Justice is the very first objective enshrined in the preamble of the Indian Constitution. It declares that the Sovereign, Socialist, Secular, Democratic Republic of India has to secure to all the citizens ‘Justice’. This justice is social, economic and political. The primary instrument of justice is the judiciary. It has to dispense justice not only between one person and another, but also between citizen and the State. In a federation like ours, the judiciary has also to decide controversies between the Centre and the States and the States inter se. It interprets the Constitution and acts as its protector and guardian by keeping all authorities within its bounds.\(^1\) This judicial function can only be performed by an authoritative, independent and impartial judiciary. Hence, an independent judiciary is an indespensable requisite of a free society under the rule of law. Independence here means freedom from executive or legislative interference in judicial functions. This also means that the judges must discharge their functions without fear or favour. It is, therefore, essential that their appointments and tenure is not dependent upon the mere pleasure of the Government. The question is: Do we have any prescribed procedure for appointment of judges? Whether the procedure, if any, is free from executive or legislative interference?

The Constitution of India, which is the supreme law of the land identifies the kind of persons who should be considered for appointment as judges of the Supreme Court and the High Courts. Accordingly, a person is not qualified for appoint-

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ment as judge of the Supreme Court unless he is a citizen of India and either has been a judge of a High Court for five years, or has been a High Court advocate for ten years, or is a distinguished jurist. Similarly for appointment as a High Court judge, a person should be a citizen of India and should have held a judicial office or have been a High Court advocate for at least ten years. However, the most important aspect concerning judicial appointment is the procedure by which appointments are made and the extent to which the existing appointing process is open to political considerations. In the matter of appointment to Supreme Court the procedure for appointment is laid down in Article 124(2) of the Constitution. The Article reads:

“Every judge of the Supreme Court shall be appointed by the President by warrant under his seal after consultation with such of the judges of the Supreme Court and the High Court as the President may deem necessary for the purpose — Provided that in case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

The words used in the above provision make it quite clear that in sub-clause (2), the consultation process is discretionary for the words are “may deem it necessary,” whereas the consultation provided in the proviso is obligatory, for the words are “shall always be consulted.” In fact, Article 124(2) recognises the pre-eminent position of the Chief Justice of India by making consultation with him mandatory. But what is the effect of such consultation? The word “consultation” merely indicates that the President is not bound to follow the recommendations of these persons. Moreover, the President here means “the President aided and advised by the Council of Ministers.”

The last word will thus rest with the Prime Minister. What is more disturbing is that in actual practice, the Union Ministry

2. Article 124(3).
3. Article 217.
of Law and Justice and the Home Ministry have come to play a pivotal role in the whole process. But neither the President nor the Government of India have set up any machinery to evaluate the merit of the eligible candidates for the Supreme Court judgeship.

Now coming to the High Courts, it may be noted that each High Court consists of the Chief Justice and such other judges as the President may appoint from time to time. These judges are appointed by the President after consultation with the Chief Justice of India, the Governor of the State and in the case of the appointment of a judge other than the Chief Justice, the Chief Justice of the High Court concerned. Here also the Union Law and Home Ministries, though not mentioned in Article 217 of the Constitution have come to play a significant role regarding the information about an eligible candidate. But in the absence of any independent machinery to evaluate their merit other considerations come into play. In fact, it is the Chief Minister, who, if agreed with the recommendations, forwards it to the Central Home Ministry after consultation with the Governor. The last word thus rests with the Chief Minister. Will not such a procedure bring politics in the appointment of judges? In fact, such a system leaves much scope for political considerations influencing the appointment of judges. It is an admitted fact that the Chief Justices are, and the State Governments are not qualified to judge the legal equipment, competence and suitability of a person to be appointed as a judge of the High Court. It is quite unfortunate that though Article 217 provides for consultation between the four designated authorities, the Article does not explain the nature of the consultation, the procedure to be followed in appointing judges and the functions and position of the four authorities inter se. The result has been the domination of political considerations in the selection and appointment of judges.

5. Article 216.
6. Article 217: The same process is also adopted for appointment of Additional Judges to the High Courts. The appointment of such judges can be made for a period not exceeding two years. See, Article 224.
The Law Commission of India, also examined the question of appointment of judges. The Commission expressed the view that regional and communal considerations are sometime at play in the selection of judges. It pointed out that executive influence exerted from highest quarters is also responsible for some of the appointments to the Supreme Court. The Commission noticed that the best talent was not recruited from the High Courts. It took the view that the real test for selection should be merit. The Commission also criticised the appointment of High Court judges on the ground that they are not always made on merit. The Commission recommended that Article 217 of the Constitution should be amended to provide that a judge of a High Court should be appointed on the recommendations of the Chief Justice of the High Court with the concurrence of the Chief Justice of India. This recommendation did not find favour with the Government as it was stated that the High Court judges have continued to be appointed with the concurrence of the Chief Justice of India.

The problem of judicial appointment pointed out by the Law Commission compels us to ask: What kind of appointments should be made to the judiciary? Does the system of appointment set up by the Constitution need to be reviewed? The first question came for consideration in 1973 when a controversy arose about the appointment of judges. It was claimed that independent India should have judges who are “committed” not only to the social philosophy of the Constitution but also to that of the Government. The claim was upheld when Mr. A. N. Ray was appointed as Chief Justice of India, superseding three judges senior to him, Mr. Justice Shelat, Mr. Justice Hegde and Mr. Justice Grover all of whom resigned. This raised a hue and cry in the country and this action of the Government was described as a “manifest attempt to undermine the court’s independence.”

8. Id., 71, 75.
In January 1977, the second supersession controversy arose. The government appointed Mr. Justice M. H. Beg as Chief Justice of India, superseding a senior judge to him Mr. Justice H. R. Khanna, who also resigned in protest. This time the Government did not talk about the “social philosophy of the judges.” It was explained that the senior-most judge would have served a very short term as Chief Justice — an argument which was totally unconvincing because there had hitherto been short terms of Chief Justices.

In September, 1977, two judges, Mr. Justice V. D. Tulzapurkar and Mr. Justice D. A. Desai of Bombay and Gujrat High Court were appointed as judges of the Supreme Court. However, Justice Desai’s appointment became controversial because he was fourth seniormost judge in the Gujrat High Court and the claims of those judges who were senior to him were ignored.

In February 1978, a controversy arose about the appointment of Chief Justice of India. Mr. Justice Chandrachud (as he then was) and Mr. Justice Bhagwati were singled out for criticism because they were the senior most, if the criterion of seniority was to be followed. However, the controversy disappeared when Mr. Justice Chandrachud, the senior most judge was appointed as the Chief Justice of the Supreme Court.

Again, in March 1981, a controversy arose when the Government refused to agree to the suggestion of the Supreme Court to extend the appointment of Mr. Justice Kumar and Mr. Justice Vohra, two additional judges of the Delhi High Court. The dropping of these two judges raised questions which went to the root of judicial independence in Judges Transfer case, where the Supreme Court was accused of inflicting wounds on judicial independence.

10. Out of the 17 retired Chief Justices of India the shortest term has been of Mr. Justice J. C. Shah. He served for a total period of 35 days.
Thus it has become a normal feature of our system to have controversies about judges. The result has been to make the executive a centre of unlimited power for appointment of judges by Article 74(2) of the Constitution. This provision lays down that no court can enquire into the advice tendered by the Council of Ministers to the President. The resulting effect is that the judiciary is refrained from looking into the considerations that have prevailed especially in the absence of any mechanism for appraising merit, with the Union Law and Home Minister, the Prime Minister, or the President in appointing a judge. In other words, the Government, which is a major litigant in almost all courts in India have a final say in selecting its own judges. Hence, there is an urgent need for establishing an independent constitutional authority for making judicial appointments. In this connection, the French experience may be of some help to us.

In France, the President of the Republic appoints the judges whose names are submitted to him by a body known as the Superior Council of the Judiciary, with the President as its ex-officio Chairman. It has Minister of Justice as its Vice-Chairman. It has also among its members two judges and Advocate General of the Supreme Court, three judges from other courts, a member of the Council D’Etat (Council of States) and two members of the general public. The council also exercises certain disciplinary powers over judicial officers. The Constitution guarantees them independence by stating that judges are irremovable.

To safeguard independence of the judiciary, it is essential that we introduce certain fundamental changes in the existing appointive process of judges of the High Courts as well as the Supreme Court. In this regard, the following points deserve consideration:

(1) The Supreme Court and High Courts are not ordinary institutions. The Constitution has assigned them a special role. It becomes of paramount importance that only persons of highest qualities of learning, training and character are considered for appointment to these courts. All
efforts should therefore be made to search out the best judicial talent in the country as judges of these courts.

(2) There is today no machinery to evaluate the merit of those who qualify for appointment to the Supreme Court and the High Courts. The Chief Justice of India, the Bar Council of India and the Chief Justices of different High Courts should jointly deliberate upon this matter and request the Government to set up a constitutional machinery to evaluate the merit of those who qualify for appointment to these courts. Since the existing system of appointment to higher judiciary is open to great abuse, it seems almost inevitable that this task will have to be assigned to a body like the Superior Council of the judiciary as it obtains in France and not to the executive whose concepts of right and merit may be basically politically oriented.

Concluding suggestions

The proposed council should ordinarily consist of:

a) Five Senior most judges of the Supreme Court including the Chief Justice for the Supreme Court appointments.

b) Three senior most judges of the particular High Court including the Chief Justice for the High Court appointments.

c) Attorney General of India for Supreme Court appointments.

d) Advocate General of the concerned State for High Court appointments.12

e) The Union Minister for Law and Justice who is usually the political head of the judicial department should be the ex-officio chairman of the proposed body. The recommendations of the above body should be binding.

12. The author acknowledges that this has been included as a suggestion received from Mrs. Rama Devi, Secretary, Law Commission of India at the above workshop.
The government should be made bound to place all relevant information about the eligible candidates when asked for by the proposed Council. All disciplinary matters concerning judges including their transfers, if any, should be within the jurisdiction of the Council. As regards the appointment of the Chief Justice of India, the principle of seniority should generally be adhered to and if at all a departure from this principle is to be made, the decision in this regard should be left to the body which may be created for the purpose.

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