Transfer of High Court Judges and Independence of the Judiciary

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The transfer of High Court judges is a subject which evoked much public attention recently after the announcement by the Union Government of its decision to appoint one-third of the judges and the Chief Justices of the High Courts from outside the State and the Supreme Court’s verdict on transfer of judges. In this paper, an attempt is made to study the constitutional provision on the transfer of judges in the light of the concept of independence of the judiciary, one of the pillars of a free democracy.

INDEPENDENCE OF THE JUDICIARY

Civilisation rests upon law and law rests upon courts.¹ If for law and courts are substituted the voice of a temporary majority, we are ‘pro tanto’ abandoning the achievements of civilisation and drifting back to barbarism.² In every State which recognises the rule of law, the existence of a body to dispense justice according to law is an absolute necessity.

If the judiciary has to be a bulwark for the protection of the rights of the individual and mete out even-handed justice without fear and favour that should be independent.³ The foundation of a democracy, the source of its perennial vitality, the con-

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2. Ibid.
dion for its growth and the hope for its welfare—all lie in that great institution, an independent judiciary. 4 If the beacon of the judiciary must remain bright, the court must be above reproach, free from coercion and from political influences. 5

Why the judiciary has to be independent? All modern constitutions envisage a separation of powers between the different organs of the government. The Constitution fixes the limit within which the two organs of the government—the Executive and the Legislature—can function. The judiciary acts as an umpire and decides upon the ‘vires’ of the actions of the other branches of government. In the Constitutions, which recognise the supremacy of the legislature, (eg. U.K.) the judiciary ensures that the government is functioning according to law and it secures the observance of rule of law. 6

The requirement of an independent judiciary is more essential in the case of a federal constitution where the courts are called upon to decide disputes not only between the individual and the State, but between the federal centre and a federating unit. A federal constitution is a written document which clearly defines the powers and duties of each of the different organs of the government, both federal and the state, and it is the supreme law of the land. If a written constitution which imposes limits on the powers of all the organs of government which derive their existence from its provisions is to be preserved in its integrity, power must be lodged somewhere to restrain any infringement of it by any one of these organs. 7 It is in the judiciary that such power is vested.

How is the independence of the judiciary preserved under a Constitution? Every Constitution recognises this concept and

7. See, A. Inglis Clark, “Supremacy of the Judiciary under the Constitutions of United States and under the Common Wealth of Australia” (1903) 17 Harv. L. Rev. 1 at p. 5.
many Constitutions contain express provisions for making the judiciary independent of the executive. In England, this is achieved by different methods, viz., by providing security of tenure for the judges, by providing immunity for the judges for any thing done while acting judicially, by insulating the judiciary from the influence of politics etc.8

Under the Indian Constitution, there are several provisions which make the judiciary independent:——

1. The security of tenure is guaranteed to every judge of the High Court and Supreme Court. A permanent judge of the High Court holds office until he attains the age of 62 years and a judge of the Supreme Court holds office till he attains the age of 65 years.9 An additional judge of the High Court holds office for a certain term and during the term of office he cannot be removed.10 During the term of office, a judge of the Supreme Court and High Court can be removed from office only on the ground of proved misbehaviour or incapacity and only by impeachment.11

2. The salaries of the judges of the Supreme Court and High Courts are charged on the Consolidated Fund of India and cannot be varied by the legislature except during a financial emergency.12 Once a judge is appointed, his privileges, rights and allowances shall not be altered to his disadvantage.13

3. The administrative expenses of the Supreme Court and High Courts, including salaries and allowances to the officers are charged on the Consolidated Fund of India.14

9. See, Constitution of India, Articles 124(2) & 217(1).
10. Id., Article 224.
11. Id., Article 124(4).
12. Id., Articles 125, 221, 360.
13. Id., Articles 124, 218.
4. No discussion shall take place in Parliament or the State Legislatures with respect to the conduct of any judge of the Supreme Court or High Courts in the discharge of his duties.¹⁵

5. The Supreme Court and High Courts have been given the authority to recruit their staff and frame rules regarding the conditions of service.¹⁶

6. The Constitution prohibits the Supreme Court judges from practising in any court in India after retirement and High Court judges in any court in which he had acted as a judge.¹⁷

7. The appointment of judges of the Supreme Court and High Court is not solely in the hands of the executive.¹⁸

8. The Constitution places the subordinate judiciary completely under the control of the State High Court.¹⁹

9. Provisions dealing with Union and State judiciary have been made entrenched provisions, so that the sanctity of the courts be better protected.²⁰

Apart from these constitutional provisions, the Supreme Court also has contributed in its own way in making this concept more alive. The court has consistently taken the view that the independence of the judiciary, forms part of the basic structure of the Constitution.

**Transfer of Judges: Historical Background**

Under the Government of India Act, 1935, there was no provision directly dealing with the transfer of judges. But, in 1944 Section 220 of the Government of India Act dealing with

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¹⁵ *Id.*, Articles 121, 221.
¹⁶ *Id.*, Articles 146, 229.
¹⁷ *Id.*, Articles 124(7), 220.
¹⁸ *Id.*, Articles 124, 217.
¹⁹ *Id.*, Article 235.
the constitution of High Courts was amended and a new clause was introduced (Clause c) in Article 220(2) which provided that "the office of a judge shall be vacated by his being appointed by His Majesty to be the judge of the Federal Court or of another High Court." This provision clearly is a pointer to the existence of the practice of appointing a sitting judge of one High Court as a judge of another High Court. But, nowhere in the provision the word "transfer" was used and therefore it is not sure whether this provision was really intended for transfer of judges.

When the Constitution was being drafted, the Drafting Committee did not incorporate any provision for transfer in the Draft Constitution. But, Clause (c) of the proviso to Article 193(1) of the Draft Constitution had copied Section 220(2)(c) of the Government of India Act and this provided for vacation of office of a judge on his being appointed by the President to be the judge of the Supreme Court or of any other High Court. During the discussion of the Draft Constitution in the Assembly, an amendment was moved by two members, Mr. R. R. Divaker and Mr. V. V. Krishna Moorthy Rao. They suggested the introduction of para (d) of the proviso to Clause (1) of Article 193 providing that "Every judge of the High Court shall be liable to be transferred to other High Courts." But the Drafting Committee felt that this amendment was unnecessary because there was no bar under Article 193 to a judge of one High Court being appointed a judge of another High Court, and clause (c) of the proviso to Clause (1) of Article 193 clearly provided that the office of the judge shall be vacated by his being appointed by the President to be a judge of the Supreme Court or of any other High Court.

However, the Drafting Committee subsequently decided to incorporate an express provision for the transfer of judges. According to this provision, the President was given the power

21. See, India (Miscellaneous Provisions) Act, 1944, Sections 2 and 6(1).
22. See, B. Shiva Rao, Framing of India's Constitution (Select Documents) Volume, 4, p. 165.
23. Ibid.
to transfer a judge from one High Court to another High Court, within the territory of India. Provision was also made for compensatory allowance for the judges transferred away from their home States, but the quantum was left to be decided by Parliament by law and until so determined such allowance as the President may by order fix. The Constituent Assembly while discussing the revised draft felt that the power to transfer judges should not be completely vested in the President which would lead to abuse of power and therefore an amendment which required the President of India to consult the Chief Justice of India before exercising the power of transfer was adopted by the Assembly. Thus Article 222(1) which was finally approved by the Assembly provided that the President may transfer a judge of a High Court within the territory of India after consultation with the Chief Justice of India.

In 1956 following State Reorganisation Act 1956 it was felt necessary that provision for compensatory allowance be omitted in order to facilitate easy movement of judges to newly constituted High Courts. Thus, this provision was omitted by Constitution (7th Amendment) Act, 1956. However, this was re-introduced into the Constitution by the Constitution (15th Amendment) Act, 1963.

**Transfer of Judges: The Practice**

The present Article 222 provides as follows:

24. Revised Draft Article 222(1).
25. Revised Draft Article 222(2).
27. However, in a recent decision *V. B. Raju v.State of Gujarat* (A.I.R. 1980 S.C. 2075) the Supreme Court held that the appointment of an additional judge of Bombay High Court as a judge of Gujarat High Court following the Bombay Reorganisation Act, 1960 was not a “transfer” under Article 222 of the Constitution and the court rejected the claim for compensatory allowance.

28. Section 14 of the Constitution (7th Amendment) Act, 1956 deleted Article 222(2) of the Constitution.
29. Section 5 of the Constitution (15th Amendment) Act, 1963 inserted Clause (2) of Article 222.
(1) The President may after consultation with the Chief Justice of India transfer a judge from one High Court to another.

(2) When a judge has been or is so transferred, he shall during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963 as a judge of other High Court be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law, and until so determined, such compensatory allowance as the President may by order fix.

The provision was invoked a number of times and some of the judges of the High Courts were transferred to other High Courts either as Chief Justices or as puisne judges. Most of such transfers were made during the States reorganisation, as many new High Courts were created at that time. During emergency in 1976 sixteen judges were transferred to different High Courts. One of the judges so transferred challenged the constitutional validity of his transfer before the High Court of Gujarat and later in the Supreme Court. The following were the main grounds of challenge:\textsuperscript{30}

1. The transfer order was passed without the consent of the judge transferred; such consent must be necessarily implied in Article 222(1) of the Constitution and therefore the transfer of a judge from one High Court to another High Court without his consent is unconstitutional.

2. The order was passed without effective consultation with the Chief Justice of India. "Consultation" in Article 222(1) means ‘effective consultation’ and since the pre-condition of Article 222(1) that no transfer can be made without such consultation was not fulfilled, the transfer order was bad and of no effect.

3. The order was passed in breach of the assurance given on behalf of the government of India by the then Law Minister Mr. A. K. Sen in 1963 that the High Court judges would not be transferred without their consent. Mr. Sheth having accepted

judgeship of Gujarat High Court in 1969 on the faith of this assurance was bound by the assurance on the doctrine of promissory estoppel.

4. The order of transfer militated against public interest. The power conferred by Article 222(1) was conditioned by the existence and requirement of public interest and since the impugned order was not shown to have been made in public interest, it was ultra vires.

In the Gujarat High Court petition was heard by a full Bench consisting of three judges. The Court unanimously struck down the order of transfer. The judges through different processes of reasoning arrived at the same conclusion. A. D. Desai, J. was of the view that the order was invalid, because it was passed without Mr. Sheth's consent, whereas D. A. Desai, J. was of the view that there was no effective consultation with the Chief Justice of India which was an essential condition precedent for the exercise of power under Article 222 (1)\(^3\)\(^1\) J. B. Mehta, J. was of the view that the transfer of a judge was an administrative action and as the action was taken without complying with the principles of natural justice, the transfer was invalid.\(^3\)\(^2\) All the judges rejected the contention based on promissory estoppel.

In the Supreme Court, the appeal was heard by a Constitution Bench consisting of Chandrachud, Bhagwati, Krishna Iyer, Untwalia and Fazal Ali, JJ. During the pendency of the appeal, the Central Government decided to withdraw the transfer order and Mr. Sankal Chand Sheth was allowed to go back to Gujarat High Court. In spite of this, as this case involved many important constitutional questions, the Court delivered its judgment.

The majority of the Court (Chandrachud, Krishna Iyer and Fazal Ali, JJ.) held that there was no need nor any justification, in order to protect the independence of the judiciary, for construing Article 222(1) to mean that a judge could not be transferred

\(^{31}\) Id., at p. 2334.

\(^{32}\) Ibid.
without his consent. But the minority of the Court (P. N. Bhagwati, Untwalia, JJ.) held that a judge of a High Court could not be transferred without his consent.

The majority of the Court held that there are sufficient built-in safeguards in Article 222(1) which would ensure fair play. They are:

1. The power to transfer a High Court Judge could be exercised in public interest only and not by way of punishment.

2. There must be full, complete and effective consultation between the President of India and the Chief Justice of India before an order of transfer under that article was made.

In substance and effect, the judge could not complain of arbitrariness or unfair play if the due procedure was followed.

The Supreme Court had to consider the validity of another transfer of a High Court judge in the momentous decision, S. P. Gupta v. Union of India. In this case the validity of the transfer of Mr. K. B. N. Singh from Patna to Madras High Court was in issue. The following were the grounds for challenge:

1. The transfer was made without the consent of the judge transferred. (This meant the majority decision of the Supreme Court on this point in Sankal Chand’s case had to be reconsidered).

2. There was no full and effective consultation between the Chief Justice of India and the President in respect of his transfer.

3. The transfer was not in public interest, but by way of punishment and was vitiated by mala fides.

The case was heard by a Constitution Bench consisting of Bhagwati, Gupta, Fazal Ali, Tulzapurkar, Desai, Pathak and

33. *Id.* at p. 2349, *per* Chandrachud, J.
34. A.I.R. 1982 S.C. 149. (Also reported as *S. P. Gupta v. President of India*) (Hereinafter referred to as the Judges case).
Venkataramiah, JJ. The transfer of Mr. Singh was held to be in public interest, and not vitiated by mala fides, by the majority of the Court consisting of Gupta, Tulzapurkar, Venkataramiah and Pathak, JJ. There was unanimity among all judges that the transfer of judges must be in public interest and not by way of punishment. Prior consent of the judge transferred was held to be not necessary by the majority of Court. But Bhagwati, J. dissented.

**Transfer of Judges and Consent of the Judge**

In *Sankal Chand's case* it was contended that though the word 'consent' was not used in Article 222(1), by necessary implication, that word had to be read into that article. It was also argued that transfer of a judge from one High Court to another resulted in fresh appointment of the judge to the other High Court and since a person could not be appointed as a judge without his consent, the transfer could not be made without his consent. Again, it was contended that the essence of judicial service was that there was no master-servant relationship between the Judge and the government. Therefore 'transfer' under Article 222(1) did not have the same colour and content as in other services. Finally, it was argued that non-consensual transfer would provide a potent weapon in the hands of the executive to punish a judge who did not toe its line and thereby destroy the independence of the judiciary.

The majority of the Court (consisting of Krishna Iyer, Fazal Ali and Chandrachud, JJ.) negatived all these contentions. The Court held that it was needless to cut down the width of the words used in Article 222(1) by making the power of transfer dependent on the consent of the judge himself. The Court ruled that the transfer of a judge without his consent would not damage or destroy the provision contained in the Constitution


37. Id. at p. 2341.
for preserving the independence of the judiciary. The following reasons were given by the Court:

1. If the transfer of a judge is tantamount to his de novo appointment a second time, there should be consultation with the Chief Justice and the government of the State to which he is transferred. Article 222(1) does not visualise such a second consultation.

2. The Government of India Act 1935 and the Draft Constitution did not provide for the transfer of judges but only their appointment in any other High Court. Then, why did the Constitution makers deliberately depart specially to include the provision for transfer of judges, unless it be that it was meant to vest this additional power in the President?

3. Wherever consent of the judge is contemplated, it is specifically stated in the Constitution (Eg. Article 224-A: it is specifically provided that appointment of retired judges at the sittings of the High Court can be made only with the previous consent of the judge) and the omission in Article 222 is a pointer to the non-consensual sense.

But this opinion of the majority was strongly questioned by the minority judgments delivered by Bhagwati, J. and Untwalia, J. separately. According to Bhagwati, J. though the words “without his consent” are not to be found in Clause (1) of Article 222(1) the word ‘transfer’ which is used is a neutral word which can mean consensual as well as compulsory transfer and if the high and noble purpose of the Constitution to secure the independence of the judiciary by insulating it from all form of executive control or interference is to be achieved, the word ‘transfer’ must be read in the limited sense of consensual transfer. He gave the following reasons in support of his view:

1. The transfer of a judge from one High Court to another would ordinarily inflict many serious personal injuries on him.
2. The power of transfer is in fact in the hands of the executive. If Article 222(1) is interpreted to mean non-consensual transfer too this power of the executive would become a dangerous power, because the executive would then have an unbridled charter to inflict injury on a High Court judge by transferring him from the High Court to which he originally agreed to be appointed to another High Court if he decides cases against the government or delivers judgments which do not meet with the approval of the executive. That would gravely undermine the independence of the judiciary.

3. Judges do not form part of an All India Service.

4. When a judge is transferred from one High Court to another High Court, he is appointed to the High Court to which he is transferred and it is only when he assumes charge of the office of a judge of that High Court by making oath or affirmation before the Governor of the State, that he ceases to be the judge of the High Court from where he is transferred. No appointment can be made without the consent of the judge.

Untwalia, J. who supported the views of Bhagwati, J. observed:42

There may be necessity or justification on the ground of public interest or policy for the transfer of judges from one High Court to another. Although it may be few and far between but to do so without the consent of the judge concerned will bring devastating results and cause damage to the tower of judiciary and erosion of its independence.

This question was subjected to a searching examination by the Supreme Court a second time in the Judges Case.43 All the judges, except Bhagwati, J. refused to read consent into Article 222(1). They held that it was a deliberate omission and not 'causus omissus.' Pathak, J. held that Clause (1) of Article 222 was specifically enacted in our Constitution for the purpose of empowering the President to transfer a judge without necessarily

42. Id. at p. 2393.
securing the consent of the judge, and if a transfer only with the consent was contemplated, it would have been sufficient to rely on the power of the President under Article 217(1) to appoint a judge to another High Court.\(^4^4\) According to him, the fact that a fresh oath or affirmation was necessary when a judge enters upon his office in the other High Court did not lead to the conclusion that the element of consent could be imported into Article 222(1).

Venkataramiah, J. who agreed with the majority of the court for non-consensual transfer said: \(^4^5\)

If Article 222 is construed as requiring the consent of the judge to be transferred, then the power of the President can be neutralised by the judge withholding consent. Such a construction would virtually confer on an unwilling judge an immunity against the exercise of power by the President under Article 222 even though public interest demands the transfer of the judge. Article 222 would in that case become almost ineffective.

He also rejected the contention that transfer involved a fresh appointment. According to him, such a construction ran counter to Article 222(2) as the payment of additional compensation under Article 222(2) would be justified only by holding that the transfer under Article 222(1) did not result in a fresh appointment in another High Court to which a judge is transferred.\(^4^6\)

Fazal Ali, J. held that Article 222 was couched in clear, explicit, intelligible and unambiguous language and it was not the function of the courts to supply words to suit a particular course of action. According to him, the word ‘consent’ had been dropped by the legislature deliberately and it was a case of deliberate omission.\(^4^7\) Desai, J. thought that the Constitution makers

\(^4^4\) Id. at p. 544.
\(^4^5\) Id. at p. 606.
\(^4^6\) Id. at p. 615.
\(^4^7\) Id. at p. 300.
clearly envisaged a power to transfer a High Court judge and conferred it on the President and this power could not be denied by the court by re-writing the Article. 48

Bhagwati, J. in his dissenting note on this question said that he remained unconvinced of the incorrectness of his view in Sankal Chand's case 49 and held that prior consent of the judge transferred is the only effective safeguard against the unfettered power of the executive under Article 222(1). 50

CONSULTATIVE PROCESS UNDER ARTICLE 222(1)

In Sankal Chand's case 51 the Court unanimously held that Article 222(1) cast an absolute obligation on the President of India to consult the Chief Justice of India before transferring a judge from one High Court to another. It was in the nature of a condition precedent to the actual transfer of a judge.

According to the Court, the consultation must be full and effective and not formal or unproductive. 52 The consultation to be effective, there should be identical materials before the consulting parties. In this process the President must make all the relevant data available to the Chief Justice of India on the basis of which he can offer to the President the benefit of his considered opinion. If the facts necessary to come to a conclusion are not made available to the Chief Justice of India, he must ask for them because in casting on the President the obligation to consult the Chief Justice, the Constitution at the same time must be taken to have imposed a duty of the Chief Justice of India to express his opinion on nothing less than a full consideration of the matter on which he was entitled to be consulted. 53

48. Id. at p. 500.
49. Supra, n. 30.
52. Id. at p. 2347.
53. Ibid.
Krishna Iyer, J. (Fazal Ali, J. concurring) explained the meaning of the words 'full and effective consultation' thus:\(^5^4\)

Before giving his opinion, the Chief Justice of India would naturally take into consideration all relevant factors and may informally ascertain from the judge concerned if he has any real difficulty or any humanitarian ground on which his transfer may be directed. Such grounds may be of wide range including his health or extreme family factors. Where the proposal of transfer is made, the government must put forward every possible material to the Chief Justice of India so that he is in a position to give an effective opinion.

Does 'consultation' mean concurrence? The Court answered in the negative. According to the Court, the final say in the matter of transfer is with the government and in most cases the government will act on the advice of the Chief Justice of India and departures from this are open to judicial review.

Chandrachud, J. observed:\(^5^5\)

After an effective consultation with the Chief Justice of India it is open to the President to arrive at a proper decision of the question whether a judge should be transferred to another High Court, because what the Constitution requires is consultation with the Chief Justice and not his concurrence with the proposed transfer. But, in all conceivable cases, consultation with the Chief Justice of India should be accepted by the Government of India. The court will have the opportunity to examine if any other extraneous circumstances have entered into the verdict of the executive if it departs from the counsel given by the Chief Justice of India.

In the *Judges* case\(^5^6\) the Court accepted the interpretation of the word 'consultation' given by the Court in *Sankal Chand's*

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54. *Id.* at p. 2384.
55. *Id.* at p. 2348.
56. *Supra*, n. 34.
Fazal Ali, J. laid down the following as the essentials of an "effective consultation" under Article 222(1).

1. Consultation contemplated by Article 222 must be full and effective and is an essential ingredient of the exercise of power under that Article.

2. Once the President decides to transfer a judge, he must consult the Chief Justice of India.

3. If the consultation with the Chief Justice of India has not been made before transferring a judge, the transfer becomes unconstitutional.

4. The President must make the relevant data and the necessary facts available to the Chief Justice of India so that the latter may arrive at a proper conclusion. In case any facts are wanting, the same shall be supplied to the Chief Justice of India and this is an imperative duty or obligation cast on the President who initiates the proposal.

5. The fulfilment by the President of his constitutional obligation and performance of his duty by the Chief Justice of India are parts of the same process and after this process is fully complied with, the consultation becomes full and effective and not formal or unproductive.

6. Sufficient opportunity should be given to the authorities concerned to express their views so as to tender advice as deliberation is the quintessence of consultation.

7. After the data, facts and materials are placed before the consultee and the consultant, there should be full and complete application of minds in respect of the subject to enable them to reach a satisfactory conclusion.

8. The Chief Justice of India owes a corresponding duty both to the President and to the judge who is proposed to be

57. Supra, n. 30.

transferred to consider every relevant fact before tendering his opinion to the President.

9. Before giving his opinion, the Chief Justice of India must take into consideration all relevant facts and should informally ascertain from the judge if he has any personal difficulty or any humanitarian grounds regarding the proposed transfer and having done so, must forward the same to the President.

10. Consultation or deliberation is not complete until the parties make their points of view known to the other or others and discuss and examine the relevant merits of their views. If one party makes a proposal to the other and the latter has a counter-proposal which is not communicated to the proposer, the direction to give effect to the counter-proposal without anything more will not amount to consultation.

Test of Public Interest and Transfers

In Sankal Chand's case Supreme Court held that the transfer of judges could be made only in public interest and not by way of punishment. Neither the President nor the Chief Justice of India had the power to punish a judge for misconduct. A judge can be punished only by the legislature by a procedure contemplated by Article 124(4) of the Constitution, i.e., impeachment. According to Chandrachud, J. the power to transfer a judge of High Court is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a judge who does not toe its line or who for some reason or the other, has fallen from its grace. This extraordinary power which the Constitution has conferred on the President under Article 222(1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of the executive.

60. Id. at p. 2339.
61. Id. at p. 2340.
What is meant by transfers in 'public interest'? How do we distinguish a transfer in 'public interest' from a transfer by way of 'punishment'? These questions are not of easy solution. The Court did not clearly answer these questions. Different solutions were given by different judges.

Chandrachud, J. gave some examples of transfers in 'public interest':

The factious local atmosphere sometimes demands the drafting of a judge or the Chief Justice from another High Court and on the rarest of the rare occasions which can be counted on the fingers of a hand, it becomes necessary to withdraw a judge from a circle of favourites and non-favourites.

But, Bhagwati, J. who pleaded strongly for consensual transfer was not convinced by this argument of 'public interest' in transferring judges without their consent.

Bhagwati, J. said:

It is true that there might be some cases where the dictates of public interest might require the transfer of a judge from one High Court to another, but such cases, by their nature are few and far between and I do not think that it would be right, on account of a few such cases, to concede power in the executive to transfer a High Court judge without his consent which would impinge on the independence of the judiciary. Here there is a competition between two categories of public interest. One is the public interest in seeing that a High Court judge does not continue to pollute the pure fountain of justice and the other is the public interest in securing the independence of the judiciary from executive control or interference. The latter public interest clearly outweighs the former.

In the judges case the validity of this test again came up for consideration before the Supreme Court. It was contended

62. Id. at p. 2341.
63. Id. at p. 2365.
64. A.I.R. 1982 S.C. 149.
that the main reason for the transfer of Mr. Singh was that some persons close to Sri K. B. N. Singh, the Chief Justice of Patna High Court were exploiting their proximity to him and therefore the transfer was by way of punishment. The majority of the Court consisting of Gupta, Tulzapurkar, Venkataramiah and Pathak, JJ. held that the transfer of Mr. Singh was in public interest and not by way of punishment. According to Tulzapurkar, J. as there was no connivance or complicity on the part of Mr. Singh in the matter of exploitation, no reflection is implied on him simply by reason of his transfer which must be regarded as having been made with a view to remedying the dissatisfactory working conditions in the High Court and no unfairplay was involved in the procedure followed by the Chief Justice of India. Therefore the transfer of Mr. Singh was held to be in public interest and not by way of punishment.

Here, it was contended that the illustrations of transfers without consent in public interest given by Chandrachud, J. in Sankal Chand's case were really cases of transfers by way of punishment. Tulzapurkar, J. admitted this contention. But, he held that would not lead the court to the conclusion that all transfers were punitive. He said that there were many cases of transfers in public interest. He quoted with approval Dr. Ambedkar's speech in the Constituent Assembly about the transfer of judges. This speech gave two instances of transfers of judges in public interest:

It might be necessary that one judge may be transferred from one High Court to another in order to strengthen the High Court elsewhere by importing better talents which may not be locally available. Secondly, it might be desirable to import a new Chief Justice because it might be desirable to have a man unaffected by local politics or local jealousies.

65. Id. at p. 434.
66. Supra, n. 30.
68. XI C.A.D. 580.
According to Tulzapurkar, J. other instances of transfers in public interest are (1) Transfer of a judge for remedying the unsatisfactory working conditions obtaining in a High Court for reasons beyond the control of the judge concerned and for which he is not responsible; and (2) a particular judge by reason of his nature and temperament is unable to get along with the Chief Justice or any of his colleagues in the High Court. In these cases transfer of judges from one High Court to another High Court without his consent is justified.  

Desai, J. who was against selective transfers pointed out that transfer of a judge for misbehaviour or on charges of misbehaviour was not contemplated by Article 222(1). According to him, if transfer could be effected because there were complaints and grievances against a judge of a High Court on account of his behaviour or conduct, it would permit the executive, after going through the process of consultation, to rotate the inconvenient judges and this rotation would cause such character assassination on the one hand and hardship and inconvenience on the other hand that it would be sufficient to drive out even a strong willed judge.

A wide definition was given for 'public interest' by Pathak, J.:  

Public interest is the touch stone on which every transfer must be tested. That is the necessary limitation implicitly circumscribing the exercise of power under Article 222(1). All grounds which can be said to fall within that rubric may be entertained. But no ground which falls within the scope of Article 218 read with Clauses (4) and (5) of Article 124 can be brought within its scope. The grounds envisaged by these provisions are 'proved misbehaviour' or 'incapacity.' In relation to them, express provision has been made by the Constitution, the ground being so grave that if established, they can result in one penalty only, that of removal of the judge.

70. Id. at p. 504.
71. Id. at p. 545.
Venkataramiah, J. felt that if a judge with a bad reputation was transferred, no public interest was served because the reputation was the stock-in-trade of a judge.\(^{72}\)

It was contended that non-consensual transfer itself was punitive in nature and amounted to punishment. Majority of the Court negatived this contention. According to Fazal Ali, J. when a person is punished for an offence or mistake or an error, then he is to undergo some penal process, but in this case when a judge is transferred, no such penal consequences are at all visited, because on the plain terms of Article 222, that judge has to get special facilities before being transferred to the transferee Court. The granting of compensatory allowance completely destroys the concept that the transfer involves a stigma or punishment.\(^{73}\) Venkataramaih, J. observed that since transfer was to be made in public interest, a natural corollary was that the transfer was not to be considered as a punishment even in disguise.\(^ {74}\)

**Judges Case: A Critique**

In the *judges case*\(^ {75}\) the Supreme Court held that the consent of the judge was not necessary for his transfer from one High Court to another. According to the Court there are three safeguards against arbitrariness in the use of President's power to transfer judges under Article 222. They are:

1. There must be full and effective consultation with the Chief Justice of India.

2. The power of transfer can be exercised in public interest only and not by way of punishment.

3. Judicial review of the decision of the President to transfer a judge.

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72. *Id.* at p. 618.
73. *Id.* at p. 322.
74. *Id.* at p. 615.
75. *Supra,* n. 34.
Consultation according to the Court means the meeting of the minds and therefore identical materials should be placed before all the constitutional functionaries. But, consultation does not mean concurrence. Consequently, the President is not bound by the advice given by the Chief Justice of India. The Court had expressed the hope that in most cases the advice given by the Chief Justice of India would be acted upon by the President. That is only a pious hope. This would mean that the decision to transfer a judge would be that of the government and the Chief Justice of India is just 'informed' of this transfer. What the High Court judges would have to reckon with in the light of this decision is that even if the Chief Justice of India supports them, the executive may still be able to get them transferred.76

Now there are two more safeguards: (1) Public interest and (2) Judicial review. These are the safeguards against arbitrary transfers even in the case of government servants, those people who hold an office of 'pleasure.' The presumption is that every transfer is in public interest and not by way of punishment. Judicial review is one of the remedies open to all to challenge any transfer ordered by the government. Do these safeguards suffice to preserve the independence of the judiciary, one of the cardinal faith of the Constitution? Judges unlike government servants hold an office under the Constitution and there is no master-servant relationship between the government and the judge.

A close study of Sankal Chand's case77 and the Judges case78 would reveal that the Supreme Court has miserably failed to bring out the clear distinction between the transfers by punishment and transfers in public interest. Public interest is an expression not capable of any precise definition and in a given set of circumstances may be applied differently by different people as is evidenced in the Judges case itself.79 Different opinions were

77. Supra, n. 30.
78. Supra, n. 34.
given by different judges in that case. In many cases, it would not be possible to rule out some element of a penal character. There was unanimity among the judges as to one point; that transfers cannot be made on the ground of misbehaviour as will come within the scope of Article 124(4) of the Constitution. That means that the definition of public interest has wide sweep. Thus, the decision has instead of limiting the scope of transfers only enhanced its scope by giving a very elastic definition of public interest. Mr. Palkhiwala, after examining the Judges' case rightly pointed out that the dichotomy was not between transfer in public interest and transfer by punishment, but the dichotomy was between transfer in public interest and transfers for extraneous considerations. According to him, the object of the transfer and not the result or effect of the transfer is the decisive factor.

The net result of the decision in the Judges case is that it has vested the power to transfer a judge in the hands of the executive. This has many disastrous consequences. Transfers will become a powerful weapon in the hands of the executive to make the judges to toe its line. It can be used to coerce the judges and will instil a fear in the minds of the judges, the first casualty of which would be the justice itself.

That the safeguards suggested by the Court are not sufficient is clearly seen if we look at the mass transfer of judges in 1976. These transfers clearly show that the provision had been made use of for political purposes. Neither consultation with the Chief Justice of India, nor the doctrine of public interest, could save those innocent judges whose only deficiency was their sturdy independence.

Consensual Transfer: The Only Solution

Though India is a unity, it is a unity in diversity. There is much diversity in culture, language, race, caste, traditions etc.
between different States. A judge uprooted from his home State and replanted in an alien State will be like a fish out of water. He may require much time to get acclimatized with the new surroundings. In most of the cases, by the time the transferred judge gets acclimatized with the new environment, his term of office may expire.

Exercise of judicial function is one which requires more than any other work a proper balance of mind and an undisturbed and peaceful life. Administration of justice cannot properly be done by a disgruntled judge. If transfer hangs over his head as a Democles' sword, the balance of justice slips out of his hand.

A lawyer becomes a judge in the late evenings of his life, at the age of fifty or fifty five. He will have a lot of family problems. An immediate and unnoticed transfer may cause so great inconveniences that it may compel him to quit rather than comply with the transfer order. (eg. Justice Ismail of Madras High Court).

In spite of all this, if a sitting judge of one High Court is willing to serve in another state, there is no harm in transferring him. Article 222 has two meanings, both consensual migration and non-consensual migration. During the last twenty five years (till 1977) the article was interpreted in the former sense. This is sufficient safeguard against arbitrary transfer. There is no reason why there should be a departure from this practice, now.

It is to be noted that in U.K. no judge of a High Court is transferred from one division of the High Court to another division without the consent of the judge, despite the fact that all divisions of the court are situated in London itself and no serious inconvenience is caused by such a transfer.

Justice Bhagwati has rightly pointed out in Sankal Chand's

case and reiterated in the *Judges* case that the transfer being made consensual was the only effective safeguard for a judge against arbitrary transfer and only if such an interpretation is accepted, the noble concept of independence of the judiciary can be preserved. This view is shared by many eminent jurists, judges, lawyers etc. The Lord Chief Justice of England, Hon. Lord Lane, speaking on “Standards of Judicial Independence” under the auspices of the Bar Association of India expressed the view that a judge ought not to be liable to be transferred from one High Court to another without necessarily seeking his consent. Justice H. R. Khanna, former judge of the Supreme Court, regretted that the Law Commission’s recommendation that no judge should be transferred without his consent, unless a panel consisting of the Chief Justice of India and his four seniormost colleagues find cause for such a course has fallen into deaf ears.

**TRANSFER OF JUDGES AND THE CIRCULAR LETTER**

The Union Government has decided to appoint one-third of the judges of a High Court from outside the State. In pursuance of that decision the Central Law Minister issued a circular letter on 18-3-1981 to all the Chief Ministers of the States to obtain the consent of all sitting additional judges and also those persons whose names were recommended or might in future be recommended for initial appointment outside their State. The validity of this circular letter was challenged in the *Judges* case.

The majority of the Court consisting of Bhagwati, Fazal Ali, Desai and Venkataramiah, JJ. upheld the validity of the circular letter. According to the Court, all high-powered bodies and associations which have anything to do with the judicial system have consistently over the years taken the view that one-

86. *Supra*, n. 30.
87. *Supra*, n. 34.
89. See, *Indian Express* (Cochin Ed.) March 14, 1982.
91. *Id.* at p. 217.
third of the judges of each High Court should be from outside the State and the unanimity of the view has been so complete and overwhelming that it is impossible to contend that this policy is ill-conceived or mala fide or subversive of the independence of the judiciary. The majority of the court also negated the contention that the process envisaged by the circular letter involved transfer as contemplated in Article 222(1). According to the Court\textsuperscript{92} by reason of appointment as an additional judge or permanent judge, the additional judge no doubt has to go to another High Court, but it is not while being a judge of another High Court. His appointment as additional judge comes to an end and he is appointed afresh as an additional or permanent judge in another High Court. Therefore, the circular letter does not violate Article 222(1).

But among the majority of the judges who upheld the circular letter two judges, Bhagwati, J. and Desai, J., were of the view that the circular letter was without any legal force. According to Bhagwati, J.\textsuperscript{93} the circular letter is a document without any legal force and does not by itself or of its own force create or alter any legal relationship or arrangement or produce any legal consequence or effect.

The minority of the Court consisting of Pathak, Tulzapurkar and Gupta, JJ. held the circular void. According to Pathak, J.\textsuperscript{94} the circular letter has the effect of by-passing the consultative process which the President is obliged under the Constitution to enter into with the Chief Justice of India and thus violates Article 222(1). According to him,\textsuperscript{95} to adopt this procedure will be to equate this procedure with the appointment of the members of the All India Service, a position which cannot constitutionally be countenanced. According to Tulzapurkar, J.\textsuperscript{96} by resorting to transfers of sitting additional judges under the garb of making fresh appointments on the expiry of their initial

\textsuperscript{92} Id. at p. 233.

\textsuperscript{93} Id. at p. 215.

\textsuperscript{94} Id. at p. 554.

\textsuperscript{95} Ibid.

\textsuperscript{96} Id. at p. 416.
or extended term the circular letter is an attempt to circumvent the safeguard of public interest and the stringent condition of full and effective consultation with the Chief Justice of India contemplated by Article 222(1). The minority also held that reading the circular letter as a whole, it clearly exuded an odour of executive dominance and arrogance intended to have a coercive effect on the minds of the sitting additional judges by implying a threat to them that if they do not furnish their consent to be shifted elsewhere where they would not be continued nor made permanent but would be dropped.97

The minority judgements seem to be correct. As said by the minority, the circular letter as regards additional judges is an indirect way of transferring them without their consent and also by-passing the constitutional mandate of consultation envisaged in Article 222(1). The circular letter will have a coercive effect on the minds of additional judges.98 It would make the additional judges mere puppets in the hands of the Government.

The appointment of one-third judges from outside the state has many merits. That would help national integration. Moreover, a judge belonging to an outside state would be less amenable to the influences from the Bar or from the State executive. But, this policy cannot be carried out overnight by resorting to mass transfer of judges or by appointment of additional judges as permanent judges outside their states.

This policy should be worked out through initial appointment only. That is what is contemplated by the second part of the Law Minister’s circular letter (ie. seeking the consent of all persons whose names might be recommended for initial appointment to be posted outside the State). This proposal does not violate any of the provisions of the Constitution. Once a person is found to be suitable for High Court Judgeship after the con-

97. Id. at p. 418.

sultative process envisaged in Article 217(1)\textsuperscript{99} that person can be appointed as a judge of another High Court. But, once he is appointed as a judge outside his State he should be ensured that he would not be transferred. If a Judge appointed in an outside State is guaranteed that he would not be transferred throughout his career as a Judge, he will try to acclimatize with the new atmosphere and may even try to learn the regional language. But, then the government has to ensure that all the court proceedings are conducted only in English and if any documents, papers etc. produced before the court are written in regional language, translated copies are made available to the outsider judges.

\textbf{APPOINTMENT OF CHIEF JUSTICE OF THE HIGH COURTS THROUGH TRANSFERS}

The Union Government has recently taken a decision to have the Chief Justices of all High Courts from outside the State.\textsuperscript{100} According to the guidelines, “inter se” seniority of the puisne judges will be reckoned on the basis of their seniority in their own High Court and subject to suitability, they will be considered for appointment as Chief Justices in other High Courts when their turn would normally come for being considered for such appointment in their own High Courts.\textsuperscript{101} But a Chief Justice who has only one year or less to retire may not be transferred to another High Court.\textsuperscript{102}

The Constitution does not prescribe any special procedure for the appointment of Chief Justices of the State High Courts.

\textsuperscript{99} Article 217(1) reads: “Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.”

\textsuperscript{100} See \textit{Indian Express} (Cochin Ed.) January 28, 1983.

\textsuperscript{101} \textit{Ibid.}

\textsuperscript{102} \textit{Ibid.}
But there is an established convention of appointing the senior-most judge of the High Court as the Chief Justice of that High Court. The new governmental policy sets at naught the old convention.

This policy has some merits. But, it has many demerits too. This is also an indirect method of transferring a judge without his consent. No judge should be transferred and appointed as the Chief Justice without the prior consent of the judge. If a judge is not willing to serve outside, he need not be elevated, but he should be allowed to continue as a puisne judge of that High Court itself.

Another major drawback is that it leaves vast discretionary power in the hands of the executive and there are much chances of its being abused to avoid abuse of this power by the executive, one suggestion has been that selections should be on the basis of all-India seniority instead of state seniority.\textsuperscript{103} There should be an All-India seniority list of the judges and whenever there is a vacancy of a Chief Justice in any State to appoint the senior judge in the list from whichever State he may hail as the Chief Justice.\textsuperscript{104} There can be some exceptions. One exception is when the senior-most judge happens to be from the same State and he has only one year or less for retirement in which case he must be posted as Chief Justice in that court itself.

**Conclusion**

The constitutional provision on transfer of judges has a direct and proximate connection with the independence of the judiciary. This provision like many other constitutional provision can be made use of for achieving many useful purposes as well as evil purposes. During the first quarter century of the working of the Constitution, this was never abused. But in recent years, some attempts were made and are being made to misuse this provision. Its abuse will have many dangerous effects on the


\textsuperscript{104} Ibid.
judiciary and its independence. If the judiciary loses its independence and becomes subservient, the net result would be that the Constitution will lose its prominence. Justice Khanna has aptly put it like this: 105

"Once the independence of the judiciary is undermined and the seats of Justice came to be occupied by men with 'pliable conscience' and subservient to the political wing of the State, the first casualty would necessarily be the supremacy of the Constitution, for it would be open to every branch of the State to ride roughshod over the provisions of the Constitution."