

The Union Judiciary: The Supreme Court of India. [Articles 124to147.]

Introduction:

Disputes are endemic in any society. Even in a well-knit family, disputes cannot be ruled out or wished away. It was Bernard Gournay, a French Philosopher, who said several decades ago that the only place which is free from conflicts is the grave yard. But, today, even this proposition is contestable because at grave yards you would, invariably, witness several urchins engaged in gambling. Gamblers, we should suppose, are more inclined to engage in conflicts, The point being emphasized is that disputes/conflicts do arise in various situations and unless resolved quickly would disturb peace in society. Perennial social unrest in a democratic polity would not be a healthy sign. Prudence, therefore, demands that disputes or conflicts should be resolved as expeditiously as possible by an impartial, independent tribunal or Court.

A Constitution is not a static, rigid, lifeless document. It mirrors the ambitions and aspirations of the people who it governs. Its provisions are ever-changing, ever-evolving. It embodies the supreme Law of the Land.

*Lectures prepared for e-Learning Centre, Visveswaraya Technological University.

**B.Sc., LL.M., S.J.D. (U.S.A) Formerly, Dean, Faculty of law, Karntak University, Dharwad

To abide by the constitutional dictates, to promote or achieve the constitutional goals, the legislatures have enacted numerous statutes. These laws may confer rights, impose obligations, The Constitution itself guarantees to its citizens several fundamental rights, like, Freedom of speech and Expression, Freedom of Assembly, Freedom of Association, Freedom of Movement,(Art.19) Equality before the law and Equal protection of the laws (Art.14), Prohibits discrimination on grounds of religion, Race, Caste Sex or Place of Birth (Art.15), guarantees Equality of opportunity in matters of Public Employment (Art.16), promises to protect life and personal liberty (Art.21), Right to Education (Art.21A),Freedom of Religion (Art.25), to mention a few, for illustrative purposes.

Of course, the rights guaranteed under Art.19, like freedom of speech and expression, freedom of assembly, association are not absolute and the State, that is the Central or State Legislatures.... may impose reasonable restrictions upon the same. But who is the final arbiter or authority to determine whether the restrictions imposed are reasonable or unreasonable? Or, whether the Constitutional Prohibition on discrimination on grounds of race , religion, sex, etc., has been honoured by the state or not? Or, whether the law enacted offends the Equality Doctrine which Art.14 propounds?

Further, it is not the Constitution alone that is the repository of the rights of the citizens. Various Statutes enacted by the Legislature do also confer rights. For example, the laws creating rights to pensionary benefits, to gratuity, etc. Who has to ultimately decide the ambit of these rights, the extent of entitlement, whether there has been a violation of these rights?

Also, it would be worthwhile to recall that ours is a written Constitution, which, while creating the various organs of the State, namely, the Executive, the Legislature and the Judiciary, also marks out the jurisdictions within which they have to discharge their constitutionally ordained obligations, functions, duties. That is, the Constitution which grants the powers also limits them. Who has to decide whether the limitations have been crossed or transgressed.

The foregoing would boil down to some significant questions: who has to ensure that the citizens' rights and liberties are secured or protected? Who has to interpret or expound the statutes and the Constitution? How to ensure the rule of law reigns supreme? If there be no remedy to a citizen when his rights are violated, then, the instruments which confer rights would be worthless. That is the reason why Alexander Hamilton has said: "Laws are a dead letter without Courts to expound and define their true meaning and operation". Thus, an independent impartial judiciary becomes indispensable in a democratic polity. So also, judicial Review of administrative and legislative actions. In fact, Our Supreme Court has ruled that "Judicial Review" and "Independent Judiciary" are among the "Fundamental Features of our Constitution" and are unamendable. Thus, pronouncements of the Supreme Court acquire great significance when one realizes that "the Government of India is the biggest single litigant in India, and the Govt.(sic) of the States are the biggest single litigants in the states". Seervai, at p.2836. Seervai, therefore, argues that in ensuring the independence of the judiciary, the Constitutional Provisions bearing upon the appointment of Judges to the Supreme Court and the High Courts should not be interpreted as conferring absolute or unfettered power on the

Executive. The learned scholar asserts that “any interpretation of Art.217 (“Appointment –of a Judge of a High Court”) which puts judicial independence at the mercy of an Executive, which is the largest single litigant-must be rejected if any other reasonable interpretation can be put on Art.217” Seervai,at p.2836.

With the foregoing introduction, we may now refer to the relevant Constitutional Provisions relating to the establishment of the Supreme Court, the procedure for the appointment of Judges, the qualifications prescribed for such appointments, the manner of removal of Supreme Court Judges and, importantly, the kinds of jurisdiction exercisable by the Highest Court of our land.

Incidentally, it has to be noted that although the Constitution provides for distribution of powers between the centre (union’) and the states and there is a dual polity, there are no separate hierarchies of Courts at the state and union levels as exist in some federal systems, for example, the U.S.A. We have “one unified Judicial system and an integrated judiciary (and) there is one hierarchy of courts”. National Commission--- at p.135. The Supreme Court is at the top.

The Supreme Court: Art.124 (1).

Clause (1) of Art.124 declares that there shall be a Supreme Court of India. The Chief Justice of India (“CJI”) and twenty-five other Judges constitute the Supreme Court. The Supreme Court and the High Courts enjoy an exalted status. under our Constitution. They have been described as the “Protectors” and “Guardians” of the individual’s Rights and Liberties

and the “Conscience-Keepers of our Constitution”. The Supreme Court is the Highest Court and the final Court of Appeal.

Chief Justice of India:

The Constitution offers no indicators for the appointment of the Chief Justice. However, the convention, though breached on a couple of occasions in the past, that the senior-most Judge be appointed as Chief Justice has been followed.

When the CJI presides over a Bench, he is primus inter pares, that is, first amongst equals.

CJI Constitutes the Benches of the Supreme Court and assigns matters to be heard. In the appointment of Judges of the Supreme Court and the High Courts, CJI and his senior-most colleagues have an important role to play.

Appointments of officers and servants of the Supreme Court are to be made by the CJI or such other Judge or officer of the Court as he may direct.

Appointment of Judges: Art.124(2).

The procedure for appointment of Judges to the Supreme Court is spelt out in cl.(2) of Art.124. As per the provisions, it is the President who appoints every judge of the Supreme Court by warrant under his hand and seal. However, the President, before making the appointment is obliged to consult such of the judges of the Supreme Court and of the High Courts as he deems necessary. Further, in the case of appointment of a Judge other

than the Chief Justice, the President shall consult the Chief Justice of India(“CJI”).

At this Juncture, two important points need be noted. The first one is, although Art.124(2) gives the impression that the appointment of a Judge is made by the President, in reality, it is the union executive that exercises the power. That is, the President has to make the appointment on the advice tendered by the Council of Ministers. The second point is, the Constitution has provided for consultation with a view to fetter the power of the Executive in making judicial appointments so that the Executive would not enjoy absolute power in making the said appointments. For, to concede such a power to the executive, would devastate and destroy the prospect of an independent, impartial Judiciary, Seerrai, at p.2854.

There was confusion surrounding the Consultation Process contemplated in the Constitution. The questions being raised were: whether ‘Consultation’ means “concurrence”? Whether the opinion of CJI should be given primacy? Or, when the CJI and the President differ, whose opinion should prevail? For the time being, atleast, the confusion seems to have been removed in the light of the Supreme Court’s Advisory opinion in Presidential Reference, AIR 1999 SC 1

Now, CJI’S sole opinion in regard to the appointment of a Judge is of no consequence. “Consultation” means” Consultation of Plurality of Judges”. As Prof.M.P.Singh explains: “The process of appointment of Judges is initiated by the CJI through a collegium consisting of himself and four of the senior-most judges of the Court. Recommendation of the collegium is binding on the President. However, the President may not

appoint a person whom for specific reasons he does not consider suitable for appointment. In such a case, the collegium must reconsider its recommendation. On reconsideration, it may either drop the name of the person not found suitable by the President or reiterate its recommendation. In the later case, the President is bound to accept the recommendation". Constitution of India Revised by M.P.Singh (Tenth Edition), (2004),at p. 413.

Term of office:

A Judge appointed to the Supreme court shall hold office until he attains the age of sixty-five years. Art.124(2). He may resign before the age of retirement by addressing his letter of resignation to the President. Second proviso to cl.(2) of Art.124.

Impeachment(Removal):

Cl.(4) of Art.124 provides that a Judge can be removed from office before he attains the age of sixty five years on grounds of proved misbehavior or incapacity. 'Misbehavior' or 'Incapacity' are not explained under Art.124(4). Further, what separates 'misbehaviour' and 'Incapacity' is 'or', not, 'and'. That is , a Judge can be removed on either of the grounds and there is no need to establish both "misbehavior" and "Incapacity". 'Misbehaviour' may be "misconduct". For example, use of public funds for private purposes. 'Incapacity' may imply either physical or mental incapacity

Further, a sitting Judge can be removed only when his 'misbehaviour' or 'incapacity' is "proved". So, mere allegation, apprehension, or suspicion

won't do. 'Misbehavior' or incapacity' has to be investigated, established and proved. Natural Justice demands that the delinquent Judge has to be apprised of the charge and be heard. So, a summary or an informal procedure adopted by the executive for the removal of a Judge is unacceptable because it destroys the independence of the Judiciary. Therefore, democratic constitutions prescribe an elaborate and, if we can say, a cumbersome procedure for the impeachment of persons holding high Constitutional Offices.

Under our Constitution, a Judge of the Supreme Court can be removed from his office by an order of the President. Such an order can be passed only after an address by each House of Parliament for the removal of the Judge on the ground of proved misbehaviour or incapacity is presented to the President. The address must have been supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting.

What should be noted is that the address, referred to above, can be presented only after misbehaviour or incapacity on the part of the Judge concerned is proved. Now, what is the procedure to be followed to investigate and establish the alleged 'misbehaviour' or 'incapacity'? Who has to conduct the investigation?

Cl.(5) of Art.124 says that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge.

Pursuant to the above provision, Parliament has enacted the Judges (Inquiry) Act, 1968. This Act lays down an elaborate procedure for

investigating and establishing ‘misbehaviour’ or ‘incapacity’ of the Judge by a Committee of Inquiry to be constituted by the Speaker of Lok Sabha or Chairman of Rajya Sabha. The Committee has to frame definite charges and the Judge concerned has to be given a reasonable opportunity to present his defence. Should the committee hold the Judge guilty, then the House can take up the motion for consideration. After the motion is adopted as stipulated in Art.124(4), the address shall be presented to the President for the removal of the Judge.

Qualifications: The qualifications for appointment of a Judge to the Supreme Court are mentioned in Cl.(3) of Art.124.They are:

- 1) He must be an Indian citizen.
- 2) He must have been a Judge of a High Court for at least five years,
or
- 3) He must have been an advocate for a High Court of at least Ten
Years;
or
- 4) In the opinion of the President, he is a distinguished Jurist.

The National commission has observed that “in the last fifty years not a single, distinguished jurist has been appointed”. At,p.139. The Commission adds: “From the bar also, less than half a dozen Judges have been appointed” Ibid. The Commission recommends that “suitable meritorious persons from these sources (be) appointed” Ibid.

Apart from the qualifications expressly prescribed by the Constitution, the implied qualifications required are: unimpeachable character and integrity; impartiality, independence; equanimity; incorruptibility. Dr.Ambedkar had, in the Constituent Assembly, expressed that the Judiciary should be independent of the Executive and competent in itself. Nehru felt : “They (the Judges) should be first class and seen to be first class”.

Supreme Court: Jurisdiction and Powers:

The Jurisdiction of the Supreme Court under our Constitution is quite wide. It is the final Court of Appeal in respect of civil and criminal matters. What follows would give us an idea about the extensive jurisdiction our Apex Court enjoys as well as the powers conferred upon the Court under our Constitution.

a) Power to Enforce Fundamental Rights (Art.32):

You are, Probably, aware that part III of our Constitution adumbrates our Fundamental Rights. The various Fundamental Rights like ‘Right to Equality’ ‘Right not to be discriminated on the grounds of race, religion, caste, sex or place of birth, ‘Equality of opportunity in matters of public employment,’ Freedom of Speech and Expression,’ ‘Freedom of Assembly,’ Freedom of Association,’ to mention a few, guaranteed to the citizens would remain as pious constitutional declarations if the repositories of the rights are not assured that in case of any violation of those rights they can look up to some authority for their enforcement. It is, at this juncture, Art.32 comes into play and acquires significance. Dr.Ambedkar had remarked that Art.32 “is the soul of the Constitution and the very heart of it” and without this

article our constitution would be a nullity.” Art. 32 is in the company of other Fundamental Rights in Part. III. But, unlike other rights, “it is remedial and not substantive in nature”. (Shukla, Constitution of India, p.277)

Art.32(1) declares :”The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed”. To be noted is the right to move the Supreme Court for the enforcement of the fundamental Rights is itself a Fundamental Right. Thus, the Supreme Court is the ultimate protector and guarantor of the fundamental rights and a solemn duty has been cast upon this Court to protect the citizens’ fundamental rights “zealously and vigilantly”.

Clause (2) of Art.32 empowers the Supreme Court to issue writs including the writs of habeas corpus, mandamus, quo warranto, certiorari and prohibition for the enforcement of the fundamental rights. The Court’s power is not confined to the issuance of the above writs, It can issue directions or orders which appear to the Court to be appropriate for the enforcement of the fundamental rights. The Court’s power is not only preventive, in the sense, preventing violations of fundamental rights, but also remedial , in the sense, the court can award compensation and exemplary costs when the state has violated the fundamental right to life and personal liberty guaranteed under Art.21. Illustrations: Direction that the labour laws be faithfully enforced; that under-trial victims be rehabilitated; that contract labourers be paid minimum wages.

b) Supreme Court's Power to Commit a Person for Contempt (Art.129):

Art.129 declares that the Supreme Court shall be a Court of Record and has all the power of such a court including the power to punish for contempt of itself.

A Court of Record is one where its acts and judicial proceedings are enrolled for a perpetual memorial and testimony and has the power to fine and imprison for contempt of itself. Wharton's Law Lexicon, 14th Edition, p.275.

A Court of Record is a Court whose records are of evidentiary value and cannot be questioned when produced before any court.

Power to punish for contempt is conferred to uphold the majesty and dignity of the court, to prevent scandalisation of the judiciary, to ensure that the stream of justice remains unsullied, to bar interference in the administration of justice. (for more details, see Contempt of Court Act,1971).

The power of the Supreme Court to punish for contempt extends to all Courts and Tribunals subordinate to it.

For the exercise of the power to punish for contempt, no one has to apprise the court. The court can act suo moto.

Fair and objective criticism of courts will not amount to contempt.

National Commission has observed:” Judicial decisions have been interpreted to mean that under the law that now prevails even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law”---at, p.140.

The Commission has recommended that “the law in this area [contempt of court] requires an appropriate change”. Ibid.

c) Supreme Court’s Original and Exclusive Jurisdiction in Respect of Certain Disputes(Art.131):

The Supreme Court has Original and Exclusive Jurisdiction in any dispute

- i) between the Government of India and one or more States; or
- ii) between the Government of India and any State on one side and one or more States on the other side; or
- iii) between two or more States,

if the dispute involves a question of law or fact on which the existence or extent of a legal right depends.

A Court is said to have Original Jurisdiction when it has authority to hear and determine a case in the first instance.

The Court’s Jurisdiction is exclusive when no other court has the authority to hear and decide the case.

What is necessary under Art.131 is that the existence or extent of a legal right must be in issue in the dispute between the parties, that is, between the Government of India and one or more States, etc.

The rationale underlying Art.131 is if there be a dispute between two or more states--, it is not proper that the dispute be agitated before the court of one of the disputants, that is, disputing parties.

Further, under Art.131, the plaintiff State need not assert a legal or a constitutional right. It is enough if it can challenge the right claimed by the Respondent State.

d) Appellate Jurisdiction of the Supreme Court (Art.132):

a)The Supreme Court shall have the final say on questions involving the interpretation of the Constitution. Different opinions by different High Courts on Constitutional Questions would create confusion among the lawyers and citizens.

Art.132, therefore provides that an Appeal shall lie to the Supreme Court from any Judgment, Decree or Final Order of a High Court, whether in Civil or Criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

e) Supreme Court's Appellate Jurisdiction in Civil Matters (Art.133):

b) The Supreme Court is empowered to entertain Appeals from the Judgment, Decree or Final Order of a High Court in Civil Proceedings, that

is proceedings of civil nature. The Proceedings are civil in nature if a person seeks relief in a Civil Court when his civil rights are infringed by another person or by the State. After the conclusion of the proceedings, the Civil Court may declare that the plaintiff's claim is justified and he is entitled to relief.

To invoke the Supreme Court's appellate Jurisdiction, the following conditions have to be fulfilled:

- i) What is being appealed against must be a Judgment, Decree or Final Order of a High Court in a Civil Proceeding.
- ii) The High Court must certify that the case involves a substantial question of law of general importance and that it (the High court) is of the opinion that the substantial question of law... needs to be decided by the Apex Court.

It can be said that the Judgment, Decree or Final Order –all seem to convey the same meaning, that is, the Civil Court's pronouncement that finally or conclusively determines the rights of the parties in a controversy or suit.

It should be noted that under Art.133, no appeal can be made against the Judgment, Decree or Final Order of a single Judge of a High Court unless Parliament enacts a law to remove this restriction.

f) Appeals to Supreme Court in Criminal Matters (Art.134):

The Criminal Appellate Jurisdiction of the Supreme Court can be invoked against the Judgment, Final Order or Sentence of a High Court in a

criminal proceeding when the High Court has certified that the case is a fit one for appeal to the Supreme Court.

The grant of certificate by the High Court would be justifiable when difficult questions of law or principles are involved in the case. Ordinarily, the High Court's Certificate would demonstrate that the case involves a substantial question of law or principle.

No doubt, in granting or not granting the certificate under Art.134(1) (c) , the High Court enjoys discretion but the discretion is judicial one which has to be judicially exercised in the light of well-established principles.

The Supreme Court's Criminal Appellate Jurisdiction can be invoked in the following circumstances:

a) When the High Court has reversed the decision of acquittal of the accused by the Sessions Court and sentenced him to death;

or

b) When the High Court has withdrawn for trial before itself any case from any court subordinate to it and has convicted the accused person and sentenced him to death.

Parliament may by law enlarge the appellate criminal Jurisdiction of the Supreme Court. In 1970, Parliament enacted a law which enables an accused to appeal to the Supreme Court when the High Court "has not sentenced him to death under Art.134(2)(6)(1) but has sentenced him to imprisonment for life or for a period of not less than ten years. The Supreme

Court (Enlargement of Criminal Appellate Jurisdiction) Act,1970 has substituted the words underlined above for the words “to death”

g) Appeal to Supreme Court by Special Leave(Art.136):

Under Art.136, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Under Articles 132 to 135, the Supreme Court’s appellate Jurisdiction can be ignited by fulfilling the conditions mentioned there-under.

But, under Art,136, Supreme Court’s permission or leave is required. Such permission or leave can be granted by the Court in its discretion.

Further, appeal may be allowed against determination, sentence or order (note, need not be a ‘final order’) of a court (note, need not be a High Court) or tribunal. (Industrial Tribunal, Income Tax Tribunal)

Supreme Court may be inclined to grant special leave in situations where a party has suffered gross injustice on account of violation of natural justice or where the tribunal’s order or determination is so palpably wrong or absurd as to shock the court’s conscience.

Since Art.136 speaks of judgments, decrees, sentence, orders, determinations of Courts or Tribunals, purely administrative or executive order or direction cannot be the subject-matter of appeal and the court would be disinclined to accord leave. The Court has to be convinced that there are special circumstances which warrant its intervention. For example, when the

Tribunal has been improperly constituted; where the procedure followed is unjust, unfair, unreasonable; when the Tribunal has assumed a jurisdiction which in law it does not enjoy.

The Supreme Court has no power or Jurisdiction to grant special leave against the Judgment, Decree, Sentence, Determination, Order passed or made by any Court or Tribunal functioning under any law relating to the armed forces. Art.136(2).

h) Supreme Court's Power to Review its own Judgments, Orders. (Art.137):

In Judicial decision-making, the general proposition is that there should be finality attached to Court's Judgments and that there should be an end to law suits. A rigid adherence to this proposition may, in some cases, result in gross and manifest injustice, A court cannot be allowed to be a court of Injustice. If, in a case, the court finds that a particular provision of the Act was not brought to its notice or evidence which would have tilted the scales of Justice was not available at the time of its pronouncement, then, it may be inclined or probably pleased to review its earlier judgment at the instance of the aggrieved.

Art.137 expressly empowers the Supreme Court to review its Judgments.

Review is permissible on the following grounds;

- i) Discovery of new and important matters of evidence;
- ii) Mistake or error of law apparent on the face of the record;

iii) If there be any other sufficient, justifiable reason.

i) Supreme Court's Power to make an Order necessary for doing complete Justice in any case (Art.142);

This is a power which every final court in a democratic polity should possess. When the Constitution of the country does not declare that the Highest Court has this inherent power, then, it should, at least, command the Legislature to provide for this power through law.

Prof M.P.Singh has Observed: "The Supreme Court's power under Art.142 is a residuary power, supplementary and complementary to the powers specifically conferred on the court which it may exercise whenever it is just and equitable to do so and in particular to ensure the observance of due process of law, to do complete justice according to law." Op.cit, p.459. (citing DDAV Skipper Construction Co,(p)Ltd, AIR 1996 SC 2005.

The power conferred on the Supreme Court under Art.142 has been exercised by the court to order payment of compensation to a person who had been illegally detained, to order payment of interim compensation to the victim of rape ,etc. (For case law citations, see Shukla, Constitution of India. (already cited) p.461.

j) Advisory Jurisdiction (Art.143);

Normally, the Court's function is to decide the controversy presented to it and render its judgment. Again, Courts do not take suo moto notice of a prevalent controversy and offer their opinions. The Court's Jurisdiction has to be invoked by the aggrieved party through appropriate means, But,

Art.143 enables our Supreme Court to render Advisory Opinion in certain contingencies. Such Advisory Opinion of the Supreme Court rendered at the instance of the President of India may enable Parliament to pass appropriate Legislation or to introspect and effect suitable amendments to the existing law.

Art.143 enables the President to refer to the Supreme Court a question of law or fact which in the opinion of the President is of such nature and such public importance that it is expedient to obtain the Court's Opinion on it.

It has to be noted that a question of law which the Supreme Court has already decided in a dispute presented to it cannot be the subject-matter of a reference by the President for Advisory Opinion, Because, the implication would be that the President would be inviting the Apex Court to at act as an Appellate or Reviewing Authority over its earlier decision while seeking its Advisory Opinion under Art.143.

On a Presidential Reference for Advisory Opinion, the Attorney-General would be given notice and all concerned may also be served notices to appear as parties or as interveners.

The Court, after hearing, reports to the President.

The Advisory Opinion tendered need not, rather, should not bind the President. Conversely, the Supreme Court for germane reasons may decline to express its opinion, especially, when the reference is vague.

The High Courts In The States (Articles 214 to 231):

In this segment, we shall examine the composition of the High Courts, the qualifications prescribed for the appointment of Judges, their tenure, procedure prescribed for the removal of Judges and the Powers and Jurisdiction exercisable by the High Courts.

Art.214 declares that there shall be a High Court for each State. However, Parliament by law may establish a common High Court for two or more States or for two or more States and a union Territory (Art.231). The Constitution also Provides, under Art.230, that Parliament may by law extend the jurisdiction of a High Court or exclude its jurisdiction from any union Territory.

Within its territorial jurisdiction, a High Court may have one or more benches

Constitution of High Courts (Art.216):

Every High Court shall have a Chief Justice and such number of Judges as the President may from time to time determine.

Judicial decisions establish that the Chief Justices of the High Courts and the Chief Justice of India (“CJI”) may periodically review the strength of the High Courts and in the interest of efficient administration of Justice may recommend to the President that the strength of the High Court be increased. When the CJI makes such a recommendation, the President is required to act expeditiously. Needless to say, the it is the Executive, in reality, that has to act promptly.

Appointment and Conditions of the Office of a Judge of a High Court (Art.217):

Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal. Before appointing, the President has to consult the Chief Justice of India and the Governor of the State. In the case of appointment of a Judge other than the Chief Justice, the President shall consult the Chief Justice of the High Court.

As regards the 'Consultation Process', see the material provided under 'Union Judiciary'.

Further, it may be noted that as regards the appointment of High Court Judges, the CJI is required to consult two senior-most Judges of the Supreme Court. Hence, the opinion of CJI means the opinion of a collegium consisting of himself and two senior-most Judges of the Supreme Court. But, it has to be noted that the process of appointment of a High Court Judge has to be initiated by the Chief Justice of the High Court concerned. His sole opinion is of not much consequence. Because, he must take into account the opinions expressed by two senior-most Judges of his High Court. The Consultation Process should be in writing. That is, all the opinions of consultees and the one consulting should be in writing.

The appointment of a Judge to the High Court must be in conformity with the opinion of the CJI (that is, the Collegium's Opinion, referred to, earlier) In case of disagreement between the President & CJI, the latter's opinion shall prevail.

As regards the appointment of the Chief Justice of the High Court, it appears, that it should be made on the basis of the All India Seniority of High Court Judges.

A Judge of the High Court Shall retire on his attaining the age of Sixty-Two years. Art.217(1).

He can, of course, resign by writing to the President of India.

As in the case of a Judge of the Supreme Court, a Judge of a High Court can be impeached on grounds of proved 'misbehaviour' or 'incapacity'. Refer to relevant material under Union Judiciary. Art.217(1, proviso(b)).

Qualifications for Appointment Art.217(2):

- a) He/She shall be a citizen of India;
- b) Must have held a Judicial Office in our country for atleast ten years;
- or
- c) Must have been an advocate of the High Court for atleast ten years.

Restriction on Practice in regard to a Permanent Judge of a High Court (Art.220):

A Permanent Judge of a High Court shall not plead or act in any court or before any authority in India except the Supreme Court other High Courts.

A reading of the provisions under Art.217 indicates that in so far as the resignation and removal of the High Court Judges are concerned they are

mutatis mutandis (with due alteration of details in comparing cases) the same as those for the Judges of the Supreme Court.

Powers and Functions:

i) Appointment of District Judges. Art.233:

In regard to the appointment, posting and promotion of District Judges, the Governor of State is required to consult the High Court exercising jurisdiction in relation to such State

ii) Recruitment to Judicial Service. Art.234:

When persons have to be recruited for judicial service (Posts of District Judges excluded), appointments have to be made by the Governor of the State in accordance with the rules made by him after consultation with the State Public Service Commission and the High Court of the State .

iii) Control Over Subordinate Courts. Art.235:

The control over District Courts and Courts subordinate thereto including the posting and promotion of and grant of leave to persons in Judicial Service holding posts inferior to that of District Judge shall be vested in the High Court. This 'Control' is for ensuring the Independence of the Subordinate Judiciary.

vi) Highest Court of Appeal in the State:

In the State, the High Court is the Highest Court of Appeal in respect of both civil and criminal matters

v) Transfer of certain cases to High Court. Art.228:

On being satisfied that a case pending in a subordinate court involves a substantial question of law as to the interpretation of the Constitution and that the determination of the question is necessary for the disposal of the case, the High Court may withdraw the case and dispose it or may determine the question of law and return the case with its Judgment on the question to the subordinate court which shall then dispose of the case in conformity with such Judgment.

vi) Power of Superintendence over all Courts by the High Court. Art.227:

Every High Court shall have the power of superintendence over the subordinate courts and tribunals within its Jurisdiction.

Interference by the High Court under Art.227 can be suo moto. The High Court can interfere when shown that grave injustice has been done to a party. Or, when the jurisdictional defect of the inferior court or tribunal is established

Art.227 Jurisdiction is exercisable when lack of Jurisdiction, errors of law, gross violation of Natural Justice or perverse findings are established. or See, P.M.Bakshi, The Constitution of India, (Fifth Edition) (2004), at p.195.

High Court has no power of superintendence over any Court or Tribunal constituted under any law relating to the Armed Forces.

The High Court's Power under Art227 is exercisable even in such situations when no appeal or revision lies to the High court.

vii) Power of the High Courts to Issue certain Writs Art.226:

Art.226 is one of the most significant and important Articles in our Constitution. An Article most often invoked by an aggrieved citizen for seeking redress from the High Court. An Article greater in scope than Art.32 because the High Court is empowered under Art.226 to issue to any person or authority in its jurisdiction, directions, orders, or writs, including writs in nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, ... for the enforcement of the fundamental rights and for any other purpose.

Remedy under Art.226 is discretionary.

Power under Art.226 is to be exercised to examine whether the action under challenge is lawful or unlawful .

The High Court may dismiss the writ petition if there be an alternative, convenient, efficacious remedy.

I suppose the learned Professor who has spoken earlier on :”Fundamental Rights” has already given you an account of the various kinds of writs, their characteristic features, when they would issue, etc. You may please refer to the materials under Art.32.

viii) Power to Punish for Contempt (Art.215):

Art.215 declares that every High Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself.

What is a Court of Record ' ? Why power to commit for contempt has been conferred upon a Court of Record? These have already been dealt with under Art.129. The text accompanying Art.129 may be referred to.