Discussion Paper

Towards Greater Judicial Accountability

Creation of a National Judicial Commission

for judicial appointments and oversight

and

All-India Judicial Service

(Note: This document contains two parts: PART A deals with the National Judicial Commission and PART B, with the creation of the All India Judicial Service)

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Part –A

Creation of a National Judicial Commission

for judicial appointments and oversight in higher judiciary

1. Introduction

Independence, impartiality, integrity and competence of the judiciary are at the core of our Constitutional order. Higher Judiciary has been accorded a central role in our state structure as a vital institutional safeguard to defend the Constitution, protect liberty of citizens and check the abuse of authority.

The higher judiciary has by and large fulfilled this cardinal role and acted as the sentinel of the Constitution. The recent national consensus on the extremely contentious issue of Ayodhya to the effect that the matter should best be left to the Courts and due process of law is a testimony to the nation's faith in higher judiciary. On critical questions like reservations, inter-state disputes and the application of Article 356 or Tenth Schedule of the Constitution, the mature and balanced role of Courts in reconciling various interests and upholding the spirit and letter of the Constitution has been of inestimable value in dousing flames of passion and prejudice, and bringing peace and harmony to society.

An extremely complex, diverse, federal polity which is struggling to reconcile short-term expediency with long-term imperatives of nation building needs a credible, independent and impartial judiciary. The nation has so far been well-served by the judiciary. But certain distortions and glaring inadequacies are endangering the credibility of higher judiciary.

The Supreme Court judgments relating to appointments of judges of higher courts and the subsequent practice of the judiciary having the final say in matters of judicial appointment have raised questions of Constitutional propriety. Even more important, there is significant

disquiet about the quality of judges appointed. In recent times, serious questions have been raised about the impartiality, and ability of judges of higher courts. Of late, even the integrity of some of the judges has come under public scrutiny. The recent allegations of serious impropriety or even the taint of corruption, of some of the highest judicial functionaries in the land is a source of grave concern to all lovers of liberty and champions and constitutionalism and rule of law.

Protecting the credibility of the judiciary is a matter of great national importance. If the general public loses confidence in the integrity and impartiality of the higher judiciary, there is every danger that the nation will fall apart. Therefore protecting the image of the higher courts, enhancing the quality of judges, and ensuring their impeccable conduct are matters of great public importance which need to be addressed immediately..

The three central issues that need to be addressed in this regard are as follows:

1. How to create a mechanism for appointment of persons of highest ability, impartiality and integrity are elevated as judges of higher courts?
2. What are the institutional mechanisms to effectively address allegations of wrong doing against judges, so that judicial credibility protected?
3. How to encourage the best and the brightest to enter the judiciary at all levels?

2. Existing Legal Framework

The Indian judiciary has always been accorded independence in our constitutional framework and respect in the minds of the people. It has, in recent decades, been regarded by many as the branch of government most responsive to the needs of ordinary Indians and to the responsibilities of the Government enshrined in the Constitution. For much of its history the judiciary has been regarded as largely fair and incorruptible.

Under British rule, in several cases, members of the civil service, employees of the executive, served as judges. It was this undesirable degree of vulnerability of the judiciary to executive

influence that resulted in the Constituent Assembly according judicial independence the highest priority in the Constitution's construction of the judiciary.

In the Constituent Assembly, the suggestion that the appointment of Supreme Court and High Court judges by the President should be "with the concurrence" of the Chief Justice of India (in the case of the Supreme Court) and with that of the Chief Justice of the High Court (in the case of the High Court) was rejected in favour of executive appointments "in consultation with" the Chief Justice of the Supreme Court or High Court. Also rejected was the proposition that judicial appointments should be approved by a two-thirds vote in the Rajya Sabha.

Over the ensuing decades, there were frequent allegations that the executive exerted too much control over judicial appointments. In 1974, in *Shamsher Singh v. State of Punjab*, the Supreme Court stated that appointments to the Supreme Court or High Court must have the approval of the Chief Justice of India. There was a brief withdrawal from this stance in *S.P.Gupta* in 1981 when the Supreme Court gave the President the option to disregard the Chief Justice's recommendation. Since then, however, the march towards judicial control over judicial appointments has continued.

The framers were even more successful at insulating the judiciary from executive or legislative oversight. Not a single Supreme Court or High Court judge has been removed from the bench through the impeachment process, despite almost incontrovertible evidence of misconduct in at least one case. The Constitutional requirement of a two-thirds majority in both Houses of Parliament for the impeachment of a judge has effectively guaranteed the judiciary protection from removal regardless of conduct.

The Indian judiciary is an anomaly. In no other country of the world are judicial appointments so insulated from the will of the executive and legislative branches, and, as an extension of this, from the will of the people. In time, this has turned the judiciary's position as the champion of the people into something of a contradiction, as the least accountable branch of government is striving to be the most responsive to the people.

3. In Recent Years

In 1990, the then Union Minister for Law and Justice introduced the 67th Constitutional (Amendment) Bill in Parliament. The Bill provided for the creation of a National Judicial Commission for the appointment of Supreme Court and High Court Judges. The composition of the Commission was to be different for Supreme Court and High Court appointments. For appointments to the Supreme Court it would comprise the Chief Justice of India and the two Supreme Court judges next in seniority. For appointments to the High Court it would comprise the Chief Justice of India, the Supreme Court judge next in seniority, the Chief Minister of the concerned State, the Chief Justice of the relevant High Court, and the High Court judge next in seniority.

No action was taken on the Bill but the system of Supreme Court appointments that it envisaged was mandated three years later by the Supreme Court itself. In *Supreme Court Advocates-on-Record Association vs. Union of India* (1993 (4) SCC. 441) the Court ruled that the Constitution's provision that the President appoint Supreme Court judges in ''consultation with such Judges of the Supreme Courts…as the President may deem necessary" (Article 124(2)) meant that the advice of the Supreme Court judges was binding upon the President. It also resolved that the judges involved in this 'consultation' would be the Chief Justice of India and the two judges next in seniority. This decision was upheld in 1998 in the *Third Judges* case, only slightly modified to involve the Chief Justice of India and the four judges – rather than two – next in seniority as well as all Supreme Court judges from the candidate's High Court.

The Court also laid down a system for appointments to the High Court. The Constitution requires the President to consider the opinion of the Chief Justice of the High Court in question, the relevant Governor, and the Chief Justice of India. The Court ruled that the Chief Justice of the High Court and the Governor must make their recommendations but that the advice of the Chief Justice of India, delivered in consultation with the two judges next in seniority, would prevail.

The system of appointment to the higher courts, as stipulated by the Constitution and as interpreted by the Supreme Court, has always placed the highest premium on judicial independence. India is unique in the degree of judicial control over judicial appointments. In no other country in the world, does the judiciary appoint itself.

Unfortunately, the strong insistence on judicial independence in the appointments process has had its attendant problems.

Unaccountability: Neither the executive nor the legislature has much say in who is appointed to the Supreme Court. In the case of the High Courts, the Chief Minister (via the Governor) has a say but the final word rests with the Supreme Court. It is accepted that the judiciary must not be directly vulnerable to public approval or disapproval of its actions. We have successfully avoided this evil in our system of appointments but have invited another problem whereby people are left with no say, however indirect, in the composition of the judiciary. As Thomas Jefferson said, "A judiciary independent of a king or executive alone is a good thing; but independence of the will of the nation is a solecism, at least in a republican government".

Political, caste, and communal considerations: Appointments to the High Court have been unable to keep pace with the vacancies, stalled by the haggling over political, caste, and communal considerations at every step, as they pass from the Chief Justice of the High Court to the Chief Minister to the Supreme Court and the Law Minister. According to the 2004 year-end review of the Ministry of Law and Justice there were 143 vacancies in the 21 High Courts out of a sanctioned strength of 719 judges leaving almost 20% of the judges' posts vacant.

Questions of merit: The current system of appointments is not open to public scrutiny and it is therefore difficult to determine the criteria for appointments. In many cases it seems that seniority is used as a proxy for merit.

Thus, our chief concerns with the current system of appointment are the lack of accountability and transparency, the difficulty in getting people of adequate ability onto the bench, and the significant delays in appointing judges to the High Courts.

4. International Best Practices

Around the world, appointment or selection commissions are being chosen as an integral part of an effective, open system of judicial appointments. These commissions bear little resemblance to that featured in the 67th Amendment Bill. The proposed National Judicial Commission was dominated by members of the judiciary whereas most functioning commissions in other parts of the world are dominated by members or appointees of the legislative and executive branches.

Such commissions continue to gain traction around the world, in civil law and common law jurisdictions (in March 2005, a Judicial Appointments Commission was passed into law for England and Wales). The effectiveness of such commissions depends, not surprisingly, on how closely their structure and role is tailored to the goals of the appointment process. The main questions to be answered with regards to such a commission are the following:

1. How will the composition of the commission represent the executive, legislature, and judiciary, and who will nominate the individuals appointed?
2. Will the composition supply recommendations or issue binding advice?
3. Will the commission also be responsible for the oversight of the judiciary?

Appendix A of this document looks at five countries and two states that use judicial appointment or selection commissions. Owing to the diversity of their missions we will refer to such commissions as 'nominating commissions'. In some of the countries whose appointment process is discussed, historical forces have determined that the prime concern is insulating the judiciary from the other branches of government. In others, it is placing judges above the machinations of political parties and the election process. And in others, it is ensuring that the judiciary, though not elected by the people, is fairly drawn from the people and sufficiently representative of them. In all these cases, nominating commissions,

assembled through input from different branches of government, to screen candidates and make recommendations or appointments, have been the solution.

The commissions used in these jurisdictions represent a range of answers to the above questions. The mix of judicial, legislative, and executive representatives varies, though nearly all include some mix; in some cases the commission creates a list of candidates from which the executive must make his or her choice, in others the commission merely recommends candidates, and in still others the commission's recommendations are binding upon the executive; finally, in some of these jurisdictions the appointment or selection commission also oversees judicial conduct though in most there is another body responsible for this.

The commissions discussed here belong to both common law and civil law jurisdictions. These include England and Wales, Canada and Ontario Province, New York State, France, Germany, and South Africa. England and Wales was the most recent to create a judicial appointments commission, signed into law in March 2005. In all cases, except for England and Wales, these commissions were written into or added on to the Constitutions. A discussion of their composition, duties, procedure, and the nature of their recommendations is given in ***Appendix A***.

In many of these jurisdictions councils are responsible for judicial oversight. In these cases there is a discussion of the body's membership, duties, and procedure. This information can provide a background against which to consider the needs of the superior judiciary in India with respect to appointment and oversight. The variety of commissions in use and the various uses they are put to for judicial appointments and oversight are summarized in the following tables:

Appointment Commissions

	No. of members	Members' background	Appointment of members	Binding or non-binding recommendation
England and Wales	15	Lawyers, judges, laypersons	Judiciary and laypersons	Recommendation can only be rejected once
Canada	7	Lawyers, judges, laypersons	Executive, judiciary, Bar	Non-binding but convention restricts choice to Commission's recommendations
Ontario Province	13	Lawyers, judges, laypersons	Executive, judiciary, Bar	Appointee must be from Commission's shortlist
New York State	12	Lawyers and laypersons, representatives of more than one political party	Executive, legislature, judiciary	Appointee must be from Commission's shortlist
France	10 + President of Republic and Minister of Justice ex officio	Judges, prosecutors, and three who are neither judges nor legislators	Executive, legislature, judiciary	In theory non-binding but President limited to Council's recommendations. Binding for lower courts.
Germany	32 + Federal Minister of Justice ex officio	State Ministers of Justice and appointees of federal legislature	State and federal executive, federal legislature	Binding
South Africa	23	Ministers, legislators, lawyers, law professors, judges	Executive, legislature, judiciary, legal profession, law teachers	For Supreme Court, non-binding, though President can ask for a new shortlist only once. Binding for lower courts.

Oversight Councils

	Members' background	Body responsible for inquiry	Authority empowered to remove judges
England and Wales	Lay person who has never held a judicial post	Judicial Appointments and Conduct Ombudsman	Legislature
Canada	Judiciary	Oversight commission's inquiry committee consisting of two commission members and appointee of Minister of Justice	Legislature
Ontario Province	Judiciary and laypersons	Oversight commission	Legislature
New York State	Appointees of executive, legislature, and judiciary	Oversight commission	Oversight commission
France	Judges, prosecutors, and three who are neither judges nor legislators	Oversight commission	Oversight commission
Germany	N/A	Federal Constitutional Court	Federal Constitutional Court
South Africa	Ministers, legislators, lawyers, law professors, judges	Oversight commission	Executive after a 2/3rds resolution in the legislature

5. Measures for Enhancing Judicial Accountability

A review of the practices in democracies shows that in most democratic societies, the executive and the legislature play a key role in judicial appointments. At the same time, safeguards have been evolved to protect the independence and the integrity of the judiciary.

Several expert bodies, civil society groups and eminent citizens have been articulating the need for reforms in higher judiciary, particularly in respect of appointments and accountability, and recruiting the best and brightest into judiciary, so that a pool of talent is available for elevation to High Courts. We also need to create mechanisms for appointing eminent jurists and outstanding senior advocates to the Supreme Court. Though Article 124(3)(c) of the Constitution provides for such appointments directly to the Supreme Court, it has hardly ever been invoked so far.

There are several models which have been proposed for judicial appointments and for removal of errant judges of higher courts. The National Judicial Commission comprising of government leaders, legislative branch and judiciary is one such model. Independent advocacy bodies like Committee on Judicial Accountability advocate two separate bodies, each constituted by five member nominated by five different authorities / collegiums – one body for judicial appointments, and another for removal of judges of higher courts. The National Commission to Review the Working of the Constitution (NCRWC) suggested a body comprising of the Chief Justice of India, two senior most judges of the Court, the Union Law Minister, and an eminent person nominated by the President for recommending judicial appointments. In effect, this is a slight modification of the current practice of the Supreme Court collegium making binding recommendations. But a discussion paper published by NCRWC suggested a bipartisan National Judicial Commission headed by the Vice President and comprising of legislative, executive and judicial branches of government.

Regarding removal of errant judges, the current mechanism available is impeachment under Art 124 (4). Clearly, this mechanism failed in enhancing the credibility of the higher judiciary. The Judges Enquiry Act, 1968 merely provides for a mechanism for enquiring into allegations against sitting judges of the Supreme Court and High Courts. Under this law, the presiding officer of either House of Parliament – in which a due notice is given for a motion for presenting an address to the President for the removal of a Judge – will constitute a three member committee to enquire into the allegations and the committee's report will be submitted to the presiding officer. However, at present, except for reprimand, private counselling or transfer, there is no other recourse available to hold judges to account, short of impeachment. No Constitutional functionary in India has so far been removed by impeachment of Parliament.

The Judges Enquiry Act is now proposed to be replaced by a new enactment. The Judicial Standards and Accountability Bill is reported to have been approved by the Union Cabinet for introduction in Parliament. According to news reports, this new legislation seeks to give statutory status to the 'Restatement of Values of Judicial Life' unanimously adopted by the Supreme Court in 1997; and attempts to provide for an enquiry by a five-member

committee; the committee, after enquiry, may dismiss the case, or issue an advisory or warning or advise resignation, or recommend impeachment. While this Bill is an improvement over the present state of affairs, it still does not address the serious lacuna in enforcing accountability of the judges of higher courts.

Clearly, the provisions of Art 124 (4) have not proved effective in ensuring high standards of conduct of several judges. And yet, judiciary is the most trusted organ of state. Any further erosion of judiciary's credibility will severely undermine our democracy and political and social order. Therefore, we need to identify fool-proof, credible, effective, trust-worthy institutional mechanisms to remove errant judges.

One approach could be that the National Judicial Commission, by a two-thirds majority, will be empowered to recommend removal of a judge based on the enquiry report submitted under the Judges Enquiry Act, 1968, or the proposed Judicial Standards and Accountability Act. While appointments can be recommended by a majority decision, the requirement of a two-thirds majority of NJC for recommending removal will act as a reasonable safeguard against arbitrariness. The recommendation for removal will be binding on the President. Article 124 (4) can be replaced by such a provision.

The following, therefore, are some of the alternatives which can be considered for adoption regarding appointments and removal of Judges of higher courts.

Option A: A National Judicial Commission for India

The Supreme Court of India and the High Courts set the standard for judicial conduct and competence in the country. We must see that only candidates of the highest integrity and ability are appointed to these courts and that, once judges, they perform their duties with honesty, dedication and skill. This requires a degree of scrutiny in judicial appointments and oversight impossible under the current system. It is vital that we create a National Judicial Commission, combining input from the elected branches of government and the judiciary, to appoint and oversee the judges of the Supreme Court and High Court.

The experience of diverse jurisdictions described above supports the inclusion of the Prime Minister and legislators in the appointment process. The challenge is to ensure that the judiciary remains independent of other branches of government in fulfilling its duties, while benefiting from the input and vigilance of the peoples' representatives. We cannot expect the judiciary to appoint itself and then oversee itself. Both these elements are inappropriate in a democracy. One optional solution could be a National Judicial Commission (NJC) drawn from the executive, legislature and judiciary. One acceptable composition of NJC could be a seven-member NJC with the following members:

- The Chairman of the Rajya Sabha (Vice-President of India) as Chair of the Commission
- The Prime Minister or the Prime Minister's nominee
- The Speaker of the Lok Sabha
- The Law Minister
- The Leader of the Opposition in the Lok Sabha and Rajya Sabha
- The Chief Justice of India

In matters relating to the appointment and oversight of High Court judges the Commission could also include the following members:

- The Chief Minister of the concerned State
- The Chief Justice of the concerned High Court

The NJC can be authorized to solicit views of jurists, representatives of the Bar and the public in any manner the Commission deems fit. Also, NJC can have the option of inviting two jurists to be non-voting members.

One question which needs to be addressed is whether the advice of NJC should be binding on the President. In this respect, the procedure adopted for the Judicial Appointments Commission of England and Wales seems well-suited for our situation. Upon the Commission's recommendation, the President can either appoint the candidate, or return to the Commission for further consideration, or reject the candidate. Rejection or returning a name should be backed by reasons recorded in writing and communicated to the Commission. If rejected, the Commission cannot resubmit the candidate. But if a name is

simply returned, the Commission would be free to resubmit a candidate returned for reconsideration. The President should then appoint a candidate whose name has been resubmitted for appointment.

Then we need to address the question of oversight of the higher judiciary. Clauses (4) and (5) of Article 124, Article 217 and Article 218 govern the procedure for removal of judges of Supreme Court and High Courts. However, past experience shows that this mechanism has failed, and the Parliament could not effectively exercise oversight functions in respect of judiciary. Given this background, it would be most appropriate if NJC is entrusted with the responsibility of oversight of judiciary. The Judges Enquiry Act could be suitably amended to empower NJC to constitute a committee comprising of a judge of the Supreme Court, a Chief Justice of a High Court and an eminent jurist to investigate into complaints. Upon receiving the report of the Committee, NJC would consider it, duly giving an opportunity to the judge concerned to present his case. The NJC can then recommend dropping of charges, or censure or removal. Dropping of changes or censure would require a majority support, while removal would require support of two-thirds of the members of NJC. The recommendation made by the NJC will be binding on the President. Such a procedure will harmoniously reconcile the requirement of restraint and balance in dealing with the higher judiciary with the need for effective, independent and bipartisan oversight of judiciary.

The creation of such a Commission will require changes in three places in the existing laws. Any change in the process of appointment for the Supreme Court will require that Article 124 of the Constitution be amended to provide for a National Judicial Commission. A similar change will have to be made to Article 217. Also, since the commission is to have the authority to oversee and discipline judges, further changes will need to be made to Article 217 (Clause 4). As per Article 218, such a change would apply equally to the High Courts. Finally, the Judges (Inquiry) Act, 1968 dictates the procedure for an inquiry into judicial misconduct currently in use. This must be changed to reflect the use of a standing Commission, responsible for the inquiry into as well as the removal of judges against whom charges of corruption or gross incompetence are established.

Option B: Proposal of the Committee On Judicial Accountability

The Committee on Judicial Accountability (COJA) argued as follows:

"(i) The actions of the Judiciary on the premise of independence of the Judiciary while understandable cannot be at the expense of accountability. Accountability and independence are not mutually exclusive.

(ii) The disciplinary control via the process of impeachment, which, as seen in Justice V. Ramaswami's case, is an impractical and extremely difficult process to pursue in practice.

(iii) The additional immunity with which the judges have cloaked themselves in Justice R. Veeraswamy's case, to the effect that even an FIR or any crime committed by a Judge, can not be registered against him without the prior permission of the Chief Justice of India.

(iv) The failure to even make known/disclose the complaints against judges and the action taken thereon by the so-called in-house mechanism coupled with the exemption / exclusion being sought from the RTI."

The Committee further argued….

"It is, therefore, absolutely essential that if any enquiry is to be conducted into the conduct of a sitting judge, it must be done by an Enquiry Committee or a Council which does not consist of any sitting judges at all. It may consist of some retired judges but it must have persons from outside the judicial family. What is really required is constitutional amendment to put in place a 5 member National Judicial Commission, consisting of persons who could be retired judges or other eminent persons and chosen in the following manner:

(i) One member to be nominated by a collegium of all the judges of the Supreme Court.

(ii) One member to be nominated by a collegium of all the Chief Justices of the High Court

(iii) One member to be nominated by the Cabinet

(iv) One member to be nominated by a collegium of the Speaker, Leader of the Opposition in the Lok Sabha and the Leader of the Opposition in the Rajya Sabha.

(v) One member to be nominated by a Collegium of Chief vigilance Commissioner of the Central Vigilance Commission, Comptroller and Auditor General of the Chairperson of the National Human Rights Commission.

Thus, the National Judicial Commission will have 5 members nominated as above who would not be sitting judges and would be full time members, having an assured tenure. They must have an investigative machinery under their administrative control through whom they can get charges investigated against judges. If they find any prima facie case against the Judge, they could hold a trial of the Judge and if found guilty, recommend his removal after which his removal should be automatic. The view which has been propagated particularly by the Judiciary, that it cannot be held accountable by any body outside itself, since they would compromise its independence, is completely without merit. Independence of judiciary means independence from the Government and Parliament and not independence from accountability to an outside independent body. It cannot be said that accountability to a National Judicial Commission of the kind mentioned above, would compromise the independence of the judiciary. Independence from accountability from any outside body in practice means independence from accountability altogether, which cannot be countenanced for any body or any institution in this country. Everybody, including the President, is accountable to outside bodies. There is no reason why the judiciary should not be so accountable to an independent high powered and credible body of retired judges and eminent persons selected in the above manner."

In effect, COJA recommends two different bodies constituted in identical manner – one for making binding recommendations on judicial appointments and the other for removal of judges. The reason advanced by COJA for two different bodies is to avoid embarrassment to the appointing body in enquiring into the misconduct of the same judges whose appointment was recommended by them.

Option C: Recommendation of NCRWC:

The National Commission to Review the Working of the Constitution (NCRWC), in its report, argued as follows:

"7.3.7 The matter relating to manner of appointment of judges had been debated over a decade. The Constitution (Sixty-seventh Amendment) Bill, 1990 was introduced on 18th May, 1990 (9th Lok Sabha) providing for the institutional frame work of National Judicial Commission for recommending the appointment of judges to the Supreme Court and the various High Courts. Further, it appears that latterly there is a movement throughout the world to move this function away from the exclusive fiat of the executive and involving some institutional frame work where under consultation with the judiciary at some level is provided for before making such appointments. The system of consultation in some form is already available in Japan, Israel and the UK. The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for a collegium of the Chief Justice of India and two other judges of the Supreme Court for making appointment to the Supreme Court. However, it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.

"The National Judicial Commission for appointment of judges of the Supreme Court shall comprise of:

(1) The Chief Justice of India: Chairman

(2) Two senior most judges of the Supreme Court: Member

(3) The Union Minister for Law and Justice: Member

(4) One eminent person nominated by the President after consulting the Chief Justice of India: Member

"The recommendation for the establishment of a National Judicial Commission and its composition are to be treated as integral in view of the need to preserve the independence of the judiciary.

"Removal of Judges and remedies for deviant behaviour

"7.3.8 A committee comprising the Chief Justice of India and two senior-most Judges of the Supreme Court shall be exclusively empowered to examine complaints of deviant behaviour of all kinds and complaints of misbehaviour and incapacity against judges of The Supreme Court and the High Courts. Their scrutiny at this stage would be confined to ascertain whether –

(a) there is substance at all in the complaint; or

(b) there is a *prima facie* case calling for a fuller investigation and enquiry; or

(c) whether it would be sufficient to administer an appropriate advice/warning to the erring Judge or give other directions to the concerned Chief Justice regarding allotment of work to such Judge or to transfer him to some other court.

"If, however, the committee finds that the matter is serious enough to call for a fuller investigation or inquiry, it shall refer the matter for a full inquiry to the committee [constituted under the Judges' (Inquiry) Act, 1968]. The committee under the Judges Inquiry Act shall be a permanent committee with a fixed tenure with composition indicated in the said Act and not one constituted ad-hoc for a particular case or from case to case, as is the present position under Section 3(2) of the Act. The tenure of the inquiry committee shall be for a period of four years and to be re-constituted every four years. The inquiry committee shall be constituted by the President in consultation with the Chief Justice of India. The membership of the inquiry committee shall not be full time salaried employment. But the terms and other conditions of service of the Members of the committee shall be such as may be specified in the notification constituting the inquiry committee. The inquiry committee shall inquire into and report on the allegation against the Judge in accordance with the procedure prescribed by the said Act, i.e. in accordance with the sub-sections (3) to (8) of

Section 3 and sub-section (1) of Section 4 of the said Act and submit their report to the Chief Justice of India, who shall place before a committee of seven senior-most judges of the Supreme Court. The Committee of seven Judges shall take a decision as to - whether (a) findings of the inquiry committee are proper and (b) any charge or charges are established against the judge and if so, whether the charges held proved are so serious as to call for his removal (i.e. proved misbehaviour) or whether it should be sufficient to administer a warning to him and/or make other directions with respect to allotment of work to him by the concerned Chief Justice or to transfer him to some other court (i.e. deviant behaviour not amounting to misbehaviour). If the decision of the said committee of judges recommends the removal of the Judge, it shall be a convention that the judge promptly demits office himself. If he fails to do so, the matter will be processed for being placed before Parliament in accordance with articles 124(4) and 217(1) Proviso (b). This procedure shall equally apply in case of Judges of the Supreme Court and the High Courts except that in the case of a Supreme Court Judge the judge against whom complaint is received or inquiry is ordered, shall not participate in any proceeding affecting him.

"It shall also be proper, in appropriate cases, for the Chief Justice of the High Court or the Chief Justice of India, to withhold judicial work from the judge concerned after the inquiry committee records a finding against the judge.

"7.3.9 Article 124(3) contemplates appointment of Judges of Supreme Court from three sources. However, in the last fifty years not a single distinguished jurist has been appointed. From the Bar also, less than half a dozen Judges have been appointed. It is time that suitably meritorious persons from these sources are appointed."

Clearly, NCRWC's recommendation is more or less an extension of the current practice of binding recommendation of a collegium of judges. The NCRWC, however, did not offer any concrete suggestion to discipline errant judges.

Option D: A Search Committee:

P.P. Rao[1], an eminent Jurist, argued as follows:

"There is no country in the world where the power of appointment of judges is exercised by the judges themselves and the executive's role is restricted to issuing formal warrants of appointments. Conceding that the executive lacks credibility, it cannot be kept out altogether in a democracy. If the selection of candidates for judgeship had been left entirely to the judiciary from the beginning, a pathfinder like Justice V.R. Krishna Iyer would never have been appointed a judge.

Some of us who had assisted the court in interpreting Article 124 of the Constitution the way it did, now realise the handicaps of the collegium. It has no machinery at its disposal to collect and screen the relevant data about all prospective candidates for judgeship. They select candidates based on their limited personal knowledge and the assessment of a few others whom they choose to consult individually.

The collegium has been giving undue weightage to seniority and Chief Justices of High Courts in preference to more meritorious Judges. This practice has resulted in some unsatisfactory appointments. Before the last batch of appointments was made in May this year, for the first time, the government was constrained to raise queries as to why certain senior Chief Justices were overlooked and juniors selected.

The need for transparency and accountability in the selection process is urgent. The problem is crying for a solution. It has to be within the existing framework. Handing over the power of final selection back to the executive is neither feasible nor desirable. Parliament can put in place a mechanism to assist the collegium and facilitate proper and better selection without in any manner curtailing its power of final selection, by providing for the constitution of a statutory search committee by the President in consultation with the CJI consisting of eminent persons of impeccable integrity including a former Chief Justice and a retired Judge of the Court, two senior renowned lawyers of the Supreme Court, the Attorney-General, the

[1] "Choosing judges - A statutory search committee can help" by P.P. Rao.

Secretary (Law) as Member-Secretary, the Secretary (Home), and a very senior and well reputed journalist.

The functions of the search committee would be to collect all relevant data from the executive, the Bar and the judiciary throughout the country, analyse it and make assessments of probable candidates who are eligible and deserve to be considered for elevation to the Supreme Court both from the Bar and the Bench and also mention the names of Chief Justices and senior judges of the High Courts who do not enjoy good reputation.

The former CJI could be the Chairman of the Committee. The search committee shall prepare a panel of selected candidates, three times the number of vacancies to be filled and forward it together with the entire material to the collegium for consideration. It should be open to the collegium to consider any other candidate, for reasons to be recorded, who deserves such consideration.

Generally, universities while advertising the post of a Professor, insert a clause to the effect that it would be open to the selection committee to consider cases of other deserving candidates who had not applied for the post in question. There are several high posts like Vice-Chancellors for which search committees make the preliminary selection.

In the matter of judicial appointment, the question to be considered is not whether a particular candidate is proved to be corrupt, but whether he or she is a person of doubtful integrity. Only men of undoubted integrity ought to be considered for elevation.

As David Pannick observes: "Judges are mere mortals but they are asked to perform a function that is truly divine." The judiciary has acquired credibility because, in the past, by and large, the members had conformed to standards of life and conduct which are, in the words of Sir Winston Churchill, "far more severe and restricted than that of ordinary people". It is the credibility which sustains the judiciary. The day the last citadel loses its credibility, there will be no rule of law."

In effect, P.P.Rao's proposal involves two stages in appointment of Judges. First, there will be a Search Committee of eight members - including two former judges, three renowned lawyers (including the Attorney-General), two civil servants (ex-officio) and a reputed

journalist. The collegium of Supreme Court judges will then recommend to the President a name or names from the panels prepared by the Search Committee. This process attempts to widen the pool of selection and has the merit of identifying the best available persons, including eminent jurists. But otherwise, it preserves the status quo by making the collegium of Supreme Court judges the final authority in appointment of judges. Perhaps a National Judicial Commission, supported by a Search Committee which scouts for talent, identifies most suitable persons of ability, integrity and impartiality and prepares panels for consideration for appointment as Judges will be a robust and effective mechanism.

6. Synthesis of Options and Recommendations

Based on the above, it is possible to synthesize the various options and recommendations towards setting up institutions and mechanisms for enhancing accountability in higher judiciary in India. The following synthesis is suggested as capturing the best and most efficient features of relevant international practices and recommendations by expert bodies, civil society groups and eminent citizens discussed earlier; it also harmoniously integrates the provisions of the *Judicial Standards and Accountability Bill, 2010* reportedly approved by the Union Cabinet, for introduction in the Parliament:

1. For Appointments to Higher Judiciary:

- A **National Judicial Commission (NJC)** for recommending suitable candidates to the President. *(The composition of the NJC can be finalized by consensus among eminent jurists, parliamentarians and the political executive.)*
- A statutory **Search Committee** to identify suitable candidates and forward to the NJC an appropriate 'candidate pool' for consideration *(The composition of this Search Committee can be broadly as suggested in option D.)*
- The President can then appoint the candidate recommended by the NJC, return to the Commission for further consideration, or reject the candidate. Rejection or returning a name should be backed by reasons recorded in writing and communicated to the Commission. If rejected, the Commission cannot resubmit the candidate. But if a name is simply returned, the Commission would be free to

resubmit a candidate returned for reconsideration. The President should then appoint a candidate whose name has been resubmitted for appointment.

2. For Removals from Higher Judiciary:

- A standing **National Oversight Committee (NOC)** for receiving complaints against all judges of higher judiciary including the Chief Justice of India and the Chief Justices of the High Courts. *(The composition of this NOC could be as per the reported provisions of the* Judicial Standards and Accountability Bill, 2010*).* This standing NOC will function under the umbrella the proposed National Judicial Commission (NJC).
- **Scrutiny Panels**, functioning under the NOC, to assess complaints against judges and **Investigation Committee/Panels** to frame definite charges. *(the composition of both panels could be as per the reported provisions of the* Judicial Standards and Accountability Bill, 2010*).* The NOC will then make appropriate recommendations to the NJC.
- The NJC can recommend removal of a judge, by a two-thirds majority of its members; this two-thirds majority requirement will act as a reasonable safeguard against arbitrariness. The NJC can also recommend dropping of charges, or censure or removal. Dropping of changes or censure would require a majority support, *(discussed in Option A)*
- The NJC's recommendation for removal will be binding on the President; the ineffective and failed impeachment mechanism as per Article 124 (4) needs to be replaced by the above.

  The above mechanism will harmoniously reconcile the requirement of restraint and balance in dealing with the higher judiciary with the need for effective, independent and bipartisan oversight of judiciary.

***

Part – B

Creation of All-India Judicial Service (AIJS)

1. Introduction

The quality of judicial officers recruited to the subordinate judiciary in most states is on the decline. In comparison, the prestige and prospects attached to the Indian Administrative Service and Indian Police Service attract some of the brightest youngsters into these services. The duties and responsibilities of judges are onerous, and any dilution of competence in recruitment into judiciary has profound consequences to the country. Poor quality of judges causes delays in justice, increases pendency, impairs the quality of judgments, diminishes trust in judiciary, affects the competence of higher judiciary, and in general vitiates rule of law and constitutional governance.

The experience in many States shows that with the present practice of recruitment of subordinate judges, competent lawyers and bright youngsters with law degree are usually not attracted to a career on the Bench. However, for appointment into the all-India services there is fierce nation-wide competition. There is fair criticism about lack of mechanisms to sustain motivation, competence and integrity once officers are recruited to IAS and IPS. However, in general the quality and competence of officials in the all-India services are regarded as fairly high at the stage of recruitment.

The competence and quality of judges in trial courts is critical for the integrity and credibility of the whole justice system. Therefore there is a strong case for creation of an all-India Judicial Service, in line with the IAS and IPS.

2. Enabling Constitutional Provisions

Article 312 of the Constitution provides for the creation of an all–India Judicial Service (AIJS) common to the Union and the States. Such a service can be created and regulated by the Parliament by law, provided that the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest to do so. Article 312 reads as follows:

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

3. Various Recommendations

The first Law Commission in its fourteenth report, examined the issue in great detail and recommended the creation of an all-India Judicial Service. The Chief Justices conferences held in 1961, 1963 and 1965 favoured this recommendation. But the views of state

governments and High Courts were more divergent. In 1972, the Chief Justice of India suggested creation of AIJS. Later, the 8th Law Commission, in its 77th Report, recommended creation of AIJS. In 1976, Article 312 was amended by the forty-second amendment, expressly providing for the formation of an AIJS. In 1986, the Law Commission, in its 116th report, again examined the issue and strongly recommended formation of an all-India Judicial Service. The Supreme Court considered this issue in the All India Judges case: AIR 1992 SC 165 (Paras 9-11). Former Chief Justice J.S.Verma too recommended formation of Indian Judicial Service.

Appendix B of this document contains the relevant extracts from the above citations.

4. Recommendation: Creation Of AIJS

From the foregoing, it is clear that there is a compelling case to create a highly competent, meritocratic all-India Judicial Service. Such a Service can be created by an Act of Parliament following a resolution of the Council of States by special majority.

It may be desirable to recruit judges at a young age very much similar to those in IAS and IPS. They must have adequate experience in trial courts below district level before they become district judges and elevated to High Courts later. However, Article 312 (3) states that such an all-India Judicial Service shall not include any post inferior to that of a district judges as defined in Article 236. If officers of AIJS are directly appointed as district judges, they will not have the benefit of training and experience in subordinate positions. In case of IAS and IPS, officers have several years' experience before they become district magistrates and superintendents of police respectively. In order to ensure adequate experience and maturity before elevation as district judges, one of the following courses may be adopted:

a) Clause (3) of Article 312 may be repealed.

or

b) The rules concerning training of AIJS officials may include five years work experience in subordinate courts below district level before they are formally confirmed in AIJS in the rank of a district judge.

All other conditions of recruitment and service may be similar to IAS and IPS. The AIJS will be controlled by the High Courts in States, and the Supreme Court at the national level. While appointing judges in High Courts, a high proportion should come from AIJS, once such a service takes root, and the judicial officers so recruited gain experience.

* * *

Appendix - A

Judicial appointment or selection commissions – international case studies

England and Wales

Appointments

The Judicial Appointments Commission of England and Wales was established primarily to increase diversity on the bench and bring transparency to the appointment process. Though the judiciary was widely regarded as talented and honest, the lack of diversity was sufficiently troubling that the Government decided to develop an appointments process that would include input from voices that were previously excluded.

To that end, the new Commission includes lawyers and non-lawyers. The composition of the Commission is as follows:

- 6 lay members, 1 of whom is the Chairperson
- 5 judicial members: 1 Lord Justice of Appeal, 1 judge of the High Court, 1 Circuit Judge, 1 District Judge, and another Lord Justice of Appeal or judge of the High Court
- 1 practising barrister in England and Wales
- 1 practising solicitor of the Supreme Court of England and Wales
- 1 Justice of Peace
- 1 member of a tribunal or someone holding a similar office

The six lay members and one lay justice will be appointed by a panel comprising:

- Someone who has never been a member of the Commission or on the staff of the Commission, and has never been a practising lawyer, a member of parliament, a civil servant, or a judicial officer.

- The Lord Chief Justice of England and Wales
- The Chairperson of the Commission

The Secretary of State for Constitutional Affairs (formerly, the Lord Chancellor) may increase the number of Commissioners but may not decrease the number.

Commissioners are appointed for five-year terms and may serve no more than two terms. The Judicial Appointments Commission will make recommendations to the Secretary on all judicial appointments. In the event of a vacancy it will submit one name to the Secretary for consideration. The Secretary has three choices. He or she can either appoint the candidate or recommend them for appointment (depending on their authority for the court in question), ask the Commission to reconsider the candidate, or reject the Commission's candidate. The Secretary can only reject the recommendation or ask the Commission to reconsider their recommendation once, and must submit his or her reasons for doing so in writing. The Commission is free to resubmit a candidate returned to it for reconsideration but cannot resubmit a rejected candidate. The Secretary must then appoint or recommend for appointment the candidate submitted by the Commission.

No judicial appointments can be made until the Appointments Commission has selected the person concerned. This includes appointments to all courts and tribunals. In 2001-2002 this amounted to over 900 appointments. Due to the volume of appointments it is not possible for the Commissioners to personally interview all candidates.

Oversight

Judges in England and Wales hold office during 'good behaviour'.

The Constitutional Reform Bill 2005 also established a Judicial Appointments and Conduct Ombudsman to receive and investigate complaints against members of the judiciary. The Ombudsman will also handle complaints about the appointment process.

The Queen appoints the Ombudsman on the advice of the Secretary. No one who is in the civil service or is a practising barrister or solicitor in England and Wales, Scotland, or

Northern Ireland is eligible for the post. The Ombudsman can serve for a total of two terms, each for no more than five years.

Canada

Appointments

Canada has a federal court system and provincial court systems. The federal government is responsible for all appointments to both the federal courts and the apex courts in the provinces, known as the 'Courts of Appeal'. There are 1067 federal judges' posts in Canada. On March 1, 2005 only 24 were vacant.

The Supreme Court is Canada's court of last resort, hearing appeals from all provincial and federal courts. The Federal Court is the Canadian federal trial court, hearing cases that arise under federal law. Judges of the Supreme Court and the Chief Justice of the Federal Court are selected by the Prime Minister in consultation with the Minister of Justice. Judicial Advisory Committees have been a part of the selection process for judges of the Federal Court since 1988 and these responsibilities are discussed here. Parliament, except for the Prime Minister, has no part to play in the appointment of judges of the Federal Court and no power to review these appointments.

The committees are responsible for evaluating or simply commenting on judicial candidates. There is one in each province and territory except in Ontario, where there are three, and Quebec, where there are two, based on larger populations and a higher number of judicial posts to fill. Each candidate is considered by the committee in his or her region of practice or by the committee the Commissioner for Federal Affairs decides is most appropriate. In the case of candidates who are sitting judges in the superior courts in the provinces the committees do not evaluate the candidates but do comment on the Personal History forms that the candidate submits.

Composition of the Committees

Each judicial advisory committee has seven members – three lawyers, three laypersons and one judge. The Minister of Justice appoints all members, three directly, and four from lists of nominees. The provincial law society and local branch of the Canadian Bar Association each provide a list of lawyers, the provincial Chief Justice provides a list of judges, and the provincial Attorney-General or Minister of Justice provides a list of laypersons.

Members serve two-year terms with the possibility of renewing their terms once.

Duties of the Committees

The committees are advisory and do not actively recruit candidates; they only consider names submitted by the executive. To be considered for the federal bench one must have been a member of the bar for at least ten years. Applications must be submitted to the Commissioner for Federal Affairs. They must include both a Personal History Form and a signed Authorization Form, which allows the Commissioner to obtain a statement of their current and past standing with the law societies in which they hold or have held membership. It is also possible to nominate other people.

After receiving the applications the Executive Director, Judicial Appointments will forward them to the appropriate committee for comment. Professional competence and general merit are the primary considerations. Committee members should also consider criteria related to professional competence and experience, personal characteristics, and potential impediments to appointment. In the case of candidates who are not already on superior courts in the provinces, the committees are asked to assign candidates to one of the three categories – highly recommended, recommended, and unable to recommend. In the case of candidates who are sitting judges on the superior courts, the Committee merely comments on the candidate based on material presented in the Personal History Form. Committee comments are confidential. These comments are then provided to the Provincial Minister for Justice. The comments are not binding on the Ministers but by convention Ministers only appoint candidates recommended by the committee. The Governor General then makes the appointments on the advice of the Cabinet.

Oversight

As far as removal of judges goes, Canadian federal judges, like their counterparts in England and Wales, "shall hold office during good behaviour", under Section 96 of the Constitution Act, 1867. It is not the Judicial Advisory Committee that is involved in proceedings against judges. It is the Canadian Judicial Council, created in 1971 with statutory authority to investigate complaints against federal judges. Its powers are detailed in Part 2 of the Judges Act. The Council consists of 39 Chief and Associate Chief Justices/Chief and Associate Chief Judges of courts whose members are appointed by the federal government. The Court's only jurisdiction under the Judicial Act is to recommend removal of a judge. If a judge resigns, an inquiry is terminated.

The Council begins an inquiry either on receipt of a written complaint about a judge's conduct from a member of the public or when the Minister of Justice of Canada or the Attorney General of a province requests the Council to do so. (It is mandatory that the Council act on such 'requests'.) Complaints from a member of the public are first screened in subcommittee. If the complaint seems serious enough to merit consideration it is passed on to a panel of up to five judges, often followed by a fact-finding investigation by an independent counsel. The panel can either close the file or recommend a formal investigation to the full Council. If the Council decides to initiate a formal investigation it will create an Inquiry Committee consisting of two Council members and a lawyer appointed by the Minister of Justice.

The Inquiry Committee has the power to summon witnesses, take evidence, and require production of documents. Any judge whose conduct is being investigated is entitled to be heard and to be represented by counsel. The Inquiry Committee's report goes to the full Council. This report may include a recommendation that the judge in question be removed from office.

After receiving this report, the Council may or may not receive further submissions from the judge under investigation. It must issue a recommendation to the Minister of Justice that the judge be removed, or not be removed, from judicial office. The Minister then passes on this recommendation to the Governor in Council. The Governor in Council must present this

recommendation in Parliament within 15 days. If we break the procedure down into its constituent steps, we see that there are multiple stages in the inquiry and dismissal process in which people from outside the judiciary are involved. The first is when a complaint is referred to the panel and the panel can refer it to an independent counsel for investigation. The second is during the formulation of a report for the Council by the Inquiry Committee since one of the three members of the Inquiry Committee is a lawyer appointed by the government. Next, the Council's recommendation for removal goes to the Minister of Justice. And finally, the Parliament must approve of the dismissal.

Since the Judicial Council was constituted only twelve complaints have gone through the full inquiry process. Six of them were referred to the council by attorneys-general. A vote by Parliament on whether to remove a judge has never occurred though several judges have resigned over the course of inquiries.

Provincial Appointments and Oversight

Appointments

In Canada, judicial committees play a much larger role in the appointment of judges to the lower provincial courts, those filled by the provincial governments and not the federal government. A look at the Ontario Judicial Appointments Advisory Committee (JAAC) will offer a good illustration of the work of these provincial committees. JAAC was the outcome of a pilot program run from 1988 until 1995. The committee idea was tested as way to depoliticise the judicial appointments process. JAAC was formally established in 1995.

As of January 5, 2005 there were 275 full-time judges in the Ontario provincial courts. In an average year, the JAAC meets over two dozen times and reviews applications.

Composition of Committee

The Committee has thirteen members. Legislation requires that the composition of the committee represent the diversity of Ontario province. There are seven lay members appointed by the Attorney General and six from the legal community – three lawyers, two judges, and a member of the judicial council. All members serve for a renewable term of three years. The legislative branch is not represented in the composition of the committee.

Though the Attorney General appoints more than half the membership of the committee, the committee as a whole is considered independent of the Attorney General and the Government. The committee must produce an annual report presented in the provincial parliament. Members of JAAC themselves cannot be considered for judicial appointment until two years after they leave the committee.

Duties of the Committee

Unlike the advisory committees for federal appointments, the provincial committees advertise vacancies and invite applications. JAAC advertises vacancies in the local law society's newsletter as well as asking professional organizations to carry a copy of the advertisement. Only lawyers of ten years standing at the bar are eligible for consideration. The selection process involves three stages prior to interviews. The first is review of candidates' curriculum vitae and the lengthy Judicial Candidate Information Form (designed to include information not included in a CV). Letters of support on behalf of the candidate are not allowed though candidates must submit a list of references that may be called by the committee. Each committee member selects those candidates whom they find qualified to proceed to the second stage of reference checks and confidential inquiries. A new list is made of all those candidates who are selected by at least three members. If a member believes a qualified candidate is not on the list he or she may have that name added. The list is then circulated to all the members. In selecting and subsequently ranking candidates the committee considers professional excellence, community awareness, personal characteristics important to performance on the bench, and demographic factors.

The second step is contacting at least four references supplied by the candidates. The third is making discreet inquiries of judges, court officials, lawyers, law associations, and community and social organizations – basically, professionals with first-hand experience of the candidate.

Based on the information obtained, the committee members select the candidates to be interviewed. The Committee sits in its entirety for the interviews – usually 16 interviews over the course of two days. After each interview the committee discusses the interviewee. Finally, after the final interview and after considering candidates interviewed earlier in the

year who have applied for the current vacancy, the committee draws up a short ranked list of at least two candidates to submit to the Attorney General. The only other materials submitted to the Attorney General are the candidates' application forms. The Attorney General receives this information as soon as all necessary checks and clearances have been run on the candidates under consideration. The Attorney General will receive the short ranked list roughly four months after the committee first advertises for the vacant post. The committee does not inform candidates as to whether their names are or are not on the short list presented to the Attorney General. The Attorney General is required to make an appointment from the list.

In cases of unexpected vacancies, due to illness, death, or sudden resignation, the committee may, on the request of the Attorney General, recommend a candidate interviewed in the previous twelve months without advertising the vacancy. However, it is only in exceptional cases that the committee can abandon the policy of advertising all vacant posts.

In a given year, the committee will review hundreds of applications, conduct hundreds of inquiries, and interviews scores of applicants. Three-quarters of the 275 full-time judges on the Ontario Court of Justice were appointed after the creation of JAAC. In that time, one-third of all appointees have been women. 14 judges of the Ontario Court of Justice were appointed in 2004 alone.

Oversight

The provincial judicial councils, like the appointment advisory councils, have far wider powers than their federal equivalents. Also, in all the provinces save Nova Scotia the councils include lay members. In Ontario, the judicial council consists of six judges and six non-judges. A subcommittee investigates all complaints and makes recommendations to a larger review panel. The panel includes two judges, a lawyer, and one lay member. If the Council determines that there has been judicial misconduct a public hearing will be held and the Council will decide on appropriate disciplinary measures. The most severe sanction that the Council can impose on its own is suspension without pay for 30 days. However, it can also recommend to the province's Attorney General that the judge be removed from office. The Attorney General must table this suggestion in the legislative body within 15 days. The

Attorney General may not introduce such a recommendation except when the Judicial Council arrives at it.

The United States of America – State Commissions

Background

The United States judiciary is divided between the state court systems and the federal system. The state courts have exclusive jurisdiction over all cases brought under state laws or the state constitutions. The federal courts have exclusive jurisdiction over cases involving the United States government, the United States Constitution and federal law, or controversies between states, or between the United States and foreign governments. They may also hear cases involving litigants from different U.S. states carrying more than $75,000 in potential damages and have exclusive jurisdiction over all bankruptcy cases.

The United States Constitution dictates the appointment procedure for judges to the Supreme Court requiring the President to appoint judges with the 'advice and consent' of the Senate. Though not required by the Constitution, this procedure has been adopted for all federal judges.

Judges in the 50 state court systems and the court system of the District of Columbia are appointed in a variety of other ways, outlined in the following table:

	Partisan Elections	**Non-partisan elections**	**Governor appoints with help of commission**	**Governor appoints without help of commission**	**Legislature appoints with help of commission**	**Legislature appoints without help of commission**
Court of last resort (in all 50 states)	8	13	23 + District of Columbia	4	1	1
Intermediate appellate courts (in 41 states)	6	11	20	2	-	2
Trial courts (in all 50 states)	8 as well as 14 districts of Kansas and most of Missouri	19	15 + District of Columbia as well as 17 districts of Kansas and 4 counties of Missouri	3	1	1

The current methods used for the selection of judges to state courts in the United States developed in reaction to the once prevalent system of popular election of judges. Though, for each level of the judiciary, almost half the states retain election as the method of judicial selection a greater number have embraced judicial commissions or 'merit selection' as a way to select the most competent candidates for judicial offices while keeping them above the fray of partisan politics. 23 of the 50 states and the District of Columbia use commissions to present the governor or legislature with the list of possible candidates for the courts of last resort (usually known as the state Supreme Court). Of the 41 states that have intermediate appellate courts, between the trial courts and the court of last resort, 20 employ judicial commissions. At the lower, trial court level, 16 states use commissions as part of the appointment process.

No two nominating commissions are similar but most are non-partisan, composed of lawyers and non-lawyers, appointed by a combination of public and private officials. A good example of these commissions is that of New York State, used for the selection of judges for the state's highest court, the Court of Appeals*.

New York

Appointment

New York State created the Commission on Judicial Nominations in 1977 in the midst of a wave of reform in the judiciary. The adoption of the 'merit selection' or commission model was prompted by the concern that judicial elections were expensive and demeaning and that the process did not attract the most qualified candidates. The governor was a proponent of the constitutional reform necessary to create the commission system of appointment. This passed in the necessary two consecutive legislative sessions in 1976 and 1977 and voters approved the amendment in the 1977 elections.

* New York is one of the few states in which the court of last resort is not called the Supreme Court. The Court of Appeals is the court of last resort in New York State while the Supreme Court of New York is an intermediate appellate court.

The commission has twelve members:

- 4 appointed by the Governor
- 4 appointed by the Chief Judge of the Court of Appeals
- 1 appointed by the President pro tem of the state Senate
- 1 appointed by the Speaker of the state Assembly
- 1 appointed by the minority leader in the Senate
- 1 appointed by the minority leader in the Assembly

Of the members appointed by the Governor, no more than two may be from the same party and no more than two may be members of the bar. The same applies to the members appointed by the Chief Justice, thus ensuring that the selection process has no partisan bias. The commission submits a list of nominees to the governor who is required to select someone from the list. The governor's appointee must then be confirmed by the state Senate.

Unlike most states with the merit system, New York does not have a system of retention elections – in which each appointed judge is required, after a one- or two-year probationary period to present themselves to the public for a yes-no vote on whether they should continue in their post.

Judges of some of the other courts in New York are also screened by commissions, though the use of commission for courts other than the Court of Appeals has not been written into the Constitution.

Oversight

To complement the Commission on Judicial Nominations is New York's Commission on Judicial Conduct, created by a constitutional amendment in 1976 as part of the same wave of judicial reform. Its composition and jurisdiction were altered by a second constitutional amendment in 1978 to result in the current Commission.

The Commission has 11 members serving four-year terms.

- 4 appointed by the Governor

- 3 appointed by the Chief Judge of the Court of Appeals
- 1 appointed by the President pro tem of the state Senate
- 1 appointed by the Speaker of the state Assembly
- 1 appointed by the minority leader in the Senate
- 1 appointed by the minority leader in the Assembly

Thus, the Commission on Judicial Conduct has a composition very similar to that of the Commission on Judicial Nominations, with only one fewer appointee of the Chief Judge of the Court of Appeals.

The Commission's duties are laid out in Article 6, Section 22 of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York. The State Constitution says that the Commission

> "shall receive, initiate, investigate and hear complaints with respect to the qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system…and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties."

All of the states and the District of Columbia have adopted Commissions to "insure compliance with established standards of ethical judicial behaviour, thereby promoting public confidence in the integrity and honour of the judiciary."

The Commission meets several times a year to review all written complains and to decide whether to investigate or dismiss them. After the Commission authorizes an investigation it assigns it to a staff attorney who works with an investigative staff. If necessary, witnesses are interviewed and court records examined. The Commission may ask the judge under

investigation to testify under oath. The judge is entitled to be represented by counsel and may submit material for the Commission's consideration.

France: Conseil Superieur De La Magistrature (CSM)

The issue of judicial appointments has been a contentious one in France stemming from the Constitution's assignment of the judiciary to a position of less power and independence than the executive and legislature. While the Conseil Supérieur de la Magistrature (CSM) is a Constitutional body, created by Article 64 in 1883 to assist the President in selecting both judges and public prosecutors (considered part of the judiciary), until the new Constitution of 1946 the President did not share the power to appoint the CSM's members with the members of Parliament. In 1958, in the Constitution of the Fifth Republic, the exclusive authority to appoint members of the CSM was returned to the President, a move not reversed until 1993. The 1993 amendment also widened the CSM's jurisdiction, enlarged its membership, and handed it an advisory role in both the nomination and disciplining of judges.

The CSM's membership is as follows:

- The President
- The Minister of Justice
- Three prominent citizens who are neither judges nor members of Parliament, nominated by the President of the republic, the president of the National Assembly, and the president of the Senate, respectively
- One judge from the Council of State (apex administrative court, under the control of the executive), who is elected by the Council of State's general assembly
- Five judges
- Five public prosecutors

(The President and Minister of Justice sit as ex officio members.)

The council consists of two sections – one dealing with judges and one dealing with public prosecutors. The section dealing with judges includes only one of the five prosecutors while that dealing with prosecutors includes only one judge. The 10 judges and prosecutors are

elected by their colleagues. Thus, the executive's power in making judicial appointments has been severely curtailed. Furthermore, when the CSM sits as a disciplinary body it sits without the President and minister of justice.

The CSM plays the primary role in the appointments to the Court of Cassation (the highest court for civil and criminal appeal), of the chief judges of the Courts of Appeals, and of the chief judges of the *tribunaux de grande instance* (the major trial courts). For these 350 positions, the CSM advertises positions, reviews applications, interviews candidates and submits its recommendations to the President. Technically, the President can refuse to appoint a candidate proposed by the CSM but in reality the President is always limited to appointing a judge proposed by the council. In addition, the council's approval is required for all lower court appointments.

Oversight

Only serious complaints against judges are referred to the CSM. The Minister of Justice and the chief judges of the Courts of Appeal and of the appellate tribunals all have the authority to initiate disciplinary proceedings against a judge. The less severe disciplinary measures such as a negative appraisal and a warning that remains on the record for at least three years are handled within the relevant court. If the problem seems sufficiently grave the head of the court can refer the matter to the Ministry of Justice. The Ministry then conducts an investigation and can decide to negotiate a punishment, such as transfer, with the judge.

If these negotiations are unsuccessful or the charge is sufficiently grave then either the head of the court or the Ministry will submit a report to the CSM. The judge has the right to see the charges, his or her record, and all documents involved in the investigation. The judge also has the right to counsel and to summon witnesses. All proceedings happen in private. The CSM can impose a range of sanctions:

1. A reprimand that will appear in the judge's file
2. Transfer
3. Withdrawal of certain functions
4. Lowering in rank
5. Mandatory retirement

6. Dismissal with pension
7. Dismissal without pension

A judge sanctioned by the CSM can appeal to the Council of State, but only on points of law.

Germany: Judicial Selection Committees

In Germany, the Federal Constitutional Court, Federal Court of Justice, and federal specialized courts (administrative, social, labour, fiscal, and patent) are under the control of the federal government (*Länder*). Article 95.2 of the Basic Law provides for the selection of the judges for the federal courts, excluding the Federal Constitutional Court, by a Judicial Selection Committee.

> The judges of each of these courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag.

The details of selection are provided in the Judicial Selection Act. The Committee is designed to represent the interests of federal and state executives as well as those of the parliament. It is chaired by the federal Minister of Justice and consists of 16 state Ministers of Justice and 16 members nominated by the federal parliament. The federal Minister of Justice does not, however, have a vote on the committee. Committee members, including the Minister of Justice, have the right to propose candidates. The Committee's selection is based on review of candidates' personal files and the presentations of two Committee members. Though the final nomination comes from the Committee it also considers the evaluation of a committee of Federal Court judges. The evaluation is an important factor but is ultimately non-binding.

The "unwritten but firmly observed tradition" is that proportional representation is accorded to all political parties, regions, and both Catholics and Protestants. Candidates are nominated from the states in revolving order, with parties alternating the nominations in proportion to

their representation in the federal or state parliaments. So a significant amount of political negotiation happens prior to the actual vote in the Judicial Selection Committee.

The selection process has come under criticism for not weighting the judiciary's opinion – as represented in the non-binding evaluation – enough and for compromising separation of powers by allowing so much input from politicians and political parties.

Oversight

Articles 97 and 98 of the Basic Law deal with the removal of judges. The relevant text is below:

> Article 97(2): Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.
>
> Article 98(2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed.

Thus, Germany offers an example of the legislative branch having sole control over federal judicial appointments while only the judiciary, specifically the Federal Constitutional Court, has the authority to remove federal judges. Appointments to the Federal Constitutional Court itself, though, are made entirely by the two houses of the legislature.

South Africa: Judicial Service Commission

The South African Constitution provides for a Judicial Service Commission. Section 178 describes its composition as follows:

There is a Judicial Service Commission consisting of

a. the Chief Justice, who presides at meetings of the Commission;
b. the President of the Constitutional Court;
c. one Judge President designated by the Judges President;
d. the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
e. two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
f. two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
g. one teacher of law designated by teachers of law at South African universities;
h. six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
i. four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
j. four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
k. when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.

Appointment

In the selection of judges, the Judicial Service Commission acts in two roles – appointment and recommendation – depending on the court in question. With regards to appointment to the Supreme Court, the Commission recommends judges, presenting the President with a list of candidates with three more names than the number of positions to be filled. The President can refuse to appoint anyone on the Commission's list, supplying a reason for the

refusal. However, when the Commission presents a second list the President must appoint someone from the list. In the case of the appointment of the Chief Justice and the Deputy Chief Justice of the Supreme Court, the Commission's recommendation is not binding. In all instances, the Commission's decisions require the support of a simple majority of its members.

The Commission has even greater authority in the appointment of all judges. The Constitution stipulates that the President *must* appoint all other judges on the advice of the Commission. In effect, the Commission has the appointment power.

South Africa is notable for the public nature of the appointment process. When a vacancy occurs in a court the head of that court informs the Commission. The Commission publishes the vacancy and receives applications and nominations. A subcommittee reviews the applications and decides on a short list. At this point the names of the persons who will be interviewed, those on the short list, are published.

As part of preparation for the interview the Commission contacts professional organizations and the candidate's own employer for evaluations. This is similar to the steps taken by Ontario's JAAC though the JAAC uses this information earlier on, in the preparation of its short list. If any of the individuals or organizations contacted by the Commission make a negative comment on a candidate that candidate is invited to respond to the comment.

All candidates are interviewed even if the number of candidates is equal to the number of posts open. The interviews are held in public and the transcripts are posted on the Internet.

Oversight

Section 177 of the Constitution, regarding the removal of officers says that if the JSC finds that "the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct" then the National Assembly can pass a resolution, supported by a two-thirds majority, calling for the removal of that judge. The President must then remove that judge from office. President can also suspend a judge who is being investigated by the JSC.

To date[2], no judges have been impeached. Notwithstanding the Constitutional provisions there has been no procedure for the JSC to follow in processing complaints about judges. Two draft Bills that would fill this vacuum are currently under consideration – the Judicial Service Commission Amendment Bill and the Judicial Conduct Tribunal Bill. The Judicial Service Commission Amendment Bill details procedures for processing complaints about judges.

It provides for the creation of a committee within the JSC to draft and maintain a code of conduct and also maintain records of all judges' financial interests to prevent any conflict of interests. It also provides for the creation of all-judge subcommittees, headed by the deputy Chief Justice, to process complaints about judges. As it receives complaints it would either dispose of them or recommend them to the JSC for a formal inquiry by a judicial conduct tribunal, an ad hoc tribunal of two judges and an outsider (the creation of the Judicial Conduct Tribunal Bill). The subcommittee would also act as a body of appeal in all disciplinary matters involving judges.

Complaints could be lodged by anyone by way of affidavit and will be categorized by the Deputy Chief Justice. If a complaint were frivolous, hypothetical, or related to a judgment that could be appealed or reviewed it would be referred to the head of the relevant court. An article in the South African *Daily News* on April 22, 2005 reported that in the experience of other countries, 90% of complaints fell into this category.

This Bill has been seven years in the making. Some judges in South Africa are reportedly unhappy and threatening to resign over the involvement of politicians in disciplining judges. Some judges favoured the creation of a Judicial Council, consisting of five judges who would consider complaints on their own. The Council would have the power to dismiss a complaint, reprimand a judge following an investigation, or refer the matter to the JSC if it was an impeachable offence. However, ruling party MP's wanted this power to be vested in the JSC itself.

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[2] 'Judges will Quit', The Mail and Guardian Online, 1 April 2005

Appendix - B

Key recommendations on the creation of All India Judicial Service - relevant extracts

The first Law Commission in its fourteenth report, examined the issue in great detail and recommended the creation of an all-India Judicial Service. The relevant extracts of the report are cited below:

> "58. Though a competitive examination will be the method of selection and the persons selected will have had no experience at the Bar, in our view, the scheme we propose takes care to avoid the disabilities from which the Indian Civil Service judges suffered. To begin with, he had very often no legal qualifications other than those which had been given to him as a part of his training. These officers served for a number of years in the executive which clearly gave them an executive bias. Moreover it was the general belief that the less able of them who were, as it were, found wanting on the executive side were taken up in the judiciary. We are however, proposing to take only law graduates as recruits to the proposed service. Further, they will have no period of service in the executive as in the case of the civilian. In our scheme, they will from the commencement, be earmarked for appointment to the judiciary so that they will be imbued, as it were, with a judicial bias.
>
> "59. The great advantage that the Indian civilian had, was the intensive and varied course of training which he had to undergo. At the time of his first entry into service, his training was confined to matters pertaining to the revenue and criminal administration alone, but when he was taken over to the judicial side, generally an equally intensive training in civil law was given to him for a period of not less than eighteen months. There can be no doubt that a similar intensive judicial training given to a judicial officer who possesses a law degree can be of the greatest value. If a law graduate recruited by a competitive examination is subjected to a carefully devised scheme of training which would include the practical working of the courts,

there is no reason why he should not make as successful a judicial officer as a person recruited after a few years' experience at the Bar. After all, experience at the Bar is only a matter of training and an equally satisfactory training may be given by the adoption of other methods. Indeed, it can be claimed that a planned and systematic training such as is contemplated by us for the judicial officer selected for the Indian Judicial Service may be more effective than the uncertain and spasmodic training which may be received during the course of a few years' practice at the Bar. These and the other considerations referred to earlier have led us to the conclusion that in the interests of the efficiency of the subordinate judiciary, it is necessary that an All India service called the Indian Judicial Service should be established. This will need action. being taken in the manner provided by article 312 of the Constitution

"60. The personnel constituting the Service could be selected through a combined competitive examination relating to the Indian Administrative Service and other allied Services. Candidates competing for the Indian Judicial Service will have to be law graduates and will have to offer at least two optional papers in law. The standards insisted upon in their case will be the same as in the case of the Indian Administrative and the Indian Foreign Service. As to the age limit, having regard to the requirement that the candidate should be a law graduate, we are of the view they should be recruited from the age group of twenty-one to twenty-five years

"61. As in the case of the other All-India Services, persons selected for the All India Judicial Service will be allotted to a particular State and will form part of the judiciary of that State for the rest of their service. However, in order to foster an all-India outlook which is of vital importance to the nation, we suggest that as a rule the Indian Judicial Service officers should be allotted to States other than their own States.

"62. An officer selected for the Indian Judicial Service should, in our view, be given an intensive training for a period of two years before he starts his judicial career. To begin with, he will undergo the training that is at present being given to persons selected for the Indian Administrative Service in the Training School. It is essential

that for a period, the training of the future executive officers and the future judicial officers should proceed pari passu and in association with one another. We have found that in maintaining the efficiency of judicial administration, the district judge has to depend a great deal upon the executive officers for their co-operation. It has been generally noticed that a district judge borne on the cadre of the Indian Civil Service is able to secure the co-operation of the other officers in a larger degree than a district judge belonging to the State service. This perhaps is psychological. However, that may be, we must make use of every factor which may help to make judicial administration more efficient. Officers of the Indian Judicial Service, if trained in close association with those of the Indian Administrative Service, will in the future stages of their career as judicial officers, be able to obtain all necessary co-operation from their colleagues of the Indian Administrative Service.

"The course which has been prescribed for the one year period of probation of the Indian Administrative Service officer includes a study of the principles of the Constitution, of the Indian criminal law, general administrative knowledge, such as Indian History in its social, political and economic aspects, general principles of administration, organization of Government institutions and the regional language of the State to which he is allotted. These subjects would, in our view, be equally useful to a judicial officer. We may, however, suggest that in order to render this period of training in the Indian Administrative Service School of more practical value to the Indian Judicial Service officer, some additional subjects like Economics and Commercial law with particular reference to the civil procedure, company law, insolvency, banking and insurance, should also be included in the course of instruction at the school

"63. The training at the Indian Administrative Service School for a year should be followed by a further period of intensive training in the State to which the officer is allotted. The officer will be subjected to this training side by side with members of the subordinate judiciary recruited at the State level. We have earlier prescribed the nature of this training. This period of training for the Indian Judicial Service officer in the State will have, however, to be longer, by reason of his unfamiliarity with

courts of law. It should, we think, extend to a period of one year which will include a three months' training in the revenue matters, a two months' training in the police department and five months under a selected district judge. It may be advantageous, to give the officer some idea of how cases are prepared by posting him for training for a short period under the Government Pleader or the Public Prosecutor. In order that the officer may have some idea of work in the High Court, we also recommend that he should work as a legal assistant to a selected High Court judge for a period of two months. During this period he will be able to familiarize himself with the High Court procedure beginning with the institution of civil and criminal matters up to their final disposal. He would also be able to train himself by preparing exhaustive notes and summaries in some matters to be heard by the judge to whom he is attached. This personal contact with the High Court judge will enable him to get an intimate understanding of how complicated legal problems are approached and dealt with in the High Courts. He would also be able to watch the methods of work of experienced judges. The period of training in the High Court should also familiarize the officer with the methods by which the work of the subordinate courts is reviewed. At the end of a training such as we have suggested, the officer could well be entrusted with the responsibility of doing judicial work.

"64. After the training, the officer will be posted as a magistrate. Care will have to be taken in States where separation of the judiciary from the executive has not yet been effected to see that he is under the control and supervision of the High Court and not the executive. This should present no difficulty. Cases could be transferred to him from time to time for disposal. After a period of not less than three years has been spent by him as a magistrate exercising progressively increasing powers, the officer can be posted to the civil side starting as a junior civil judge. In some of the States where separation has been effected, the posts of magistrates and munsifs are borne on the same cadre. In these States, the officer will work as a munsif for not less than three years before he is promoted to higher posts and works as a subordinate judge or senior civil judge or an assistant sessions judge as the case may be. After three or four years' experience in these higher posts, he will be fit for being posted as a district and sessions judge.

"65. In the scheme we have proposed, the emoluments of the posts in the Indian Judicial Service will be the same as those in the Indian Administrative Service. These officers will therefore draw a higher remuneration when working as magistrates, munsifs and subordinate judges than their counter-parts in the State services. On appointment, however, as district and sessions judges their remuneration will be the same as that of persons occupying these posts who are not members of the Indian Judicial Service"

In 1986, the Law Commission, in its 116th report, again examined the issue and strongly recommended formation of an all-India Judicial Service. Justice Jeevan Reddy summarized this report as follows:

"The report dealt with three objections, generally put forward against the said proposal, namely:-

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

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

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

"The Law Commission considered each of the above objections at length and rejected them as unsubstantial. It held that a member of the All-India Judicial Service would be required to learn one more language over and above his mother tongue and once he is allotted to a State keeping in view the said fact, no problems would arise on the ground of language. Reference was made to members of Indian Administrative Service in this behalf. It also referred to the fact that prior to the independence there were provinces like Bombay and Madras, which comprised more than one linguistic area. For example, the Bombay province comprised

Gujarati speaking, Marathi speaking and Kannada speaking areas and Madras province included Tamil speaking, Telugu speaking and Malayalam speaking areas. If no difficulty was found in those provinces at that time, the Commission observed, there is no reason to feel that the language question should pose a problem. With respect to the second objection, the Commission observed that in as much as according to the present rules in force in various States about 50% (if not, more) vacancies in the cadre of District Judges are reserved to be filled by promotion from the lower cadres and because the members of AIJS will be allocated only against the vacancies to be filled by direct recruitment, the promotional prospects of judicial officers (below district judge level) will in no way be affected. Similarly, it was held with respect to the third objection, that the control of the High Court will in no manner be diminished or curtailed because on allotment to a State, the allottees (members of AIJS) would become members of the State Judicial Service for all practical purposes with the difference that "while at present it (High Court) recommends various things such as promotion or disciplinary action to the Governor, it would be recommending the same to the National Judicial Service Commission which, in turn, would make necessary recommendation to the President of India but the President of India will act in the same manner as at present it is done by the Governor having regard to the almost binding character of the recommendation of the High Court."

The Supreme Court considered this issue in the All India Judges case: AIR 1992 SC 165 (Paras 9-11). The Supreme Court observed as follows:

"9. We shall first deal with the plea for setting up of an All India Judicial Service. The Law Commission of India in its 14th Report in the year 1958, said:

'If we are to improve the personnel of the subordinate judiciary, we must first take measures to extend or widen our field of selection so that we can draw from it really capable persons. A radical measure suggested to us was to recruit the judicial service entirely by a competitive test or examination. It was suggested that the higher judiciary could be drawn from such competitive tests at the all-India level and the

lower judiciary can be recruited by similar tests held at the State level. Those eligible for these tests would be graduates who have taken a law degree and the requirement of practice at the Bar should be done away with.

'Such a scheme, it was urged, would result in bringing into the subordinate judiciary capable young men who now prefer to obtain immediate remunerative employment in the executive branch of Government and in commercial firms. The scheme, it was pointed out, would bring to the higher subordinate judiciary the best talent available in the country as a whole, whereas the lower subordinate judiciary would be drawn from the best talent available in the State".

The Commission proceeded to further state:

'Recruitment to the higher judiciary at the all-India level in the manner suggested would be a powerful unifying influence and serve to counteract the existing growing regional tendencies. In this connection, attention may be drawn to the observations made by the States Reorganisation Commission in regard to the creation of the All India Services as a major compelling necessity for the nation. The Commission observed : 'The raisond'etre of creating All India Services, individually or in groups, is that officers on whom the brunt of responsibility of administration will inevitably fall, may develop wide and all-India outlook…. The present emphasis on regional languages in the universities will inevitably lead to the growth of parochial attitude, which will only be corrected by a system of training which emphasizes the all-India point of view… it has not been very easy for us to balance these considerations, but we are definitely of the view that proportion of the higher judiciary should be recruited by competitive examination at the all-India level so as to attract the best of our young graduates to the judicial service. This measure will enlarge the field of selection and bring into the higher judicial service a leaven of brilliant young men who will set a higher tone and level to the subordinate judiciary as a whole. The personnel so recruited will be subjected to an intensive training. The rest of the higher judiciary should, in our view, be recruited in part directly from senior members of the Bar, and partly by promotion from the lower subordinate judiciary'.

'The Law Commission has reiterated this view in subsequent reports. It took nearly 20 years for the Government to take follow up action on the basis of the recommendation and that led to the amendment of the legislative entries as already referred to.

'10. This proposal of the Law Commission and the follow up governmental action led to consultation and dialogue in the Conference of Chief Justices of the High Courts but many of the High Courts were of the view that setting up of an All-India Judicial Service would affect the constitutional scheme of control of the High Court over the subordinate judiciary and in particular Article 235 of the Constitution. Article 233 makes provision for appointment of District Judges and requires that appointment to such posts has to be made by the Governor of the State in consultation with the appropriate High Court. Article 234 provides for recruitment of persons other than District Judges to judicial service by prescribing that appointments shall be made by the Governor of the State in accordance with the Rules made by him in that behalf after consulting the State Public Service Commission and the High Court exercising the jurisdiction in relation to such State. The post of District Judges has ordinarily been equated with the senior scale status in the All-India Services. It was perhaps not contemplated by the Law Commission that on appointment members of the proposed All-India Judicial Service were to hold the post of District Judge. Like all other All-India Services, the initial recruitment could be to a lower rank equal to civil judge and after serving in such post for a reasonable time, appointment to the post of district Judge could be made. Since the Law Commission itself was of the view that a percentage should be filled up by direct recruitment from the Bar, the scheme envisaged by the Law Commission would not require amendment of Article 233. It is to be examined whether any alterations in Article 234 would be necessary or recruitment to All-India Service could be made by appropriate amendment of the State Rules contemplated under that Article.

'Control over the subordinate courts under the constitutional mechanism is vested in the High Court. Under Article 235, the provision is that the control over District Courts and courts subordinate thereto vests in the High Court. The main objection against implementation of the recommendation of the Law Commission relating to the setting up of the all-India Judicial Service was founded upon the basis that control contemplated under Article 235 of the Constitution would be affected if an All-India Judicial Services on the pattern of All-India Services Act, 1951, is created. We are of the view that the Law Commission's recommendation should not have been dropped lightly. There is considerable force and merit in the view expressed by the Law Commission. An all-India Judicial Service essentially for manning the higher services in the subordinate judiciary is very much necessary. The reasons advanced by the Law Commission for recommending the setting up of an All-India Judicial Service appeal to us.

'11. Since the setting up of such a service might require amendment of the relevant Articles of the Constitution and might even require alteration of the Service Rules operating in the different States and Union Territories, we do not intend to give any particular direction on this score, particularly when the point was not seriously pressed but we would commend to the Union of India to undertake appropriate exercise quickly so that the feasibility of implementation of the recommendations of the Law Commission may be examined expeditiously and implemented as early as possible. It is in the interest of the health of the judiciary throughout the country that this should be done."

Former Chief Justice J.S.Verma recommended formation of Indian Judicial Service as follows:

"Speedy justice is within the ambit of 'right to life' guaranteed in article 21 of the Constitution of India. It is also a right duly recognized in the International Covenants. Its significance hardly needs emphasis. It is necessary also to retain faith in the credibility of the administration of justice and to preserve the 'rule of law', which is the bedrock of democracy. The problem of mounting arrears in

subordinate courts, which also adversely affects the pendency in the High Courts and the Supreme Court, is a constant worry. Mere increase in the number of judges, without improvement in their quality is of no avail. To effectively tackle this problem, it is imperative to constitute the All India Judicial Service to improve the quality of judges in the subordinate judiciary. The fact that it is, for many years now, becoming difficult to persuade the front rank lawyers to join the Higher Judicial Service and even the bench of the High Court is accentuating the need. The quality of justice administered depends on the quality of those who administer it."

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