. Maturity normally comes with years, and while brilliance and quick up-take constitute great qualifications, they cannot provide a substitute for the great faculty which eludes description but which comes as a result of maturity. Keeping in view this fact, we feel that the minimum age at which a person should be appointed a judge of the High Court should be 45. We may add that normally, in our opinion the requisite maturity which is needed for a High Court judge is acquired nearabout the age of 48. We are, however, recommending the minimum age of 45, as we do not want to circumscribe within too narrow limits the area of selection. So far as the upper age limit is concerned, we feel that for persons selected from the Bar, the limit should be 54 years. By that age a member of the Bar, if he has real merit, would have already made a mark and would be considered for selection to the Bench. It is, in our opinion, not desirable to appoint members of the Bar as judges when the tenure on the Bench is going to be less than even eight years. So far as District and other Service Judges are concerned, we do not wish to prescribe any maximum age limit for their appointment, because in some States their turn for appointment may not come till they are about to reach the age of superannuations District or Service Judges.

6.7. We are conscious of the fact that there have been distinguished judges in the past who were appointed at an age younger than that indicated by us and who even at that age made a significant contribution. Those great judges, however, constituted exceptional cases. When laying down a rule, we have to take into account the normal and usual type of cases. We may also add that the age limit indicated by us should, in our view, be ordinarily adhered to. In exceptional cases and for reasons to be stated, it should be open to the authorities concerned to appoint persons who are not within the age group.

Other points concerning eligibility. for the august office of a High Court judge are their competence and efficiency, general reputation for integrity and hard work, attitude of sobriety, balanced approach and dignity they exhibit and are expected to bring to the office of judgeship. Income-tax returns regarding professional income for the preceding three years

¹See also para. 6.13, *infra*.

of the members of the Bar being selected for judgeship would also give good indication of the extent of the practice they command at the Bar.

6.9. We are, in principle, against the selection of persons on grounds of religion, caste or region. In our opinion, the only consideration which should weigh should be that of merit and of the suitability of the person concerned to discharge his functions as a High Court judge. Wrong appointments of persons as High Court judges have, as already mentioned,¹ not only been affected the image of the courts, the confidence they enjoy and the quantum and quality of their disposal, but have also deterred suitable persons from joining the Bench in future vacancies. This, however, is an ideal state. Even when matters of State policy make it necessary to give representation to persons belonging to some religion, caste or region on the High Court Bench, every effort should be made to select the best person. Further, as appointments on grounds of religion, caste or region make an inroad into the principle of selection on pure merit, we recommend that the number of such appointments to the exalted office of the High Court judgeship which calls for great qualities of head and heart should, if unavoidable, be as few as possible.

IV. CONSIDERATION BY THE GOVERNMENT

6.10. According to the existing practice, the recommendation of the Chief Justice for appointment of the person to the office of the High Court judge is of the recommendation either agrees with the Chief Justice, or sometimes disagrees or has some other reservation. He can in such a contingency call for some further information or express his disagreement. He may also suggest a name other than that recommended by the Chief Justice. In such an event he has to inform the Chief Justice and the latter's comments on the name proposed by the Chief Minister are invited. In our view, the Chief Justice, while sending the name to the Chief Minister, should also state the views of his two seniormost colleagues as already recommended by us.²

6.11. Complaint has on occasions been made that the Chief Ministers sit tight over the recommendations made by the Chief Justices and this results in considerable delay in the appointment of judges. One consequence of that is that the vacancy for the office of the High Court judge remains unfilled for a long time. To obviate such delays we would like to re-iterate the recommendation which was made by us in the seventy-ninth Report wherein we observed:³

"Complaints have been heard that sometimes a Chief Minister sits tight over the recommendation made by the Chief Justice for the appointment of judges, and this fact results in delaying the appointment. In this regard, it would, in our opinion, be necessary to ensure that whatever may be the view of the Chief Minister about the particular recommendation of the Chief Justice, 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. Sometimes the recommendation of the Chief Justice necessitates the exchange of correspondence between the Chief Minister and the Chief Justice. In such an event, efforts should be made to see that because of such exchange of correspondence the matter does not get stuck up. It would perhaps be appropriate that necessary reply to a letter received be sent within a week of its receipt. We feel that the outside limit of six months which we have indicated above should be sufficient to take into account the various bottlenecks and delays which take place at different stages."

It may be mentioned that the Chief Justice has, pursuant to the recommendation of the Law Commission,⁴ been authorised to send directly to the Union Minister of Home Affairs and the Chief Justice of India a copy of his recommendation to the Chief Minister.

6.12. It has become a practice in some States⁵ for the Chief Minister and the Chief Justice to meet together either before the Chief Justice makes a recommendation for appointment of a person to the office of the High Court judge or after he has made the requisite recommendation. Criticism has been levelled against the adoption of such practice by some persons. It is stated that

¹Chapter 1, *supra*.

²See para. 6.5, *supra*.

³79th Report, para. 3.11.

⁴Chapter 5, *supra*.

⁵Cf. 14th Report, Vol. I, page 73, para. 16.

sometimes what may be called a bargain is struck between the Chief Justice and the Chief Minister. The Chief Minister, it is stated, concurs with the recommendation made by the Chief Justice in return for the Chief Justice agreeing in another vacancy to sponsor the name suggested by the Chief Minister. It has, therefore, been suggested that such personal meetings between the Chief Justice and the Chief Minister should be avoided and that the whole thing should be conducted through correspondence. We have given the matter our consideration and are of the opinion that no rigid rule should be laid down. Many difficulties which sometimes arise and which would otherwise take long to be resolved can be sorted out by a personal meeting between the Chief Justice and the Chief Minister. It would essentially depend upon the personal equation between the Chief Minister and the Chief Justice. We also find it difficult to subscribe to the view that every such meeting would result in some kind of bargaining between the Chief Justice and the Chief Minister. A Chief Justice conscious of the fact that his recommendation is based upon pure merit should have no hesitation in repelling any undue overture. At the same time, a Chief Justice should have no hesitation in paying due heed to the suggestion of the Chief Minister if he finds the same to be based upon merit.

6.13. At this stage, we would like to re-iterate what we have mentioned earlier¹ about the evolution of a convention that a recommendation made by the Chief Justice with which both his seniormost colleagues agree should normally be accepted.

seniormost colleagues.

6.14. Another question which has engaged attention is as to whether the role of the Chief Minister should be that of commencing on the name recommended by the Chief Justice, or whether, in case he disagrees with the recommendation of the Chief Justice, he (the Chief Minister) can also suggest another name. This question was agitated in the past, and after due consideration it was decided² that the Chief Minister would be entitled, in case he disagrees with the recommendation of the Chief Justice, to suggest another name. The Chief Minister in such an event has to invite the comments of the Chief Justice and send the matter thereafter along with the comments of the Chief Justice, to the Union Minister of Law and Justice. In view of the fact that a decision referred to above has already been taken after due consideration, we need not say anything further in the matter.

6.15. A suggestion has been made that the Chief Justice of the High Court, while making the recommendation for filling a vacancy on the High Court Bench,³ should suggest, instead of one name, a panel of names. We are against the acceptance of this suggestion, for it would inevitably have the effect of diluting the recommendation of the Chief Justice. It would also result in robbing the initiative which now vests in the Chief Justice of its efficacy. We feel that it is undesirable to impose a compulsion on the Chief Justice to suggest a panel of names instead of a single name for a vacancy on the High Court Bench.

6.16. After the papers have been finalised at the level of the Chief Minister and the constitutional requirement about the consultation with the Governor is completed, the papers are forwarded to the Union Minister of Law and Justice. The Minister, unless he has some reservations in the matter, sends the papers to the Chief Justice of India, who then expresses his view and sends the papers back to the Union Minister of Law and Justice. Thereafter the papers, in consultation with the Prime Minister, are forwarded to the President.

6.17. Whatever we have said about the avoidance of delay⁴ at the level of the Chief Minister should hold equally good at the subsequent stages also.

V. APPOINTMENT OF CHIEF JUSTICE

6.18. We may now deal with the question of the appointment of the Chief Justice of the High Court. It has already been mentioned⁵ that recommendation for this purpose emanates from the Chief Minister. Normally, we think that the seniormost judge of the High Court should be appointed as the Chief Justice of the High Court. It would not be desirable, in our opinion, to recommend or appointed.

¹See discussion as to consultation with two seniormost colleagues, para. 6.5, *supra*.

²Chapter 5, *supra*.

³Cf. Law Commission file, S. No. 87.

⁴Para. 6.11, *supra*.

⁵See Chapter 5, *supra*.

appoint a junior judge of the High Court as Chief Justice in the presence of a senior judge. In case we countenance the recommendation for appointing a junior judge to the office of Chief Justice, it would lead to the undesirable practice of junior judges cultivating and developing some kind of personal relationship with the Chief Ministers. It would also have the effect of undermining the independence of the judiciary. In any case, the image of the court would be considerably affected if some of the judges of the court start hobnobbing with the Chief Minister. We feel that the role of the Chief Minister should be continued only to taking the initiative in the matter of the appointment of the Chief Justice and expressing views about the suitability of the seniormost judge for the office of the Chief Justice.

6.19. It would not be a healthy practice, in case the seniormost judge is considered not suitable for the office of Chief Justice, to appoint a junior judge from the same court as Chief Justice. In such an event, the proper course, in our opinion, would be to appoint some judge from outside the State. It should also be ensured that the judge so appointed as Chief Justice should have been on the High Court Bench for a sufficiently long time and should have that much seniority as a judge as not to cause resentment in the senior judges of the High Court that someone junior in service has been appointed in supersession of their claim. While appointing someone from outside the State as Chief Justice of the High Court, care must also be taken to see that his tenure as Chief Justice is not so long as to block the chances of not only the seniormost judge but also of other judges in the High Court. By the words "blocking the chances", we mean not only preventing the appointment of a person as Chief Justice but also substantially reducing the length of his term as Chief Justice. Of course, arithmetical exactitude and precision in these matters cannot be insisted upon.

6.20. One aspect which needs consideration in the appointment of Chief Justice of the High Court is about the desirability of ensuring that no incumbent Chief Justice of the Office of the Chief Justice normally holds that office for more than six years. There can be no doubt that long tenures of Chief Justice gives an element of continuity to the court. There can also be no doubt that we have had Chief Justices like Chagla and Rajamannar in whose case the lustre they shed to their office was in no way dimmed by the long years they occupied that office, still we feel that in a majority of cases the long term has the effect of introducing certain weaknesses and undesirable traits which are not good for the health of the court.

VI. JUDGES FROM OUTSIDE

6.21. We may next deal with the question of having in each High Court about one-third of judges from outside the State. Recommendation for this purpose was made by the States Reorganisation Commission. The Law Commission presided over by Mr. Setalvad in its fourteenth Report observed in this connection :¹

"The recent creation of various zones in the country and the efforts to treat the States forming part of these zones as one until for various purposes would, we hope, lead to the States forming part of each zone to be recruiting ground for appointments to the High Court from the members of the Bar in these States. It is hoped that in this manner the expectation of the States Reorganisation Commission that at least one-third of the High Court Judges would be persons drawn from outside the State will be realised."

Likewise, the Study Team² on Centre-State Relations appointed by the Administrative Reforms Commission also suggested that so far as practicable, one-third of the number of judges of a High Court should be outside.

We have given the matter our earnest consideration and are in substantial agreement with the recommendations mentioned above. In our opinion, there should be a convention, according to which one-third of judges in each High Court should be from another State. This would normally have to be done through the process of initial appointments, and not by transfer. It would also in the very nature of things be a slow and gradual process and take some years before we reach the proportion.

¹Law Commission of India, 14th Report, Vol. 1, page 100, para. 74.

²Administrative Reforms Commission Study Team on Centre-State Relations Report, page 190, para. 13-20 (September 1963), Vol. 1.

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6.22. Evolving such a convention would, in our opinion, not only help in the process of national integration but would also improve the functioning of various High Courts. It would secure on the Bench of each High Court the presence of a number of judges who would not be swayed by local considerations or affected by issues which may rouse local passions and emotions. As observed by us in one of our earlier Reports, one of the essential things for the due administration of justice is not only the capacity of the judges to bring a dispassionate approach to cases handled by them, but also to inspire a feeling in all concerned that a dispassionate approach would underlie their decision. quite often, cases which arouse strong emotional sentiments and regional feelings come up before courts of law. To handle such cases, we need judges who not only remain unaffected by local sentiments and regional feelings, but also appear to be so. None would be better suited for this purpose than judges hailing from other States. It is a common feeling amongst old lawyers that apart from cases with political overtones, the English judges showed a sense of great fairness and brought a dispassionate approach in the disposal of judicial cases handled by them. We in India are in the fortunate position of having a vast country. There can, therefore, be no difficulty in having a certain percentage of judges who hail from other States. The advantages gained by having persons from other States as judges would be much greater compared with any disadvantage which might result therefrom.

Attracting
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6.23. Doubt is sometimes raised as to whether we would be able to attract competent persons on the Bench of the High Court if at the time of their appointment they are conscious of the fact that they would be posted not in their own State but in another State. So far as this aspect is concerned, we may mention that though quite a number of persons would be reluctant to be appointed outside their State, there would always be, in our opinion, a certain percentage of persons being considered for High Court judgeship who would have no objection to being appointed outside the State. In the case of District Judges being appointed, the prospect of promotion would in most cases be enough inducement and will outweigh the possible inconvenience of being posted outside the State. As regards the members of the Bar, some might consider it advantageous to be appointed outside the State, so that after retirement they can resume, if they so desire, the practice in the State High Court wherein they were practising earlier. The bar against practising in the High Court in which one was previously a judge would not thus stand in the way.

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6.24. Question then arises as to what should be the modalities for implementing the above recommendation. There was, it may be mentioned, at one time a proposal to have a common panel of names considered suitable for appointment as High Court judges and to appoint judges to the different Courts from that common pool. View was expressed in the Chief Justices' Conference held in October 1957 that while it was quite possible to have an all-India panel of service District Judges from which selection could be made, all-India panel of advocates presented considerable difficulty. In the Conference held in January 1960 the Chief Justices expressed the unanimous opinion that maintenance of an all-India panel containing names of advocates suitable for appointment as High Court judges was not only not feasible, but also highly undesirable. The Law Ministers' Conference in June 1960, while considering the question of the appointment of judges from outside the State, referred to the decision taken in the Chief Justices' Conference of January 1960 and requested the Union Home Minister to initiate such discussion as he might think necessary with the Chief Justice of India and the Chief Ministers. This matter was further considered in the Chief Justices' Conference held in March 1961. The Conference expressed the opinion that in view of its recommendation in respect of recruitment by competition of certain proportion of the higher judicial service on all-India basis, it was not necessary to have a panel of names for appointment as High Court judges either from amongst the members of the Bar or from amongst the members of the State judicial service.

Recommen-
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All Indian
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Service not
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6.25. The Law Commission in its seventy-seventh Report¹ had recommended the creation of an all-India judicial service. The recommendation of the Law Commission in this respect was turned down by the Government of India, as would appear from the reply given in Parliament on behalf of the Home Ministry. In our opinion, turning down of that suggestion makes it all the more imperative to find out other modality to ensure one-third of the judges in each

High Court from outside the State. The outside States from which such persons be appointed should normally be in the same zone, as mentioned in section 15 of the States Reorganization Act,¹ in which the State in which a person is to be appointed judge of the High Court is situated. For this purpose, the Chief Justices in the same zone may meet as and when it becomes necessary or, as a result of correspondence with each other, ascertain the names of members of the Bar and District Judges considered fit for appointment. Such of the persons from other States in the zone as are found to be suitable may be recommended for appointment as judges. 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 and that no State gets undue advantage in the actual working of the scheme.

6.26. There is, however, nothing rigid about the modality indicated above. Proposed Once the principle of having one-third of the judges from outside the State is ^{scheme not intended to be rigid.} accepted, there should, in our opinion, be not much difficulty in devising some method to bring about the desired result and to work out the details of the method.

VII. CONSULTATIVE PANEL

6.27. The question of appointment of a consultative panel may next engage our attention. As mentioned earlier,² the Secretary, Ministry of Law, Justice and Company Affairs, Department of Legal Affairs in his letter dated December 29, 1977, to the Law Commission, had referred to the suggestion about having an informal consultative panel consisting perhaps of retired three Chief Justices of the Supreme Court. The letter also pointed out the constitutional difficulty about having such a panel. The Chairman of the Law Commission thereafter sent a letter incorporating his views in the matter. Those views have already been reproduced earlier.³ Letter dated March 1, 1978 was thereafter received from the Ministry of Law, Justice and Company Affairs by the Chairman of the Law Commission. A note was then prepared.⁴ A copy of the same was sent to the Supreme Court and the various High Courts and others concerned for expression of their views on the suggestion contained in the note. In paragraph 3 of that note, it was stated :

“(3) After we have crossed the constitutional hurdles, the appointment of the Informal Consultative Panel (perhaps, it would be better to call it ‘Judges Appointment Commission’) (hereinafter referred to as the ‘Commission’) is desirable.”

6.28. Most of the High Courts which have sent their views have expressed themselves against the formation of a Judges Appointment Commission. It would seem that the word “Commission” gave rise to the reaction that what was sought to be established was something like the Public Service Commission, even though the appointment was to such august office as that of a High Court. We can understand and well appreciate the reaction and in deference to that, we drop the suggestion about the appointment of the Judges Appointment Commission. While doing so, we would like to add that the idea behind the suggestion 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 with a view to eliminating the sway of political or other extraneous considerations and ensure scrutiny of appointments by a dispassionate body.

6.29. At the same time, we recommend that whenever it is proposed to pass over the seniormost judge for appointment to the office of the Chief Justice of the High Court, the matter should be placed before a panel consisting of the Chief Justice of India and his four seniormost colleagues. The claim of the four seniormost judge for appointment to the office of the Chief Justice of the High Court should not be ignored unless the aforesaid panel finds sufficient cause for such a course. In case of difference of opinion among those constituting the panel, in case of the view of the majority should be taken to be the view of the panel. We are superseding this recommendation because criticism has been levelled on occasions that seniormost judges have been passed over in the matter of appointment of the Chief Justices of the High Courts on extraneous considerations. This has understandably

¹Section 15, States Reorganisation Act, 1956.

²See Chapter 1, *supra*.

³See Chapter 1, *supra*.

⁴See Appendix 2.

created flutter and caused discontent. It is necessary to ensure that appointment to the exalted office of the Chief Justice of the High Court does not become the subject of controversy. This objective can be substantially achieved if, before passing over the seniormost judge for the office of the Chief Justice of the High Court, the matter is scrutinised by a high level panel consisting of Chief Justice of India and his four seniormost colleagues. Avoidance of controversy is also necessary to preserve the image of the High Court.

Transfer of High Court Judges. **6.30.** We may now advert to the question of transfer of judges of the High Court. Regarding this question, we would like to emphasise that we are normally against the transfer of judges of the High Court from one court to the other as such power is liable to be abused and impinges upon the independence of the judges. Normally, a judge should continue in the court to which he is appointed, except where he is appointed Chief Justice of some other High Court. But there are occasions — we hope rare — when the image and good name of the judiciary make it incumbent that a judge posted in a High Court be transferred to some other High Court. Although by and large the judges of the High Court have evoked great respect for maintaining high standards, complaints have sometimes been heard against one or other individual judge. The facts of the case may not be such as might warrant resort to the extreme remedy of impeachment; still the requirements of the situation may call for the transfer of the judges concerned. The transfer of a judge in such an event should not be looked upon as something taboo. All that has to be ensured is that the power of transfer be not abused and that the transfers be not motivated by extraneous considerations. To prevent any abuse of the power of transfer, we recommend that no judge should be transferred without his consent from one High Court to the other unless a panel consisting of the Chief Justice of India and his four seniormost colleagues finds sufficient cause for such a course. In case of difference between the members of the panel, the view of the majority should be taken to be the view of the panel.

Constitutional aspect. **6.31.** A question which might also engage our attention is whether there is any constitutional hurdle to the creation of the consultative panel mentioned above.¹ So far as this aspect is concerned, we may mention that according to a decision of the Supreme Court, if the Constitution or law requires consultation with A, B and C and the appointing authority, in addition to consulting A, B and C also consults D, the appointment suffers from an infirmity and, as such, is liable to be struck down. Reference in this connection may be made to the case of *Chandra Mohun v. State of U.P.*²

As long as the rule laid down in the above case holds the field, it would not be permissible to appoint the consultative panel without amendment of the Constitution. It may, perhaps, be necessary to insert a provision in the Constitution that consultation with someone other than those mentioned in the Constitution would not invalidate an appointment.

Desirability of panel. **6.32.** We may add that we are normally averse to making a suggestion as may necessitate amendment of the Constitution. Despite our general reluctance on this score, we still feel it desirable to have a consultative panel with a view to preventing the sway of extraneous considerations in the matter of supersession or transfer. Occasions have arisen in the past when transfers on extraneous consideration have been made, or when the seniormost judges have been passed over in the matter of appointment to the office of Chief Justice. This has understandably created flutter and caused discontent. It is necessary to ensure that such acts in respect of high judicial offices do not become subject of controversy. This objective can be substantially achieved if, in case of transfer and also in case of ignoring the claim of the seniormost judge in the matter of appointment of Chief Justice of the High Court, the matter is scrutinised by a high level body of persons who are known for their integrity and have also judicial background. Avoidance of controversy is also necessary to preserve and keep up the image of the High Courts.

¹Para. 6.30, *supra*.

²*Chandra Mohun v. State of U.P.*, A.I.R. 1966 S. C. 1987, 1990; (1967) 1 S. C. R. 77. See also *Baldeo Raj v. High Court of Punjab & Haryana*, A.I.R. 1976 S. C. 2490.

CHAPTER 7

RECOMMENDATIONS AS TO METHOD OF APPOINTMENTS
TO THE SUPREME COURT AS JUDGES

7.1. The Supreme Court of India is the highest court of the land. It is Amplitude vested with powers which are exercised by few other courts in the world. It of jurisdiction constitutes the highest of appeal in civil and criminal matters. Appeals of the against the order of any tribunal can also be entertained by the court by special Supreme leave. Petitions questioning the validity of the election of the President and the Court. Vice-President are exclusively triable by the Supreme Court. The court has exclusive jurisdiction in any dispute between the Government of India and one or more States, or between the Government of India and any State or States on one side and one or more other States on the other; or between two or more States. The court also exercises advisory jurisdiction, inasmuch as the President may refer for consideration to the court any question of law or fact of public importance that has arisen or is likely to arise. A right has further been guaranteed to every citizen, and in some cases to non-citizens also, by article 32 of the Constitution to approach the Court in cases of infringement of any of the fundamental rights mentioned in Part III of the Constitution. The court has been vested for this purpose with power to issue directions, or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. The Constitution also provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

7.2. In view of the importance of the role which has been assigned to the court under the scheme of our Constitution, it is necessary that persons of the point per-highest calibre should be appointed judges of this court and no other considerations of the except that of merit should weigh in the matter of appointment. The fact that the highest Supreme Court sits as a court of appeal against the judgment of the High Courts calibre. makes it imperative that the judges of the Supreme Court should be persons of such high stature and command such great esteem that even when the judgment of the High Court is reversed on appeal by the Supreme Court, the judges of the High Court should have a feeling that it has been done by a court which is not only higher in the legal sense of the term but which, because of the acumen of the judges composing it, is otherwise also superior to the High Court. In one of his classic judgments Chief Justice Patanjali Sastri compared the role of the Supreme Court to that of the sentinel on the qui vive. Both on this account and on account of the fact that the law laid down by the Supreme Court becomes the law of the land, it is essential to ensure that the cream of the judicial talent of the country is represented on the Bench of the court.

7.3. Another important factor which should not be lost sight of in the appointment of judges to the Supreme Court is the need to ensure that only persons for independence who enjoy the highest reputation for independence, dispassionate approach and detachment are elevated to the Bench of the court. The revelation of any tendency —Import- or inclination to hobnob with ministers and political personages should be considered as disqualification for being considered for the job. This becomes essential ance of. because of the fact that cases having political overtones and involving high political personages frequently come up before the Supreme Court. It is plain that persons who hobnob with ministers and other political personages would not inspire confidence when dealing with such cases.

7.4. Question, then, arises as to whether persons who once had affiliations with a political party should be debarred altogether from consideration for appointment to the Supreme Court. We have given the matter our consideration, and are of the view that affiliation in remote past of a person otherwise suitable should not disqualify him for this purpose. The position should, however, be different if the person has till recently been active in political life. After having considered the various pros and cons, we are of the view that no one should be appointed to the Supreme Court as a judge unless for a period of not less than seven years he has snapped all affiliations with political parties and unless during the preceding period of seven years he has distinguished himself for his independence, dispassionate approach and freedom from political prejudice, bias or leaning. This would provide a sufficient assurance that his past political affiliation would not colour his judicial pronouncements.

Importance of dispassionate approach in India.

7.5. We are aware of the fact that in the United States, the United Kingdom and some other countries, persons who were active in political life and were appointed judges, distinguished themselves on the Bench. Taking into account the conditions as they are in India and the importance that we attach to independence and dispassionate approach of the judges and the role which the Constitution has assigned to the court, we consider it necessary to insist upon the above safeguard.

Consultation by of appointment of a judge of the Supreme Court, we feel that the Chief Justice of India, while making a recommendation, should also consult his seniormost colleagues. The number of colleagues to be consulted for this purpose should be three. The Chief Justice of India in the communication incorporating his recommendation should specify that he has consulted his three seniormost colleagues and also reproduce the view of each of them regarding his recommendation. The role of the seniormost colleagues would be confined only to making their comments on the recommendation of the Chief Justice; they would not be entitled to initiate a separate name for the purpose. The consultation with three seniormost colleagues by the Chief Justice would minimise the chances of any possible arbitrariness or favouritism.

Age for appointment to Supreme Court.

7.6. We may now deal with the question of age for appointment to the office of Supreme Court Judge. As mentioned earlier, the cream of the judicial talent of the country should, in our view, be represented on the Supreme Court. Apart from the fact that the judges should be persons possessing legal acumen and a sound knowledge of constitutional and other law, it is essential that they should have within them that great quality which eludes description, but which comes with the passage of years and as a result of long contemplation and reflection, — the quality which gives depth to the judgment and which is known as maturity. More than in any other court, it is in the Supreme Court that we cannot do without that quality. To ensure that, we recommend that the proper age for appointment to the office of Supreme Court Judge should be between 54 and 60. The upper age limit would ensure that judges appointed to the court would have a tenure of at least 5 years.

7.8. We are conscious of the fact that there have been judges who have been appointed in the past to the court at an age less than 54 years and who have distinguished themselves. Looking, however, to all the facts and keeping in view the general rule, we consider that in future no appointment should be made of a person to the bench of the Supreme Court at an age less than 54.

Principle of seniority.

7.9. We feel that the principle of seniority should be observed in the appointment to the office of the Chief Justice. Past experience tells us that whenever there has been a departure from this principle, the appointment has roused considerable controversy. It has thus affected the image of the office of Chief Justice. The vesting of unbridled power in the executive to depart from the principle of seniority in the matter of appointment to the office of Chief Justice is liable to be abused. It is also likely to make inroads into the independence of the judiciary and the approach of the judges. In case the Government considers it proper in some individual case to depart from the principle of seniority for appointment to the post of Chief Justice, in such an event, in our opinion, the matter should be referred by the Government to a panel consisting of all the sitting Supreme Court Judges. The principle of seniority should be departed from only if the above panel finds sufficient cause for such a course. In case of difference of opinion, the decision of the majority shall be taken to be the decision of the panel.

Representation of region.

7.10. One other point may also be mentioned. We are conscious of the fact in the matter of appointment to the Supreme Court, despite the need for selection on the basis of merit, regard is also had for representation of different regions. Even so, consistently with that also, it can be ensured that the best person from the region is appointed to the court.

¹See para. 7.2, *supra*.

CHAPTER 8

CONCLUSION

Our recommendations in this Report have been inspired by our desire to maintain public confidence in Judges and the highest standards in the Judiciary of a Judge. The qualities required of a Judge were described by Mr. Justice Tom C. Clark, former Associate Justice of the United States Supreme Court,¹ in words which cannot be bettered :—

"Judicial independence, of course, has its corollary of judicial responsibility. The judges must be of the stuff that goes to make a good judiciary. What is this stuff of which I speak? Legal knowledge? Yes, and of sufficient quality to be able to determine the applicable rule of law in a given case together with the wisdom to apply it with clarity and dispatch. Ability to discover the facts? Yes, and an open mind to recognise the truth and separate it from the chaff. A firm but understanding heart? Yes, and the courage to declare a just decision and enforce it. Integrity? Yes, above all other attributes; and a public and private deportment that is above reproach. A conscience? Yes, but rather than being one that breeds fear and negative action it must be a conscience which at the close of each day's work may whisper softly. 'Today you were truly worthy to wear the robe and enjoy the appellation of judge'. To maintain such a status in the public mind judges, like Caesar's wife, must live above suspicion."

Let us express the hope that our recommendations will, to some degree, facilitate the attainment of these high ideals.

We may conclude this Report by citing the words used by John Rutledge, Jr. in 1802 on the floor of the U.S. House of Representatives to describe the "shield" of the judiciary :²

"As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe..... Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself; they will be saved from what has been the fate of all other Republics, and they will disprove the position that Governments of a Republican form cannot endure."

¹Tom C. Clark, Former Associate Justice, U. S. Supreme Court, "Judicial Self-Regulation. The Potential" (Winter, 1970), 35 Law and Contemporary Problems, No. 1, pages 37, 38, 39.

²11 Annals of Cong. 739-40 (1802), dated by trying R. Kaufmann, "Judicial Independence" (March 1979), Vol. 88, No. 4, Yale L. J. 681, 716.

CHAPTER 9

SUMMARY OF RECOMMENDATIONS

We may summarise our recommendations as follows :—

GENERAL

(1) The present constitutional scheme as to the method of appointment of judges is basically sound; it has, on the whole, worked satisfactorily and does not call for any radical change. But there are certain aspects of its working about which recommendations are necessary in order to bring about an improvement.¹

APPOINTMENT OF HIGH COURT JUDGES

(2) 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 date of the vacancy,² in order to obviate the possibility of the vacancy remaining unfilled for a long time after the retirement of the previous incumbent.³

(3) When making a recommendation for appointment of a judge of a High Court, the Chief Justice should consult his two seniormost 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.⁴

(4) Any recommendation of the Chief Justice which carries the concurrence of his two seniormost colleagues should normally be accepted.⁵

(5) 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 54.⁶

Though there have been 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.⁷

(6) 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.⁸

(7) 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.⁹

(8) While sending the name to the Chief Minister, the Chief Justice should also state the views of his two seniormost colleagues,¹⁰ as already stated.

(9) 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

¹Paragraphs 6.1 and 6.2.

²Recommendation in 79th Report, para. 3.10, referred to.

³Paragraphs 6.3 and 6.4.

⁴Paragraph 6.5.

⁵Paragraph 6.5.

⁶Paragraph 6.6.

⁷Paragraph 6.7.

⁸Paragraph 6.8.

⁹Paragraph 6.9.

¹⁰Paragraph 6.10.

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 becomes necessary, efforts should be made to see that because of such exchange, the matter does not become stuck up.¹⁻²

(10) 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.³

(11) At the same time, as already indicated, a recommendation made by the Chief Justice with which both his seniormost colleagues agree should normally be accepted.⁴

(12) 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.⁵

(13) 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.⁶

(14) 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.⁷

(15) In regard to the appointment of the Chief Justice, normally the seniormost 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 seniormost judge for appointment as Chief Justice.⁸

(16) If the seniormost 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 seniormost judge, but also of the other judges of the High Court. Of course, arithmetical exactitude in these matters cannot be insisted upon.⁹

(17) 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.¹⁰ 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.

(18) 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.¹¹

¹Paragraph 6.11.

²Recommendation in 79th Report, para 3.11 re-iterated.

³Paragraph 6.12.

⁴Paragraph 6.13 read with paragraph 6.5.

⁵Paragraph 6.14.

⁶Paragraph 6.15.

⁷Paragraphs 6.16 and 6.17.

⁸Paragraph 6.18.

⁹Paragraph 6.19.

¹⁰Paragraph 6.20.

¹¹Paragraph 6.21.

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.¹

(19) 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.²

(20) Since the suggestion for All Indian Judicial Service, made earlier,³ 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 zone⁴ in which the State in which a person is to be appointed is situated.⁵

(21) For this purpose, the Chief Justices may meet when necessary, or settle the name of the person to be appointed by correspondence.⁶

(22) 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.⁷

(23) 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.⁸

(24) 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 stated⁹ 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.¹⁰

(25) At the same time, the Law Commission recommends that whenever it is proposed to pass over the seniormost judge 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 seniormost colleagues.

The claim of the seniormost 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.¹¹

(26) 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.

(27) 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 seniormost

¹Paragraph 6.22.

²Paragraph 6.23.

³77th Report

⁴Section 15, States Reorganisation Act, 1956

⁵Paragraph 6.25.

⁶Paragraph 6.25.

⁷Paragraph 6.25.

⁸Paragraph 6.26.

⁹Paragraph 6.27.

¹⁰Paragraphs 6.27 and 6.28.

¹¹Paragraph 6.29.

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.¹

(28) Constitutional amendment may be required to implement the above recommendation for consultation with a panel consisting of Chief Justice of India and his four seniormost colleagues (in the matter of supersession or transfer of a High Court judge).²

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.³

APPOINTMENT OF SUPREME COURT JUDGES

(29) 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, 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.⁴

(30) 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.⁵

(31) 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.⁶

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.⁷

(32) 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 seniormost colleagues and should, in the communication incorporating his recommendation, specify the result of such consultation and reproduce the views of each of his colleagues so consulted regarding his recommendation. The role of these colleagues would be confined to commenting on the recommendation of the Chief Justice. Such consultation would minimise possible arbitrariness or favouritism.⁸

(33) 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.⁹

¹Paragraph 6.30.

²Paragraph 6.31.

³Paragraph 6.32.

⁴Paragraphs 7.1 and 7.2.

⁵Paragraph 7.3.

⁶Paragraph 7.4.

⁷Paragraph 7.5.

⁸Paragraph 7.6.

⁹Paragraphs 7.7 and 7.8.

(34) 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.¹

(35) 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.²

S. N. SHANKER *Member.*

T. S. KRISHNAMOORTHY IYER *Member.*

P. M. BAKSHI *Member-Secretary.*

August 10, 1979.

¹Paragraph 7.9.

²Paragraph 7.10.

APPENDIX I

Circuit Judges Nomination Commission in U.S.A.

1. In U. S. A., Presidential Order 11972 has established a circuit judges nominating commission to supply the President with names of the "best qualified" persons for appointment to the United States Courts of Appeal.¹

The Order provides for a commission of thirteen panels, one for each of the federal circuits, except the Fifth and Ninth circuits, which will have two each.

The Panels will be appointed by the President when a vacancy exists on a court of appeals, and their purpose will be to recommend to the President for nomination "persons whose character, experience, ability and commitment to equal justice under law fully qualify them to serve in the federal judiciary".

Each panel will have not more than eleven members, including its Chairman, and must include "members of both sexes, members of minority groups, and approximately equal numbers of lawyers and non-lawyers".

2. The functions of the panels are outlined in the Order as follows:—

"A panel shall begin functioning when the President notifies its Chairman that he desires the panel's assistance in aid of his constitutional responsibility and discretion to select a nominee to fill a vacancy on a United States Court of Appeals. Upon such notification, the panel shall :—

(a) Give public notice of the vacancy within the relevant geographic area, inviting suggestions as to potential nominees;

(b) Conduct inquiries to identify potential nominees;

(c) Conduct inquiries to identify those persons among the potential nominees who are well-qualified to serve as a United States circuit judge; and

(d) Report in confidence to the President, within sixty days after the notification of the vacancy, the results of its activities, including its recommendations as to the five persons whom the panel considers best qualified to fill the vacancy."

Functions
of the
Panel
in
U.S.A.

Standards
for
selection.

3. The Order sets these standards for the selection of proposed nominees:—

(a) Before transmitting to the President the names of the five persons it deems best qualified to fill an existing vacancy, a panel shall have determined:—

(i) that those persons are members in good standing of at least one state bar, of the District of Columbia bar, and members in good standing of any other bars of which they may be members;

(ii) that they possess, and have reputations for, integrity and good character;

(iii) that they are of sound health;

(iv) that they possess, and have demonstrated, outstanding legal ability and commitment to equal justice under law;

(v) that their demeanor, character and personality indicate that they would exhibit judicial temperament if appointed to the position of United States circuit judge.

(b) In selecting persons whose names will be transmitted to the President a panel shall consider whether the training, experience, or experience of certain of the well-qualified individuals would help to meet a perceived need of the court of appeals on which the vacancy exists.

(c) To implement the above standards, a panel may adopt such additional criteria or guidelines as it considers appropriate for the identification of potential nominees and the selection of those best qualified to serve as United States circuit judges.

No commission member may be considered as a potential nominee while serving or for one year after service. Members will receive no compensation but may be allowed travel expenses.

4. Appointment to panels will end thirty days after submission of the panel's report. The President will appoint a person to fill the vacancy on a panel "within a reasonable time after termination of an appointment or the creation of a vacancy for any other reason".

The Commission had initially an ending date of December 31, 1978, but this was extended by the President² upto December 31, 1981.

5. A similar Order³ appears to have been issued in regard to Federal Judicial Officers.

¹Note in (April, 1977) American Bar Association Journal, 554, referring to Executive Order 11972, "U. S. Circuit Judges Nomination Commission"; Presidential Documents, Vol. 13, No. 8, page 214, dated 21st February, 1977.

²Information as to extension of date orally obtained from U. S. International Communications Agency, New Delhi.

³Executive Order No. 11992, "Committee on Selection of Federal Judicial Officers" Presidential Documents, Vol. 13, No. 22, page 810, dated 30th May, 1977.

APPENDIX 2

Questionnaire Issued by The Law Commission of India

NOTE

The Law Commission has been asked to study the question of the appointment of Judges of the High Court and the Supreme Court in Depth and to explore the possibilities of improvement in the existing method of appointment. Reference has also been made to a suggestion that there should be an Informal Consultative Panel consisting, perhaps, of three retired Chief Justices of the Supreme Court.

View in this respect has been expressed containing various suggestions as under:—

“(1) As the provisions of the Constitution stand at present, the appointment of an Informal Consultative Panel in connection with the appointment of Judges of the High Court and the Supreme Court, is of doubtful constitutional validity.

(2) In case it is decided to amend the provisions of the Constitution, we must guard against putting the whole matter of the appointment of the Judges at large and thus open Pandora's Box. The attempt should be made to plug the loopholes in the present system with a view to eliminate favouritism or the impact of any political or party consideration in the matter of appointment rather than to make any radical changes. Radical changes would be necessary if we find the method devised by our Constitution for the appointment of Judges to be basically wrong and intrinsically defective. In case, however, we find that the scheme of our Constitution for the appointment of Judges is, by and large, sound, but some defects or lacunas have come to surface in the actual working of the scheme, in that event, what would be required is not radical change but such modifications as may strengthen the scheme and eliminate the defects and lacunae. The scheme for appointment of Judges in our Constitution, *prima facie*, belongs to the latter category. By and large, the method devised for this purpose by our founding fathers was well considered. Defects, no doubt, have been noticed in the working of the scheme but they are of such a character as can be rectified without throwing overboard the whole scheme. Efforts should, therefore, be made to rectify the defects and plug the loopholes.

(3) After we have crossed the constitutional hurdles, the appointment of the Informal Consultative Panel (perhaps, it would be better to call it “Judges Appointment Commission”), (hereinafter referred to as the “Commission”) is desirable.

(4) The Members of the Commission should consist of:—

- (a) Chief Justice of India (ex-officio);
- (b) Minister of Law, Justice and Company Affairs (ex-officio); and
- (c) Three persons, each of whom has been the Chief Justice or a Judge of the Supreme Court.

The members of the Commission in category (c) should be appointed for a period of four years to prevent appointment of persons who have, with the passage of time, lost touch with the Judges and the lawyers. The persons belonging to category (c) should be normally those who have been on the Bench of the Supreme Court within six years of their appointment to the Commission under category (c) should consist only of retired Supreme Court Chief Justice is not feasible because this would circumscribe the choice within a very narrow limit which would, perhaps, be not desirable.

The sitting Chief Justice should be the Chairman of the Commission. The Commission should express its views to the Government about the suitability of persons to be appointed as Judges and Chief Justices of the High Court and the Supreme Court. In case of any difference between the members of the Commission the view of the majority should be considered to be the view of the Commission.

The consultation with the Commission would be in addition to the present practice in accordance with the existing constitutional provisions. The consultation with the Commission would take place at the final stage before the President is advised to appoint a person.

One effect of the above proposal would be that the Chief Justice of India would come into the picture at two stages one, earlier in accordance with the constitutional provisions and the practice prevailing at present and, second time, as Chairman of the Commission. This cannot, in the very nature of things, be helped. The Chief Justice in the meeting of the Commission can apprise the other members of facts which might have come to his notice. He might also clarify some matters. It would be open to the Commission, in case they consider it proper in any particular matter, to informally consult any of the members of the bar, including the Attorney-General, Solicitor-General and the Advocate-General.

Apart from the above the following suggestions are made:

- (i) In case of the appointment of a Judge of the High Court, the Chief Justice of the High Court, before making recommendation, should consult his two seniormost colleagues. In the communication containing the recommendation, the Chief Justice should state that he has consulted the two seniormost colleagues and what has been the view of each of them in respect of the recommendation. Normally, a recommendation in which the two seniormost colleagues concur with the Chief Justice, should be accepted.

(ii) Similar course should be adopted in case of the appointment of a Judge of the Supreme Court.

(iii) In the matter of the appointment of the Chief Justice of the High Court, no Junior Judge should normally be appointed in supersession of the seniormost Judge.

(iv) If the seniormost Judge is considered not suitable for appointment as Chief Justice, in that event, a Chief Justice or a Judge from another High Court should normally be appointed as Chief Justice.

(v) Apart from that also, we should more frequently appoint a Judge from outside as Chief Justice of the High Court. The disadvantage of this proposal is that an outside Chief Justice would not have full knowledge about the local talent. The advantage, however, would be that he would not suffer from any personal likes or dislikes from which a local person having long association with others, might suffer. It should not also take the outsider long to acquire knowledge of the local talent. An outsider is also likely to bring greater detachment and dispassionate approach to the office of the Chief Justice. The advantages may thus outweigh the disadvantages.

(vi) We should also have a convention according to which one-third of the Judges in each High Court should be from another State. This would normally have to be done through process of initial appointments and not by transfer. It would, in the very nature of things, be a slow and gradual process and take some years before we reach the proportion.

Once the principle of having a certain percentage of persons from outside the State as Judges of the High Court is accepted, the modalities to bring about the desired result can be worked out. One suggestion can possibly be that every Chief Justice, while proposing the name of a person for appointment as High Court Judge should mention in the communication as to whether that person agrees to be appointed outside the State. In the case of District Judges proposed to be appointed, the prospect of promotion would, in most cases, be enough inducement and thus outweigh the possible inconvenience of being posted outside the State. As regards lawyers, some might consider it advantageous to be appointed outside the State so that after retirement they can resume, if they so desire, the practice in the State wherein they were practising earlier.

(vii) In the matter of appointment of Chief Justice of the Supreme Court, the normal convention should be to appoint the seniormost Judge. There should be no departure from convention unless such a course is approved by the Commission.

It is requested that your views may be expressed on the following points :

(1) Is the scheme of our Constitution for appointment of Judges of the Supreme Court and the High Court, by and large, sound or does it require to be thrown overboard and substituted by an altogether new scheme?

(2) Have some defects or lacunae come to the surface in actual working of the scheme of our Constitution for appointment of Judges of the Supreme Court and the High Courts?

(3) Do you think that these defects and lacunae are of such a character as can be rectified by plugging the loopholes and without throwing overboard the whole scheme?

(4) What is your view regarding the appointment of a Judges Appointment Commission (or whatever be the name given to it)?

(5) In case you are of the view that it is desirable to have the above-mentioned Commission, do you agree with the view reproduced above regarding the composition of the Commission? If you do not agree with the above view, who, in your opinion should be the Chairman and the members of the Commission? Also please specify as to what should be the strength of the Commission in such an event.

(6) What is your opinion about having practising members of the bar, including Government counsel, as members of the Commission?

(7) Would you consider it preferable for the Commission to informally consult the members of the Bar, including the Attorney-General, Solicitor-General and Advocate-General, in the matter of the appointment of Judges instead of having members of the bar as members of the Commission?

(8) What is your view regarding the suggestion that the Chief Justice of the High Court, before making a recommendation should consult his two seniormost colleagues and should state the views of each one of them in respect of the recommendation? What is also your view about the suggestion that a recommendation with which the two seniormost colleagues agree, should normally be accepted?

(9) What is your view regarding the suggestion that in the matter of appointment of the Chief Justice of the High Court, no Junior Judge should normally be appointed in supersession of the seniormost Judge?

(10) What is your view with regard to the suggestion that if the seniormost Judge is not considered suitable for appointment as Chief Justice of the High Court, in that event, the Chief Justice of a Judge from another High Court should normally be appointed as Chief Justice?

(11) What is your view with regard to the suggestion that we should more frequently appoint a Judge from outside the State as Chief Justice of the High Court?

(12) What is your view with regard to the suggestion that we should have a convention according to which one-third of the Judges in each High Court should be from another State?

(13) What is your view with regard to the suggestion that in the matter of the appointment of Chief Justice of the Supreme Court, the normal convention should be to appoint the seniormost Judge and that there should be no departure from this convention unless this course is approved by the Commission?

(14) Should the Commission have the power to initiate a new name not hitherto recommended in the matter of the appointment of—

- (a) High Court Judge;
- (b) Chief Justice of the High Court;
- (c) Supreme Court Judge;
- (d) Chief Justice of the Supreme Court?

If the answer be in the affirmative in respect of some of the categories and in the negative in respect of other categories, the same may also be indicated.

(15) What is your view regarding the suggestion that the consultation with the Commission should be in addition to the present practice in accordance with existing constitutional provisions and that consultation should take place at the final stage before the President is advised to appoint a person as a Judge?

(16) Should the recommendations of the Commission be binding upon the Government? What suggestions would you make for a situation in which the Government disagrees with the recommendations of the Commission?

(17) If you think that the scheme of appointment of Judges should be thrown overboard and be replaced by an altogether new scheme, what, in your opinion, should be the new scheme?

(18) What is your opinion about having a common panel or pool of persons for appointment as High Court Judges who have given consent to be appointed outside their State?

(19) What, in your opinion, should be the age group out of which persons should be normally appointed Judges of—

- (a) the High Court; and
- (b) the Supreme Court?

(20) Any other suggestion you would like to make in the matter.

APPENDIX 3

Tabulation of Replies to the Questionnaire

The Questionnaire issued by the Commission has already been quoted.¹ Of the replies to the Questionnaire, those received from High Courts, High Court Judges, eminent jurists and State Governments,² are very briefly tabulated below, questionwise.

Question No. 1.

- (a) Seven High Courts regard the present scheme as, by and large, sound.
- (b) So do some Judges of one High Court and the Chief Justice and two Judges of another High Court.
- (c) A very eminent jurist is of the view that the present scheme is not adequate, and changes are called for.
- (d) Four State Governments and one Law Secretary regard the scheme as sound, while one States Government favours an "altogether new scheme".

Question No. 2

(a) According to four High Courts, some defects have been seen in the present scheme, though they are not serious enough to justify changing the scheme. Two High Courts, however, see no substantial defects in the working of the present scheme. Defects mentioned are—appointment on political or caste basis, and suggesting of names by the State Government.

(b) According to some Judges of one High Court and the Chief Justice of another High Court, some defects or lacunae have been seen. They have mentioned, as an example of a defect, the suggestion of a new name by the State Government, and also delaying the matter by keeping the matter pending for a long time in the State Government.

(c) A very eminent jurist is of the view that some lacunae exist.

(d) Three State Governments and one Law Secretary also see some defects in the present scheme. One State Government states that there are no major defects in the present system.

Question No. 3

(a) As regards two High Courts, Question 3 does not arise in view of their reply to Question 2. One High Court has not dealt with question 3. Four High Courts have expressed the view that the defects can be rectified by plugging the loopholes without throwing overboard the whole system.

(b) Some Judges of a High Court and the Chief Justice and a few other Judges of another High Court, are also of the view that the defects can be so remedied.

(c) This is also the view of a very eminent jurist.

(d) Three State Governments and one Law Secretary take the view that the defects can be rectified, while one State Government is of the view that radical changes should be brought about.

Question No. 4

(a) One High Court favours the proposal for Judges Appointment Commission. Six High Courts are opposed to having a judges Appointment Commission.

(b) Chief Justice and five Judges of one High Court are opposed to it. One Judge of another High Court favours it.

(c) A very eminent jurist agrees with the proposal for having a Judges Appointment Commission. (He has made detailed suggestion in this behalf).

(d) Two State Governments consider it to be desirable. Two State Governments and one Law Secretary regard it as not desirable.

Question No. 5

(a) Six High Courts have sent no reply to Question 5, in view of their reply to Question 4. According to one High Court (which has, in its reply to Question 4 favoured the idea), the Chief Justice of the Supreme Court and the Law Minister should be ex-officio members. It suggests that three more persons who have been Chief Justices or Judges of the Supreme Court, may also be appointed as members.

(b) Chief Justice of one High Court (not having favoured the proposal in Question 4), has not replied to Question 5. A Judge of another High Court (in view of his affirmative reply to Question 4) has stated that the three members should be in service, rather than retired.

(c) A very eminent jurist is of the view that the body of persons to be constituted (whether unofficial or constitutional) should not be a mixed one of both Judges and lawyers. It should not also be unwieldy.

¹Appendix 2.

²In the case of one State, the reply is of the Law Secretary.

(d) One State Government is of the view that the composition of the proposed Commission may be suitably devised, and its strength may be seven or nine. Two State Governments and one Law Secretary are opposed to the very idea of a Commission. Another State Government is of the view that—

- (i) instead of the Minister of Law, a retired Chief Justice should be made a member;
- (ii) the sitting Chief Justice of India would have already had his say and so, the retired Chief Justice of India should (instead of the sitting Chief Justice of India) be made Chairman of the proposed Commission.

Question No. 6

(a) As regards six High Courts, Question 6 does not arise in view of their reply to Question 4. One High Court is of the view that Government Counsel and practising members of the Bar should not be included in the Commission.

(b) Five Judges of a High Court are of the view that practising members of the bar should not be members.

(c) A very eminent jurist is of the view that the unofficial body should consist of the Attorney-General of India and Advocates-General of all States. Judges and lawyers should not be mixed, as most lawyers would not express their opinion freely in the presence of Judges. Representatives of Bar Associations need not be included, as the Bar Associations are split on the lines of legislatures and are moved by considerations of caste and religion.

(d) Two State Governments and one Law Secretary are opposed to the proposal for Commission. According to one State Government, practising members of the bar or Government counsel should not be made members of the Commission. According to another State Government, one practising member of the bar may be included in the Commission, but not always.

Question No. 7

(a) In the case of six High Courts, this Question does not survive in view of their opinion on Question 4. One High Court is of the view that the Commission may informally consult the Attorney-General, the Solicitor-General and the Advocate-General.

(b) In the case of the Chief Justice and five Judges of one High Court as well as some Judges of another High Court also, question 7 does not survive.

(c) A very eminent jurist has, under Question 7, referred to his opinion on Question 6 (*supra*).

(d) Four State Governments and one Law Secretary do not favour the appointment of a Commission, and for them Question 7 does not survive. One State Government is of the view that the members of the bar should not be consulted at any stage, while, according to another State Government, one practising member of the bar may (as suggested in its reply to Question 6) be included (though not always). But if that is not practicable, the Attorney-General be consulted informally.

Question No. 8

(a) Three High Courts agree with the suggestion in Question 8. They are also in general agreement with the view that a recommendation of the Chief Justice of the High Court with which the two seniormost Judges agree should normally be accepted. According to one High Court, there should be a provision for consulting—

- (i) seven Judges, where the High Court consists of (at least) 14 Judges, and
- (ii) five Judges, where the High Court consists of less than 14 Judges.

However, the recommendation of the Chief Justice (of the High Court) should normally be accepted.

Three High Courts do not agree with the suggestion in Question 8. Such a course may spoil the harmonious atmosphere in the High Court and encourage lobbying and groupism. The matter should be left to the Chief Justice in his discretion.

(b) Some Judges of one High Court agree with the suggestion, but the Chief Justice of that High Court does not agree, as it may encourage lobbying and groupism. In another High Court, some Judges agree with the suggestion, but one Judge does not agree.

(c) A very eminent jurist is of the view that the present provision in Article 217 is "totally inadequate". A High Court Judge, in his opinion, should be appointed after consulting the Chief Justice of India and other Judges of the High Court, or three Chief Justices, or all the Chief Justices of the other High Courts.

(d) Four State Governments and one Law Secretary agree that the seniormost colleagues should be consulted and that the recommendation of the Chief Justice supported by them should be normally accepted. Some of them further add that the Chief Justice should also state the views of his colleagues, along with his own recommendation.

Question No. 9

(a) Seven High Courts agree with the suggestion.

(b) Chief Justice and six Judges of one High Court and some Judges of another High Court also agree.

(c) A very eminent jurist is of the view that junior Judges should not be normally appointed in supersession, until article 124 is amended or a permanent Commission appointed.

(d) One State Government and one Law Secretary agree with the suggestion. According to one State Government, when the seniormost Judge is not considered fit for Chief

Justiceship, then approval of the proposed Commission should be necessary. Two State Governments are opposed to the suggestion, one of them stating that seniority is not sacrosanct and merit alone may be the consideration.

Question No. 10

(a) One High Court agrees with the view put forth in the Question, but adds that the Chief Justice or Judge of another High Court, who is appointed as Chief Justice, should be senior to the seniormost Judge of the Court (in the all-India cadre of High Court Judges).

Six High Courts are opposed to the suggestion put in Question 10. It has been stated by some of them that before the appointment of a High Court Judge, his suitability is judged at various stages, and it is difficult to think that the seniormost Judge is not suitable as Chief Justice. One of these High Courts adds that if the seniormost Judge is considered unfit, an outsider should not be appointed, but the next seniormost Judge should be appointed.

(b) As regards individual Judges who have sent replies, in one High Court four Judges are opposed to the suggestion, while the Chief Justice and two Judges are agreeable. In another High Court, some Judges agree.

(c) A very eminent jurist agrees with the suggestion, but adds that there should be no inflexible rule and even an outstanding member of the bar should be considered.

(d) One State Government agrees that if the seniormost Judge is not suitable, the Judge of another High Court be brought as Chief Justice, but in that case the seniormost Judge of the High Court should be considered for Chief Justiceship in another High Court.

One State Government accepts the suggestion only to a very limited extent. The Chief Justice should be from the State where the High Court is situated. In, under any extraordinary circumstances, any outside judge is appointed as Chief Justice, such Judge should be a person proficient in the language of the State.

Two State Governments are opposed to the suggestion to appoint a Judge from another High Court. One of them has stated that the bringing of Judges from other High Courts is merely a mellowing factor, adding that the next seniormost Judge be appointed as Chief Justice.

One Law Secretary agrees with the suggestion in the Question, but the outside Judge should be brought only on the choice of the Chief Justice of India, who should consult his two seniormost colleagues.

Question No. 11

(a) According to one High Court, a Judge from outside be appointed as Chief Justice only in the circumstances mentioned in Question 10. In another High Court, the Chief Justice agrees with the suggestion, while other Judges are opposed. Five High Courts are opposed to the suggestion.

(b) In regard to individual Judges, some Judges of one High Court, and some Judges of another High Court, are opposed.

(c) A very eminent jurist agrees with the suggestion.

(d) One State Government agrees with the suggestion, but stresses that considerations of regional language claim should be kept in mind

One Law Secretary is of the view that an outsider be appointed as Chief Justice, but only when the seniormost Judge is unsuitable.

One State Government has not specifically dealt with this Question. Two are opposed.

Question No. 12

(a) Three High Courts agree with the suggestion, but out of them—

- (i) one has expressed agreement only in principle, stating that practical difficulties (for example, the proceedings being in regional language) may come in; and
- (ii) another has qualified its agreement with the suggestion by stating that one-third Judges of each High Court should be "initially" appointed in another State on a reciprocal basis.

Three High Courts are opposed to the suggestion. In their view, it is impracticable. In one High Court, the Chief Justice agrees with the suggestion, but not the other Judges.

(b) In regard to individual Judges the opinion in one High Court was equally divided: the Chief Justice was of the view that the suggestion will not bring forth the result envisaged. In another High Court, one Judge agrees with the suggestion, while one Judge is opposed and four Judges state that only willing Judges should be transferred, but that there should be no convention.

(c) A very eminent jurist has expressed himself as wholly in favour of the suggestion.

(d) Two State Governments and one Law Secretary are in agreement with the suggestion. Besides this, one more State Government is of the view that *one-fifth* of the Judges may be from outside the State; that State Government has also expressed the view that *one-fifth* of the Judges appointed from the Bar should be from among Advocates practising in Mofussil District Courts. Finally, one State Government, though not in favour of the suggestion for appointment of Judges from outside the State in any *fixed ratio*, favours measures calculated to induct Judges from outside the State.

Question No. 13

(a) Seven High Courts agree with the suggestion in the Question (that the normal convention should be to appoint the seniormost Judge as the Chief Justice of the Supreme Court). Of these, five High Courts state (or imply) that there should be no departure from

the convention, according to the sixth High Court, there should be no departure unless approved by two-third of the Chief Justices of the High Courts. According to the seventh High Court, there should be no departure from the convention unless approved by the proposed Commission.

(b) As to the replies of individual Judges, some Judges of one High Court agree with the suggestion in the question. In the other High Court, two Judges agree with the suggestion in the Question, but they add that in case of a departure from the convention, other five seniormost Judges should be consulted.

(c) A very eminent jurist is of the view that in the context of the situation where the Government of the day cannot be trusted to act in accordance with the spirit of article 124(2), at least five seniormost Judges should be consulted. Further when appointment of the Chief Justice of India is to be from outside the Supreme Court, all Chief Justices of the High Courts should be consulted. As to appointment of a Supreme Court Judge, all Judges of the Supreme Court and High Courts should be consulted.

Question No. 14

(a) The only High Court that has favoured the proposal for a Judges Appointment Commission is of the view that the proposed Commission should not have a power to initiate any new name for appointment of Judges of High Court or Supreme Court or Chief Justice of the High Court. As regards Chief Justice of the Supreme Court, when all other Judges of the Supreme Court in the order of seniority are unsuitable, then a new name for the Chief Justice of the Supreme Court may be initiated by the proposed Commission.

(b) One Judge of a High Court is of the view that the proposed Commission should have no power to initiate new names.

(c) According to a very eminent jurist, the proposed Commission should have power to initiate new names for Judges, but not for the Chief Justiceship.

(d) Of the two State Governments that favour a Commission, one is of the view that the Commission should have power to initiate a new name, while the other is opposed on the ground that the Commission is a consultative body.

Question No. 15

(a) The only High Court that has favoured the proposal for a Commission is of the view that consultation with it should be at the final stage and in addition to the present constitutional provision.

(b) This is also the view of one High Court Judge.

(c) A very eminent jurist has expressed the view that consultation with the Commission should be in addition to the present practice and in accordance with existing constitutional provisions.

(d) Of the two State Governments that have favoured a Commission, one is of the view that consultation with the Commission should be in addition to present constitutional position and at the last stage. The other State Government has simply stated that the view of the Government may prevail.

Question No. 16

(a) The only High Court that has favoured the proposal is of the view that the recommendation of the Commission should be binding on the Government.

(b) This also is the view of one Judge of a High Court.

(c) A very eminent jurist is of the view that for some time the working of the Commission should be tried. Even if consultation with it is made a part of the Constitution, it is not, at the present stage, possible to make its recommendation binding, since, as the matter stands, even the recommendations of the Chief Justices are not binding. However, an appropriate provision should be made in the relevant article to the effect that the Government shall not appoint any person who is not supported by the majority of the Commission and the Chief Justice and Judges of the Supreme Court or of the High Court, as the case may be.

(d) Of the two State Governments which favour a Commission, one is of the view that its recommendation should be of a persuasive character, while the other answers the question in the affirmative.

Question No. 17

(a) Of the High Courts, only three have specifically answered this question. One has stated that it should be the "invariable convention" that the seniormost Judge be appointed as Chief Justice of the Supreme Court. According to another High Court, this should be the "normal convention", and the question of approval by the Commission does not arise. According to the third, the existing scheme should not be thrown overboard.

(b) According to one High Court Judge, the existing scheme should not be thrown overboard.

(c) A very eminent jurist who has replied to the Questionnaire in great detail has made no suggestion for any new scheme for appointment of Judges.

(d) Of the State Governments that have dealt with Question 17, one is opposed to any such convention while the other has suggested that for one appointment, there should be a panel of three names for consideration for appointment of a Judge before the Government. Choice must be left open to the Government, who will select one out of those three.

Question No. 18.

(a) Six High Courts have specifically dealt with this Question. One is in favour of a convention for appointing one-third Judges from outside the State subject to its observation on Question 12 (*supra*). Another High Court favours a common pool but has pointed out that outsiders will have difficulty of language. The remaining four High Courts are opposed to the suggestion put forth in the Question.

(b) Some Judges of a High Court are opposed, and so are five Judges of another High Court, four of them adding that second-rate persons will get in (if the suggestion is implemented).

(c) A very eminent jurist is, however, in favour of having a common panel or pool of persons who have given their consent to being appointed outside the State.

(d) Of the State Governments, three welcome a common pool; one is against it. A Law Secretary is also against it.

Question No. 19

The replies on Question 19 reveal wide variety. The following are the ages suggested :

(a) High Courts

One High Court . .	High Court Judges	— 47—50 years.
	Supreme Court Judges	— 55—58 years.
One High Court . .	High Court Judges	— 40 years (lower age limit).
One High Court . .	High Court Judges	— Round about 50 years.
	Supreme Court Judges	— 55 years for direct recruitment.
One High Court . .	High Court Judges	— 40—50 years.
	Supreme Court Judges	— 50—60 years.
One High Court . .	High Court Judges	— 45—55 years.
	Supreme Court Judges	— 50—60 years.
One High Court . .	High Court Judges	— No age consideration for High Court Judges.
	Supreme Court Judges	— 45—55 years (for members of the Bar only).
One High Court . .	High Court Judges	— (i) 45—55 years (for members of the Bar).
		(ii) 55—58 years (for members of Judicial Service).
	Supreme Court Judges	— 50—60 years.

(b) High Court Judges

Chief Justice of a High Court.	High Court Judges	50 years (minimum)
Some Judges of a High Court.	Supreme Court Judges	— 55 years (minimum).
	High Court Judges	lower age limit 42 years (No upper age limit in the case of those persons in service).
	Supreme Court Judges	— 50 years (lower age limit).
One Judge of a High Court	High Court Judges	— 45—55 years.
	Supreme Court Judges	— 55—60 years.
One Judge of a High Court	High Court Judges	— 47—55 years.
	Supreme Court Judges	— 55-62 years.
Four Judges of a High Court.	High Court Judges	— 40—52 years.
	Supreme Court Judges	— 50—58 years.
(c) A very eminent jurist . .	High Court Judges	— 50 years (minimum).
	Supreme Court Judges	55 years (minimum).
		Both relaxable in case of extra ordinary qualifications.

(d) State Government

One State Government . .	High Court Judges	— 45—50 years.
One State Government . .	Supreme Court Judges	— 50—55 years.
		— 45—58 years normally.
One State Government . .		— Should have completed— (i) 35 years for High Court. (ii) 45 years for Supreme Court.

— The minimum age for appointment of Judges must be 50 years: Certainly younger persons may not be selected for the High Court. For Supreme Court, the minimum age should be 55 years.

Question No. 20

(a) One High Court has suggested that the recommendation of the Chief Justice of the High Court for the appointment of a Judge should be sent directly to the Chief Justice of India and not through the Chief Minister or the Governor. The initiation of a proposal for appointment of the Chief Justice of the High Court should be from the Chief Justice of India, and not from the State Government.

Another High Court is of the view that there should be a time-bound procedure for the appointment of High Court Judges, particularly in regard to the stage of the Chief Minister sending comments on the names recommended by the Chief Justice for appointment as High Court Judge. The time limit should be one month, and if no comments are received within the period of one month, it should be assumed that the names recommended by the Chief Justice have the approval of the State Government.

Another High Court has suggested that the appointment (to the High Court) must be made within 6 months of getting the consent of a member of the bar. If the authorities do not give their opinion within a stated period, they should be deemed to have agreed with the Chief Justice. It is also suggested that the Members of the Bar should be entitled to full pension after 7 years of service as Judge. That High Court is opposed to a fixed quota for appointment from services, and suggests that merit alone should be considered, irrespective of seniority.

(b) The Chief Justice of a High Court is of the view that the Chief Justice of the High Court should send his recommendation to the Chief Justice of India. In his opinion, consultation with the Chief Minister and the Law Minister is an extra-constitutional practice. Some Judges of another High Court have also stated that the State Government should have no say in the matter of appointment of Judges and that the provision regarding consultation with the Governor should be deleted. But the Chief Justice of the same High Court is not in favour of deleting the provision regarding consultation with the Governor.

According to some Judges of a High Court, there should be no transfer of a High Court Judge without his consent. They are also of the view that no person should be appointed as a Judge of the High Court unless recommended either by the Chief Justice of the High Court or by the Chief Justice of India and that no person should be appointed as a Judge of the Supreme Court unless recommended by the Chief Justice of India.

A Judge of another High Court has expressed the view that the appointment of High Court Judges should be made on the recommendation of the Chief Justice of the High Court, who should have a preponderating voice.

(c) A very eminent jurist who has sent a reply to the Questionnaire has no further suggestions to make.

(d) As regards the State Governments, one of them is of the view that there should be one-third of the Judges of the High Court from the subordinate judiciary to attract better talent while another State Government suggests that at least 60 per cent of the Judges should be appointed by promotion of District Judges as a fillip to the lower judiciary which decides the fate of the common man.

One Law Secretary would like half of the vacancies in the High Courts to be filled from amongst District and Sessions Judges.

Consultation with the Chief Justice of India and his two seniormost colleagues for the appointment of Judges in the Supreme Court has been suggested by a State Government.

A State Government has suggested that 6 months before a Judge is to retire, the process for selection should be initiated. Another State Government would like the names of the candidates considered for appointment to be duly published 6 weeks in advance, so that if any candidate has unsatisfactory or unsavory past, it may be brought to the notice of the members of the public. It says that the Government would make secret inquiries about the truth or falsity of the allegation against any aspirant before a final decision is taken.

One Law Secretary suggests that at least 10 members should be considered for the post of High Court Judge and selection should be on seniority-cum-merit basis.

The proposal from the Chief Justice of the High Court after consultation with two seniormost colleagues and agreed in by the State Government should, he says, be accepted. He has emphasised that in the confirmation, extension and transfer of High Court Judges, the Chief Justice of India should have a decisive voice.